

## TEACHING BUSINESS ASSOCIATIONS WITH GROUP ORAL MIDTERMS: BENEFITS AND DRAWBACKS

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### INTRODUCTION

Teaching Business Associations (or another similarly labeled foundational course in business law)<sup>1</sup> is a formidable challenge in many respects. Each time I sit down to write or edit my syllabus for this course (or to prepare for a presentation or research and write about teaching the course, as I am doing here), I feel overwhelmed, fatigued, and apprehensive from the start. I have determined that this beleaguered, exhausted, uneasy feeling derives from the fact that I have internalized the importance of the material encompassed in the course to the overall practice of law, regardless of the setting. While this should give me a feeling of self-importance, instead, it makes me ask myself: “Why me? Why am I encumbered with teaching this significant component in the law curriculum?” In my heart, I know the answer. As inadequate as I feel to the task, I am (as a former colleague once said in a different context)<sup>2</sup> the most qualified *available* person to take on the daunting task of organizing and teaching this vital and ever-more-vast mass of material. My hope is that by sharing some ideas about teaching the law of business associations here and in

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1. The course may go by many different names or be split into different courses teaching the broad base of foundational material in entity law, including governance, finance, civil procedure (especially as to derivative litigation), and broader state and federal business regulation topics. See Joan MacLeod Heminway, *Teaching Business Associations Law in the Evolving New Market Economy*, 8 J. BUS. TECH. L. 175, 175 n.2 (2013) (noting different names for Business Associations courses). For this Article, references to “Business Associations” should be read to apply to each and all of these course offerings, unless otherwise noted.

2. See Ronald J. Tabak, *The Egregiously Unfair Implementation of Capital Punishment in the United States: “Super Due Process” or Super Lack of Due Process?*, 147 PROCEEDINGS AM. PHILOSOPHICAL SOC’Y 13, 13–14 (2003). The tale Ron tells, relating to his first representation of a death row inmate, is one that I have heard a number of times. It is inspirational and sticks with me. At its core, it is a story of a lawyer overcoming the fear of inadequacy, with appropriate professional support, to serve those in need in important circumstances. (In Ron’s case, this service to death row inmates is ongoing and noteworthy.) I often use the story to help law students in summoning the courage to engage in direct client representation.

other forums I can help support others to teach this important material more effectively and efficiently for their respective student populations. The teaching of any subject matter is not a one-size-fits-all proposition, and applied pedagogy in the Business Associations context is no different.

I focus in this Article on a particular way to assess student learning in a Business Associations course. Those of us involved in legal education for the past few years know that “assessment” has been a buzzword . . . or a bugaboo . . . or both. The American Bar Association (ABA) has focused law schools on assessment (institutional and pedagogical),<sup>3</sup> and that focus is not, in my view, misplaced. Historically, institutional evaluations of assessment in legal education have largely occurred in connection with ABA accreditation and sabbatical reviews.<sup>4</sup> Until relatively recently, much of student assessment in law school doctrinal courses was rote behavior, seemingly driven by heuristics and resulting in something constituting (or at least resembling) information cascades or other herding behaviors.<sup>5</sup>

For many years, the traditional—and sole—law school method for student learning assessment in a doctrinal course was a single, written comprehensive final examination administered in a specific time block during a post-semester examination period.<sup>6</sup> This examination was (and is) a time-bound, written,

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3. See A.B.A., REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS 22–23, available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/201406\\_revised\\_standards\\_clean\\_copy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf) (adopted by the ABA Council of the Section of the Legal Education and Admissions to the Bar in June 2014 and the ABA House of Delegates in August 2014); see also Susan Hanley Duncan, *The New Accreditation Standards Are Coming to A Law School Near You—What You Need to Know About Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605, 605–09 (2010) (commenting on the ABA Standards Review Committee assessment proposals); 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, 225–26 (2011) (discussing the possible revisions to the ABA standards).

4. Cf. David M. Moss, *Tethered to Tradition: Toward an Innovative Model for Legal Education*, 17 CHAP. L. REV. 1, 4 (2013) (“In terms of programmatic and institutional level assessment, the American Bar Association (ABA) accreditation processes and standards are a primary driving force for self-evaluation by law schools.”).

5. See, e.g., ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 151, 159–60 (2000) (discussing herd behavior and information cascades).

6. See, e.g., Steven I. Friedland, *Towards the Legitimacy of Oral Examinations in American Legal Education*, 39 SYRACUSE L. REV. 627, 627 (1988) (noting, in 1988, that “the dominant evaluation process, the written essay final examination, has remained as a virtually unchanging law school fixture.”); Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 174 (2012) (“[S]tudents typically get feedback only on a final exam . . .”).

summative assessment tool<sup>7</sup> designed by the instructor to test the students' knowledge of the doctrine taught in the course and, presumably (but not always transparently or adequately) their legal reasoning and writing skills in using that doctrine to respond to specific fact situations. For many who enter the law academy, nary a thought is given to altering this time-worn norm. Having said that, the norm is generally acknowledged to be suboptimal pedagogy<sup>8</sup> (with due respect accorded to those among my colleagues who still use comprehensive written final examinations as the only means of assessing student success in meeting learning objectives), unless the instructor's learning objectives for his or her students are quite narrow. Among other things, the customary written final examination comes too late in the learning process to have any formative impact on student learning in the course and tests only written formulations of legal analysis.<sup>9</sup> As a general matter, formative assessment has been praised for its contributions to student learning outcomes.<sup>10</sup>

When I started teaching full time in 2000, I used two principal forms of assessment to gauge the learning of my Business Associations students. Their

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7. "Assessment measures can be formative, summative, or both. Formative assessment measures provide students with feedback to help them improve their performance. These assessments need not be scored, and they are not used to assign course grades. Summative assessment measures, by contrast, provide students with evaluative feedback such as a grade." Fisher, *supra* note 3, at 238–39; see also Ruth Jones, *Assessment and Legal Education: What Is Assessment, and What the \*# Does It Have to Do with the Challenges Facing Legal Education?*, 45 MCGEORGE L. REV. 85, 107–09 (2013) (describing formative and summative assessment in greater detail); Niedwiecki, *supra* note 6, at 170–73 (providing further description of formative and summative assessment).

8. See, e.g., Duncan, *supra* note 3, at 624 ("[N]o research finds that giving one exam at the end of the semester will adequately assess a student's knowledge." (footnote omitted)); Fisher, *supra* note 3, at 240 ("The law school tradition of evaluating students on the basis of a single final exam is inappropriate for course-based assessment." (footnote omitted)).

9. See, e.g., R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1521 (2012) ("In many so-called 'podium' courses, law students are first exposed to problems during the final examination. . . . The irony here is that such exposure comes primarily at the end of the semester through an evaluative instrument rather than a teaching opportunity." (footnote omitted)); Niedwiecki, *supra* note 6, at 158 ("[M]any classes provide only a final exam or a final paper without giving the students the necessary feedback to improve student learning, so the students generally determine how to get the highest grade on the assignment without fully knowing if they used the correct process to get it." (footnote omitted)); see also Cassidy, *supra*, at 1519 ("[L]aw schools primarily teach, reinforce, and evaluate only one form of communication—written."); Niedwiecki, *supra* note 6, at 174–75 (describing weaknesses in law school assessment, including "the lack of formative assessment early in a course").

10. See Niedwiecki, *supra* note 6, at 175–78 (describing literature reviews conducted by Paul Black and Dylan Wiliam and (separately) David Nicol and Debra Macfarlane-Dick that substantiate improved short-term and long-term student learning with the use of formative assessments).

final course grades were determined solely by a four-hour written comprehensive final examination. However, I also required the students to complete two short writing assignments that offered opportunities for summative doctrinal and analytical assessment (and, depending on my use of them from year to year,<sup>11</sup> formative assessment as well). I graded these writing assignments on a pass/fail basis (with every student required to re-write an assignment that does not receive a passing grade until it passes). Although I later began to offer extra credit (a small bump on the final grade for the course) to students who achieved a high level of competence on the first writing assignment, performance on the writing assignments did not, in the early years, contribute to a student's final grade in the course.

A number of years into my teaching career, I also began to use brief quizzes on The West Education Network (TWEN)<sup>12</sup> to check students' knowledge of fundamental internal governance and third-party liability rules for each form of business entity covered in the course. The TWEN system automatically scores all multiple-choice, multiple-guess, and true/false responses; other types of responses (e.g., fill-in-the blanks) require manual evaluation by the instructor.<sup>13</sup> These quizzes allow for formative assessment (my primary objective in using them) as well as summative assessment of substantive legal rules. I do not factor the scores on these quizzes into a student's final grade in the course.<sup>14</sup> Rather, I use the scores as an opportunity for the students to benchmark their basic doctrinal knowledge at key junctures and address deficiencies in that knowledge at a time when the doctrine is still in use in the course. The quizzes also offer me an opportunity to evaluate the

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11. Some years, I have used one or both of the writing assignments in classroom or out-of-class exercises that enable the students to get dynamic feedback from each other or from me to leverage their knowledge.

12. See Joan MacLeod Heminway, *Caught in (or on) the Web: A Review of Course Management Systems for Legal Education*, 16 ALB. L.J. SCI. & TECH. 265, 268, 291, 293 (2006) (offering observations on the use of TWEN and LexisNexis Web Courses: the two web-based course management systems designed for use in legal education).

13. See Ann E. Woodley, *A Student-Centered Approach to Teaching Excellence: 10 Ways to Identify Opportunities for Improvement Through the Observation of Students in the Classroom*, 4 PHOENIX L. REV. 155, 163 n.19 (2010) ("With TWEN, professors can do the following and more: create and manage online courses; post course materials, class announcements, and course calendars; host threaded discussion forums; create online polls and quizzes for their students; and create and grade course assignments that their students receive and submit online.").

14. I could incorporate the writing assignment and quiz scores into each student's final grade. I consider that possibility every year. But I have determined that these other assessment activities offer my students, many of whom are first-semester, second-year students intimidated by business law, a non-threatening way to check their course knowledge and learning skills during the semester. Adding the extra-credit opportunity on the first writing assignment has been a positive compromise, in my view, that allows students to work toward a limited (but important) grade contribution on one of the intra-term assessments.

parts of the course in which my teaching methods and techniques may be more or less effective in producing student learning.

In the fall of 2011, I began offering an oral midterm examination to students in my Business Associations course as an additional assessment tool. This Article explains why I started (and have continued) down that path, how I designed that examination, and what I have learned by using this assessment method for three years.<sup>15</sup> Although some (probably most) will not want to do in their Business Associations courses exactly what I have done in mine (as to the midterm examination or any other aspects of the course described in this Article), I am providing this information to give readers ideas for, or courage to make positive changes in, their own teaching (for a course on business associations or anything else).

### I. REASONS FOR INSTITUTING AN ORAL MIDTERM EXAMINATION

Why did I decide to use an oral midterm examination in Business Associations, a traditional doctrinal course? Answering that question involves understanding the learning objectives that I have for students in the course and unpacking the answers to two questions: why one might use a midterm examination, and why one might choose an oral, rather than a written, examination. I will take on each matter briefly in turn.

I want students in Business Associations to leave the course with, at a minimum, a comparative knowledge of the basic governance, finance, and entity law liability attributes of sole proprietorships, partnerships, limited liability partnerships, limited partnerships, and corporations. This doctrine is the core of the course. But I also want students to become familiar (and perhaps even comfortable) with the operation of standard business transactions, the unique litigation environment for business law controversies, and the structure of business entity regulation. These latter objectives involve

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15. My commentary can be mapped roughly to an excellent list of questions one should consider in determining appropriate assessment methods for a course in a 2009 book coauthored by legal education gurus Michael Schwartz, Sophie Sparrow, and Gerald Hess, although the Article is not structured to follow that list strictly. MICHAEL HUNTER SCHWARTZ ET AL., *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 163 (2009).

[L]aw professors need to assess student attainment of the learning outcomes through multiple measures. These assessments need to be ongoing and focused not only on outcomes but experiences. They should be designed using best practices and the latest research on learning and teaching. In addition, designing effective rubrics requires professors to focus on the learning outcome or objective that students are expected to achieve and work backwards defining possible criteria that students need to demonstrate to show competency. These rubrics also provide students valuable feedback about their progress in achieving learning outcomes.

Duncan, *supra* note 3, at 626.

both state entity law and federal securities law components. A final educational goal of the course is the exploration and practice of written and oral legal analysis. I ask that my students engage in both written and oral expressions of legal analysis in both advocacy and transactional practice contexts because (1) I have come to understand that law students do not fully appreciate what they do and do not know about a particular subject until they try to write or talk about that subject and (2) a lawyer's stock in trade is giving advice both in writing and orally. Based on the foregoing, the statement of course objective included in my syllabus for Business Associations this year<sup>16</sup> is as follows:

This course is designed to enable you to (a) compare and contrast the structure and legal operations of the basic forms of business entity (and distinguish them from sole proprietorships) through the review and analysis of statutory and decisional law; (b) understand the legal framework of business entity regulation and key business law tools, concepts, and principles at the intersection of law and legal practice; and (c) apply, both in writing and through oral expression, basic principles of business entity law and U.S. federal securities law in advocacy and transactional settings. In this course, you are required to act as legal decision-makers and advisors—both individually and as part of a group—and your performance will be assessed both individually and in the group context (with all members of the group being individually and collectively responsible for the group's performance, as lawyers are in law practice).

I review and revise this course objective every year. It has changed substantially over the years, but the essence of it, which reflects in no small way my relatively lengthy (fifteen-year) pre-teaching transactional practice background, has remained much the same.

So, why does a midterm examination contribute positively to the achievement of my articulated course objective? Well, for one thing, there is a lot of material in the course. (I often say that taking the course is like drinking business law through a fire hose.) Breaking up the comprehensive course assessment into two major chunks is more administratively manageable, may allow the instructor to test more substantive material or more applied skills (by spreading doctrinal and skills assessment over two examinations), and gives both the students and the instructor a way of evaluating progress toward learning objectives at a point in the course where adjustments in teaching tools and methods and learning tools and practices can make a difference. The literature on teaching and learning generally recommends frequent, varied

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16. See Fisher, *supra* note 3, at 242 (“The course syllabus can be an important learning tool for students. Course outcomes should be included on the syllabus to help students track and control their own learning.”). My course syllabus for Business Associations also includes a course outline that forms the basis of the reading syllabi for the course. *Id.* (“By embedding in the syllabus brief explanations of topics and/or questions that students should be considering, the professor can help students understand what they should be achieving and understanding.”).

assessment.<sup>17</sup> Although my writing assignments and quizzes in Business Associations already provided opportunities for intra-term formative and summative evaluation to students in my course, neither of these assessment tools, as I was employing them, allowed for a sufficient analytical synthesis of the course material to test complex, tiered, sequenced legal analysis of a client-centered problem. While one or both of the writing assignments in the course could be expanded to address this deficiency, they serve other teaching and learning objectives that I believe to be independently valuable in my course (e.g., teaching specific kinds of written legal analysis and writing contexts).

In deciding to use an oral examination rather than a written one, I was striving to bring a more equitable, structured, rigorous, interactive verbal and aural experience into my Business Associations teaching. Prior to introducing the oral midterm, my Business Associations course tested oral analysis only through selective (albeit regular) classroom interactions between individual students and me. These experiences—especially when initiated by me (by calling on the student at random) and conducted through Socratic and other routinized forms of question-and-answer pedagogy—were uneven, and the feedback provided to students (both the student directly engaged in the inquisition and others) was not always entirely helpful to them.<sup>18</sup> Moreover, I had noticed in both Business Associations and Securities Regulation (the other doctrinal class that I teach regularly), over a period of years, that some students offered better analysis in spoken conversations with me (in and outside class) than they provided in written form on the final examination. I came to believe that the use of a single comprehensive written examination in my doctrinal courses was not enabling some students to accurately or adequately show what they had learned from a substantive perspective. Without knowing the cause of that perceived disparity (but suspecting it might have something to do with the

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17. Cassidy, *supra* note 9, at 1520 (“The literature on teaching and evaluation suggests that multiple assessment formats provide students with a better opportunity to demonstrate their ability and knowledge and allow them to practice responding to unanticipated questions—which is an essential lawyering skill.” (footnote omitted)); Duncan, *supra* note 3, at 624 (“No matter which assessments are chosen, legal educators should design several assessments and vary them.” (footnote omitted)); Fisher, *supra* note 3, at 240 (“Multiple summative assessment opportunities . . . increase the accuracy of the final grade, prepare students for the final exam and reduce the stress on students produced by having only a single opportunity to earn a course grade.” (footnote omitted)); Jones, *supra* note 7, at 106 (“The best practices of assessment suggest using multiple and differing types of assessment.” (footnote omitted)).

18. For example, some students are asked to participate on days that are aberrant, for one reason or another. A student may be distracted or their contribution may be otherwise impaired because of circumstances in their lives outside my course and classroom. This means that feedback may be over-inclusive or under-inclusive as to that particular student. Of course, others in the classroom may learn from the interaction in any case, if the engagement with the student is properly crafted and executed and if the other students in the classroom are paying attention to the interaction and have the capacity to learn from it and apply that learning.

written form of the examination), I thought it might be useful to try a more structured, systematic approach to evaluating legal reasoning conveyed through the spoken word.

Although these all represent the reasons why I determined to implement an oral midterm examination in my Business Associations course, the idea is hardly new. Steve Friedland promoted the use of oral midterm examinations in legal education over twenty-five years ago.

There are several advantages to using oral examinations as a midterm. The implementation of midterm examinations may promote concentrated study during the course of the semester. Oral midterm examinations, in particular, have the added incentive of face-to-face interaction with the instructor. Of equal significance is the fact that the grading process of an oral pass/fail examination should consume considerably less of the instructor's time than that of its written counterpart. Yet an oral midterm may efficiently inform students about their particular strengths and weaknesses and inform the instructor about the effectiveness of his or her communication.<sup>19</sup>

Professor Friedland surveyed U.S. law schools in 1987 inquiring about the use of oral examinations and found few law schools using them in any way at that time.<sup>20</sup> Anecdotal information I have gathered over the years indicates that practices have not changed much in the intervening twenty-eight years.

## II. DESIGNING THE ORAL MIDTERM EXAMINATION FOR USE IN A LARGE POPULATION COURSE

Having decided to pursue the idea of an oral midterm examination, I set off in search of models appropriate for my circumstances. I implemented an individual oral examination in my Securities Regulation course (in the spring of 2009) and learned a number of things in doing that, but my objectives for the Business Associations oral examination and the comparatively large size of the class dictated a different format. My typical class in Business Associations, an introductory course in business law, is more than four (and sometimes as much as seven) times as large as my Securities Regulation class.

Specifically, my vision for the Business Associations examination was an experiential learning exercise that simulates real-life legal advising and required problem-solving using a multi-level legal analysis. I was willing to set aside a week of time (cancelling class meetings in Business Associations, but not in my other fall course, Corporate Finance). With seventy-two students in my Business Associations course (at maximum enrollment),<sup>21</sup> I determined,

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19. Friedland, *supra* note 6, at 644–45.

20. *See id.* at 632–33 (noting that of 150 law schools surveyed, only five schools reported using oral examinations).

21. One might initially balk at offering an oral examination or exercise of any kind to a class of this size. But, I sensed it was possible, and I saw others innovating group experiential learning



based on time-efficiency considerations, that I should give group examinations. Based on past experience with similar simulation exercises, and with some substantiation in the literature (which generally advises setting group size to best facilitate identified learning objectives), I chose to give the examination in groups of three.<sup>22</sup> I wanted the experience to be as similar, and the grading to be as equitable, as possible from examination to examination. To give the students incentives to collaborate productively (including by engaging in peer-to-peer teaching in preparation for and during the examination), I decided that each group of three students would be graded as a team.

Models that met all of my criteria were hard to find. Much of the teaching and learning scholarship I found at the time focused on European-style oral examinations, in which students often are examined individually or in groups either on a specified topic (e.g., a subject from the student's research focus area) or through one or more discrete questions drawn from a hat or selected by the instructor or an examination panel.<sup>23</sup> The examples of these types of examination in the literature generally did not satisfy my desire for efficiency (too time-consuming) or equity (with the variance in the level of

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exercises in their doctrinal courses. See, e.g., Anne M. Tucker, *Teaching LLCs by Design*, 71 WASH. & LEE L. REV. 525, 527–28, 537 n.18 (2014). So, I (ever the optimist) chose to believe it was possible to design an appropriate and effective oral assessment method for my course. See Mary A. Lynch, *An Evaluation of Ten Concerns About Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976, 1008–09 (2012) (“[A]ssessment of outcomes in and of itself does not require smaller class sizes. Engaged and active learning can occur in large as well as small classes. Teaching innovations in team-based learning and small group exercises enable professors to offer formative assessment in larger class settings.” (footnotes omitted)).

22. See, e.g., Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 1, 12–13 n.30 (2003) (“In fact, research shows that ‘the optimal number of students per group is three.’” (citing Paula Lustbader, *Some Tips on Using Collaborative Exercises*, L. TEACHER 9 (Spring 1994))); Elizabeth A. Reilly, *Deposing the “Tyranny of Extroverts”: Collaborative Learning in the Traditional Classroom Format*, 50 J. LEGAL EDUC. 593, 611 (2000) (“A group of two or three is best for teaching collaborative skills, and members frequently develop a special intimacy and positive power relationships.”).

23. See, e.g., Nancy A. Armstrong, “*Tell Me More About That . . .*”: *Using an Oral Exam as a Final Assessment Tool*, 25 LEGAL REFERENCE SERVS. Q. 117, 119 (2006) (describing administration of oral examinations); John M. Burman, *Oral Examinations as a Method of Evaluating Law Students*, 51 J. LEGAL EDUC. 130, 132–35 (2001) (describing oral examinations of law students in Russia and Wyoming); Ottavio Campanella, *The Italian Legal Profession*, 19 J. LEGAL PROF. 59, 65 (1994) (describing Italian oral examinations based on law student theses); George A. Critchlow, *Teaching Law in Transylvania: Notes on Romanian Legal Education*, 44 J. LEGAL EDUC. 157, 172 (1994) (describing oral examinations in Romania); Rainer Grote, *Comparative Law and Teaching Law Through the Case Method in the Civil Law Tradition—A German Perspective*, 82 U. DET. MERCY L. REV. 163, 173 (2005) (describing German oral examinations of law students); Jane M. Picker & Sidney Picker, Jr., *Educating Russia's Future Lawyers—Any Role for the United States?*, 33 VAND. J. TRANSNAT'L L. 17, 35–36 (2000) (describing oral law examinations in Russia).

detail/difficulty of the questions a major concern and the number and method of selection of the questions also a thorny issue). Yet, I learned something (even if it was something I wanted to reject rather than adopt) by reading about each exam type that I encountered. I was developing a body of knowledge.

Constructively creative mental wheels began to turn when I found an article in an online higher education newsletter that described ways to conduct group oral examinations involving formative and summative evaluation and collaborative peer-to-peer learning experiences.<sup>24</sup> Although the article had nothing to do with legal education (focusing, instead, on courses taught by two different college instructors—one who teaches English courses and one who teaches Political Science courses),<sup>25</sup> it unlocked important doors for me. After reading the article and talking to several trusted colleagues, I settled on the structure of the Business Associations examination that I thought could work best.

The examination I eventually designed was a forty-five-minute oral examination given in groups of three. Although the examination structure relied to a great extent on the information included in the higher education newsletter article, it is (as far as I know) unique in U.S. legal education. The examination is both summative and formative in nature, and I tell the students that it may engage any material covered in the course to date. Groups of three students (which I often refer to as teams) are chosen randomly by me and assigned at least a week in advance of the first day of the examination period. Facts and instructions relating to the examination are distributed at or about the same time the teams are assigned. Team members are asked to sign up for an exam time slot (originally set up sixty minutes apart, but now set up at least ninety minutes apart to allow for some slippage on start times and build in more time to discuss the examination after it is over<sup>26</sup>) using TWEN sign-up sheets. Students are strongly encouraged, but not required, to collaborate in studying for the examination.

The examination is structured as an advisory simulation exercise. I assume the role of a senior supervising attorney in a law firm; the students are my junior colleagues in the firm. The simulation involves a meeting among us. Specifically, I have called the group in to help me prepare for a telephone conference call with a new client or an existing client on a new matter. The junior colleagues have been given certain general factual information about the

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24. See Tom Deans & Jamie Frueh, *Talking During the Test*, INSIDE HIGHER ED (Apr. 2, 2010, 3:00 AM), <http://www.insidehighered.com/views/2010/04/02/deans>.

25. *Id.*

26. The need for a bit of break time—at least a few minutes—when multiple sessions are scheduled back-to-back also prompted the lengthened time frames. See Burman, *supra* note 23, at 138 (“[M]y secretary and I learned that we should schedule breaks. She generally does not schedule more than six twelve-minute exams consecutively.”).

client and the matter that we have been retained to address—information that will be useful, if not important, in preparing for our meeting.

In the examination, I ask each team three principal questions—the same three questions for each team.<sup>27</sup> These questions are *not* provided to the students in advance. I ask each of the three questions of a different team member, chosen at random<sup>28</sup> after the students get settled in the examination room. After the initial questionee has an opportunity to respond to his or her question, I ask each of the other two team members if he or she endorses the initial questionee's response or desires to highlight or enhance portions of that response (to add anything he or she would like to add) or to correct anything in the initial questionee's response that the other team member believes requires correction. Accordingly, each team member has the opportunity to comment on each of the three questions posed. I offer prompts as to missing items in their analysis (but do not point any student to doctrinal rules or direct his or her analysis), and I do not deduct from the group score for these prompts. I may, however, help direct the students to a particular resource to answer a question. Over the years, I have adopted creative ways to refer to the course material and assigned texts in ways that are consistent with the simulation (referring, e.g., to the firm's junior associate training program and training materials, which I have asked for them to have available at the meeting).

I inform students in the examination instructions of the basis for my evaluation of their work in the examination. Specifically, I advise them that, to receive maximum credit for any answer that requires legal analysis of all or part of the facts provided to them, they must first clearly identify and discuss each legal issue responsive to the question and then, at a minimum: (a) recite or describe any applicable legal rule; (b) cite to the source of that applicable rule (whether from a statute, a court case, or elsewhere); (c) apply that legal rule to the facts; and (d) state the conclusion that they draw from the application of the law to the facts. I remind them that a single question may require the identification and resolution of more than one legal issue and offer them related advice.

Teams are graded together, as a group; each member of the team earns the same grade. I grade the students during the examination, based on a grading sheet that I create for that purpose and bring into the examination room, and the students know their grades when they leave the examination room.<sup>29</sup> The

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27. Where the class is not evenly divisible by three, I assign one or two teams of two. These two-person teams are asked two of the three examination questions, but we discuss the third during the post-mortem discussion.

28. To make things easier for me, I usually just move left to right after the students sit down at the conference room table in the examination room.

29. I schedule a single conference room for all the examinations sessions during the week, when at all possible, to make the examination process easier for the students and for me.

midterm examination grade comprises solely my evaluation of the students' substantive mastery of the material covered in the examination. This grade constitutes thirty percent of a student's final grade in the course and is assigned based on a thirty-point scale—ten points for each of the three questions. The examination score is not curved. To calculate final grades for the course, I curve the combined raw scores for the students based on their performances on both the oral midterm examination and the comprehensive written final examination (which constitutes seventy percent of the final course grade).<sup>30</sup> The final course grade also may be affected by an extra credit opportunity that I offer on the first writing assignment in the course or by extraordinarily good or bad class participation.

Students are directed to bring the following items to the examination: a hard copy of the examination facts, their statutory resource books,<sup>31</sup> and their casebooks. They also are permitted to bring hard copies of any notes prepared by them for class or for the examination and any and all other written or printed materials. I caution them, however, that there will be little time to consult these resources, except to double-check a citation or unwind a momentary brain cramp as to a doctrinal label or a statutory reference or case name. Students are not permitted to bring a computer or any other electronic device with them for the examination. Accordingly, I advise them to print off anything they think they may need or want to have with them.

Until the examination period begins (typically at 8:00 a.m. on the Monday morning of the examination week), students are permitted to discuss the examination facts and any issues they identify from them with their classmates (including those *not* on their team). I ask that the students post any questions that they have for me in a designated part of the course TWEN site at or before 11:00 p.m. on the Sunday prior to the beginning of the examination week. I do not respond to questions on the substance of the examination after that time. Once the examination period begins, students are not permitted to discuss any aspect of the examination with anyone (except their teammates, in *absolute* privacy, so that no one else can overhear) until I notify them that all examinations have been completed.

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30. While the written final examination is designed to evaluate all of the material in the course, the content of the final examination typically is weighted somewhat toward the course material covered after the oral midterm examination.

31. I call the standard statutory supplement a statutory resource book as a means of focusing students on the centrality of statutory law to the practice of business associations law. *See* Heminway, *supra* note 1, at 187.

### III. OBSERVATIONS ON THE EMPLOYMENT OF AN ORAL MIDTERM EXAMINATION

Four years into the experiment, a number of my core observations parallel those of Professor John Burman, who has used individual oral examinations in law courses in both Russia and the United States. His general reflections on the Russian oral examinations that he administered were as follows:

While there were features of the Russian system I did not like, others intrigued me. First, a law student's ability to discuss the law with others is critical to his success as a lawyer. Second, the ability to respond to unexpected questions off the cuff is equally important. Third, I noticed that some students who began the exam off track quickly realized the error of their ways when asked a question or two and performed very well thereafter. Fourth, it's hard to snow someone for more than a couple of minutes. And finally, when orals are over, they are over. No stacks of blue books towering ominously in the corner, filled with barely legible scrawl.<sup>32</sup>

In particular, I admit that the grading-on-the-spot feature of my oral midterm examination is a powerfully positive aspect of this assessment format for me. A number of Professor Burman's additional thoughts about his U.S. translation of the individual oral examination method also match my observations.<sup>33</sup>

The most striking thing that I noticed at the conclusion of the first Business Associations oral midterm examination, back in 2011, was the transformation—before my very eyes, in real time, over a single week—of an entire class of my students into collaborative transactional lawyers. While clinical legal education experiences and some transactional law simulations in which I have been involved over the years had engaged me with students in a way that enabled me to have this experience from time to time, to go through the experience with a large group of students in a doctrinal course over a period of a week was a more intense experience (in a good way) for me than I had expected. While the experience was physically and mentally exhausting in some aspects, overall, I was excited, energized, and (yes) emotional.<sup>34</sup> The sense of pride that I had in my students was surprisingly strong. I admit that the powerful reaction that I had may be attributable to the adrenaline rush and crash that inevitably occurs in a week of nearly continuous teaching. (I sometimes get a similar, but not as extreme or sustained, reaction to teaching first-year students case briefing and analysis in our introductory period while also teaching my two upper-division courses.) The same intense positive,

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32. Burman, *supra* note 23, at 134.

33. I have cited to his consonant observations in footnotes to relevant parts of the remaining text of this Article. *See infra* notes 33–36, 38, 40 and accompanying text.

34. *See* Burman, *supra* note 23, at 136 (“Although seventy-three twelve-minute sessions within a week were draining, they were certainly informative.”).

prideful reaction has occurred in each of the four years in which I have given the examination to date.

The anecdotal student reactions were similarly positive and strong. Students were apprehensive about the examination in the first year that I used it (and some, although less, apprehension about the examination persists despite more common knowledge about the experience, which is freely shared by me and among those in the student body). Indeed, I observed that some of the students experienced high levels of stress prior to and during the examination session, and some students informed me that the experience was anxiety-producing for them. Yet, at the conclusion of the examinations, most report that they felt relieved, jubilant, or empowered, or experienced a similar positive reaction. Students characterize the experience as difficult, but they also cite the examination as a positive learning and evaluation experience. They indicate learning occurred both in the group voluntary study sessions (in which essentially all groups did engage, at some level) and in the examination itself. These anecdotal observations are consistent with those of others who use oral examinations inside and outside the law school environment.<sup>35</sup>

While a full analysis of the performance of the students on the oral midterm examination is a matter requiring rigorous empirical examination beyond the scope of this Article, I can make a few general descriptive comments on the grades students earned on the oral midterm examination vis-à-vis the grades they earned in the course based on an inspection of the raw data. Unsurprisingly (given the group nature of the activity and my prompting), the grades for the oral midterm examination are spread across a more narrow range than the grades are on the written final examination in my course. Many (but not all) of those who performed relatively poorly overall in the course (under a 3.0 on our institutional grading scale of 0 to 4.3) earned a midterm grade in the lower tiers, and a number of the students who performed extremely well overall in the course (including those few earning the very highest grades in the course, 4.0 to 4.3) also earned high grades with their group on the oral midterm examination. But those general observations are not uniformly true. For example, consistent with the general observations, one student earned a 2.4 for the course, and his oral midterm team earned the third lowest score of the 23 teams taking the examination that year. However, another student in the same under-achieving midterm group earned the highest grade in the course that year, with a final written examination that was at the top end of the raw numeric grades that students earned on that examination. The grades earned by that pair of students represent among the most extreme

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35. *See id.*; Deans & Frueh, *supra* note 24; Bernard A. O'Brien & Richard A. Mackey, *Use of Group Oral Examinations as an Evaluative Method*, 7 PROF. PSYCHOL. RES. & PRAC. 674, 675-76 (1976).

variations I have noted in looking over the data. Those students took the course the first year in which the oral midterm examination was offered (2011).<sup>36</sup>

The group element of the examination is important to more than the student's grade, however. It is relevant to the practice of law generally, part of the learning experience (*writ large*), and an opportunity for rich formative assessment. Accordingly, in discussing the students' performance at the end of the oral examination, I ensure that students recognize certain attributes of group work, including the power of giving legal counsel as a team. As a general matter, this point takes little effort to make. Most students understand well in that moment—while the experience is still fresh—that a colleague has “saved their bacon” or that they have been able to contribute meaningfully to a colleague's analysis during the examination. As to each substantive question in the examination, the group learning and advising context essentially enhances what the individual performance of any student on the team would have been to a level equal to the highest performance level of any individual on the team.

To that point, while the students are not graded on their ability to collaborate, they do gain knowledge of or sharpen collaborative learning and working skills in preparing for and taking the examination. Some teams worked together better than others. The students and I discuss the perceived and actual cooperation between and among group members during the evaluation of their performance. This discussion sometimes leads to a dialogue about group dynamics and teamwork.

I also use the interaction time at the end of the examination session to discuss professional development with the students in a general way. Although many of the students in my Business Associations course are just beginning their second year of law school, they are already consumed by and with the summer and permanent job-search process. Many have gone through on-campus interviews earlier in the semester; a number are still searching for their passion in the law; some have recently changed their post-law-school career objectives based on a summer job, internship, or course work. There also are a healthy number of third-year students in the course. Some have post-graduation job offers outstanding or jobs already lined up. Others are in a more panic-stricken state. After talking through the examination itself, I ask them questions like:

- “How did you feel in the role of a legal advisor in this setting?”
- “Was this legal advisory role comfortable or uncomfortable for you—or maybe a bit of both?”
- “Was the role you played in the examination enjoyable? What about it did you like or not like?”

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36. See Burman, *supra* note 23, at 138–39 (describing grading patterns observed in his oral examinations).

- “Is this kind of legal advising something you’d like to do in practice after you leave the College of Law?”

The students’ answers to these questions often enable me to comment more specifically on the connection between the doctrine and skills they have learned and practiced (and are learning and practicing) and their career objectives or job search strategies. Some students then follow up with me for more conversations about those issues or about course selection as they work toward their career objectives.

A number of students (and, in some cases, entire teams) dressed in professional attire for the examination, even though this was not a requirement (or, in fact, addressed at all in the examination instructions).<sup>37</sup> I asked some students about their choices in that regard. Most expressed the belief that dressing in clothing befitting the role they play in the examination gives them confidence or otherwise enables them to perform better.<sup>38</sup> However, some students and groups came in more customary student examination attire—e.g., jeans or khakis or even sweatpants. Students dressed in various types of attire (from shorts and t-shirts to business suits) have performed well on the oral midterm examinations in my courses.<sup>39</sup>

The examination did take a significant amount of time to construct, plan, and execute. Having said that, once I had settled on the examination structure and thought through a few examples of transactions that could be discussed using only the material covered in the first half of the Business Associations course, the time spent on examination construction was not altogether very significant. I spent many hours, however, thinking hard about and drafting the examination instructions and grading sheet. I continue to tweak the content of the instructions and the format for the grading sheet from year to year.<sup>40</sup> The planning (securing a room, assigning student teams, getting students to sign up properly) is a relatively low-level nuisance. And the twenty-four hours that I spend in the examination room over the course of a week does not leave much

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37. See *id.* at 137 (“As in Russia, many students, though not as many, dressed up for the oral exams.”).

38. There is some support for this notion in the literature and the popular press. See, e.g., Hajo Adam & Adam D. Galinsky, *Enclothed Cognition*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 918, 922 (2012) (finding that subjects wearing a lab coat had increased attentiveness); Jennifer Lavoie, *Dress Well, Test Well: How to Create Success with What You Wear*, COLLEGE MAGAZINE.COM (Mar. 6, 2014), <http://www.collegemagazine.com/editorial/3468/Dress-Well-Test-Well-Create-Success-with-What-You-Wear> (describing the common “dress well, test well” theory). A Google search of “dress well test well” brings up numerous anecdotal reports and related gratuitous advice.

39. See Burman, *supra* note 23, at 137 (“In the fall of 2000 two students made A+ on the oral exam. They happened to meet with me back to back. One wore a suit and tie. The other wore shorts and a T-shirt.”).

40. See Duncan, *supra* note 3, at 625 (“Designing effective assessments and rubrics is just the beginning as they should be continually assessed and improved.”).



time for anything other than preparing for and teaching my other three-credit-hour course, eating, sleeping, and attending an occasional immutable meeting. Needless to say, the positive aspects of the oral midterm experience are so compelling to me that I have determined that the benefits far exceed these costs.<sup>41</sup>

Several Business Associations students have raised concerns with me that I assess student performance too much in the course, given that I require participation in the quizzes (typically three or four quizzes having five-to-ten questions each), two writing assignments, and two examinations, plus classroom participation (about two times a semester, either voluntary or conscripted). Although other students value the number and diversity of assessment methods I use, I am mindful of the fact that each student has at least four *other* courses or academic activities on his or her schedule each semester.<sup>42</sup> In cutting my Business Associations course back to three credit-hours from four this year, I evaluated the number and type of assessments I use in the course. I offered the quizzes this fall but did not make them mandatory. In the future, I likely will cut out one of the two writing assignments or structure one of them differently (e.g., as an in-class activity). I also may revisit the relative weight of the oral midterm examination as a component of the student's final course grade.

#### CONCLUSION

This Article describes my experience using oral midterm examinations in a law school Business Associations course as a means of providing formative and summative student learning assessment. My use of an oral examination is non-exclusive. I use it among a number of other types of assessment in fostering and evaluating student learning in my course.<sup>43</sup> Any recommendation

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41. *E.g.*, Burman, *supra* note 23, at 137 (“I viewed the experiment as sufficiently successful to make oral exams a regular part of the classes I teach. Every semester since spring 1999, oral exams have been a fixture in my courses.”).

42. *See* Lynch, *supra* note 21, at 1011 (“[A]dding formative and evaluative feedback to courses is perceived as creating more work, not only for the faculty member, but also for the student. Professors who have introduced quizzes, midterms, or other ‘extra’ work anecdotally tell me that they receive both gratitude from students who are eager to reflect on their strengths and weaknesses and pushback for introducing expectations for performance earlier than the final exam.”).

43. *See* Friedland, *supra* note 6, at 644 (“[T]he preferable use of an oral examination is as a pass/fail supplement to existing evaluative criteria.”); *id.* at 646 (“[O]ral examinations can and should play a supplementary role in modern American legal education.”). In a 2012 article in the *Boston College Law Review*, my colleague and friend Mike Cassidy also suggested the use of an oral examination on this basis, albeit for a smaller section course than the typical Business Associations course. *See* Cassidy, *supra* note 9, at 1520; *see also* Burman, *supra* note 23, at 138–40. In fact, Professor Cassidy also suggests the increased use of collaboration and problem-solving in legal education, both of which also are employed in my oral midterm examination. *See*

that I would make to a faculty member about using this method of teaching and evaluation in his or her course would only be made on that basis. I have not formulated any formal views on the exclusive use of an oral examination in evaluating student performance in Business Associations. However, I will note (as indicated above) that I include in my course objective the value of both written and oral communication of legal analysis. If an instructor's learning objectives for students include written legal analysis, then the instructor should ensure that he or she is testing student progress in achieving that goal.

I hope to soon be in a position where I can step back and engage in a more thorough study of the pluses and minuses of giving oral examinations as part of my Business Associations course (and also as part of my Securities Regulation course, in which I continue to use an individual oral midterm examination). I know that information from a study of that kind is likely to be useful to all of us who teach Business Associations, and I will plan on publishing the results of that study when I undertake it. In the interim, however, this Article represents a way to share my assessment methodology and related anecdotal observations with other instructors in the hope that it informs their teaching in a meaningful way and incentivizes them to experiment in their courses for the benefit of their students and themselves.<sup>44</sup>

In this vein, I encourage continued conversation about assessment as a component of teaching generally and of teaching Business Associations in particular. Far too often we focus on teaching materials and tools to the exclusion of assessment methods. And when we do focus on assessment, we tend to think of it as "extra work" (no one likes grading—or at least few of us do) that gets added on to the "teaching" we have been hired to do. But this misses the point. Teaching *includes* assessment. Well-constructed, appropriate assessment allows students to benchmark and enhance their understanding and instructors to best ensure that they are connecting with their students in a manner that enables the students to satisfy the course learning objectives.

The continuous search for thoughtful, effective assessment methods is particularly important for a law school course like Business Associations that is full of challenging, unfamiliar legal doctrine and is actually or functionally (because it is tested on the bar examination) a required course. As a result of the integration of a group oral midterm into the mix of assessment methods

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*id.* at 1518–22. Professor Friedland notes that oral examinations are flexible tools for evaluating student learning. Friedland, *supra* note 6, at 644 ("Oral examinations can be used in several ways: as a midterm evaluation; as a component of a final examination; as a part of a written paper requirement; as a follow-up to a written examination; or as a comprehensive semester or year-end evaluation of a student's knowledge in several basic subjects.").

44. See Cassidy, *supra* note 9, at 1532 ("We are all in charge of our own classrooms and do not need to wait for permission to improve our pedagogical methods. Experimenting with new methodologies will not only improve the educational experience for our students, but it will also reinvigorate and reenergize us as teachers.").

used in my Business Associations course, I am more confident that I am creating a deeper, richer learning experience for my students in a difficult, important part of our overall program of legal education. Although I am still overwhelmed by the task of teaching Business Associations as I gear up each fall, my greater confidence that I am “doing the right thing” (or at least a good thing) helps buoy me through the experience. And the amazing joy of seeing the students become business law advisors in front of my eyes never gets old . . .

