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Experimental Educating in the Classroom: Designing an Administrative Law Practicum Meeting New ABA Requirements and Student Needs

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EXPERIENTIAL EDUCATING IN THE CLASSROOM: DESIGNING AN ADMINISTRATIVE LAW PRACTICUM MEETING NEW ABA REQUIREMENTS AND STUDENT NEEDS

Jeffrey Thaler

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EXPERIENTIAL EDUCATING IN THE CLASSROOM: DESIGNING AN ADMINISTRATIVE LAW PRACTICUM MEETING NEW ABA REQUIREMENTS AND STUDENT NEEDS

*Jeffrey Thaler**

“Administrative law is not for sissies.”—Honorable Antonin Scalia¹

In 1992, the American Bar Association (“ABA”) published a lengthy report, which became known as the MacCrate Report (the “Report”), examining the connection between the profession and legal education.² In part, the Report recognized the value of a more practice-oriented curriculum that would include a combination of externships, clinics and classroom-based simulations. One result of the Report was a significant increase in the number of clinical and externship programs offered by law schools, as well as many more law review articles on such programs. However, the concept of combining experiential educating techniques with traditional doctrinal case method courses utilizing simulations (known as practicum or simulation courses) remained underdeveloped.

Fifteen years later, two major reports were issued that put increased pressure on law school deans and faculty to change the dominant and age-old approaches to educating law students. The reports, *Best Practices in Legal Education*³ and *Educating Lawyers*,⁴ generally found that law schools might be teaching students how to “think like a lawyer,” but were not sufficiently teaching the needed skills and values for students to be lawyers, using knowledge in the complexity of actual law practice.⁵ One key recommendation was that law schools should develop more

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1. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511 (1989). While not for sissies, another judge finds administrative law to be an acquired taste, like fine scotch. See *infra* text accompanying note 22.

2. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter *Report*].

3. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007), http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf [hereinafter BEST PRACTICES].

4. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (hereinafter CARNegie REPORT). See also William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law (Summary)* (2007), http://www.albanylaw.edu/media/user/celt/educatinglawyers_summary.pdf [hereinafter *Summary*].

5. BEST PRACTICES, *supra* note 3, at 14-17; CARNegie REPORT, *supra* note 4, at 81-82, 147. Or as Dean Jeremy Paul of Northeastern Law School has said, “You know that saying about how a law school teaches students to think like a lawyer [?] Well, if you get into a cab, you don’t want a driver who thinks like a driver. You want someone who can drive.” Hunter Metcalf, *ETL Consortium Prominent in National Jurist’s 2015 Best Schools for Practical Training*, IAALS ONLINE (April 15, 2015),

opportunities for students’ “skills development, focused on learning how and when to intervene in contextual situations, and taught in simulation courses or clinics.”⁶ In other words, just adding clinical courses to a curriculum full of doctrinal lecture courses is not enough to provide the “diversity of skills and experience needed for competent legal practice.”⁷

Thus, in 2008 the ABA commenced a review of accreditation standards for all accredited law schools—at the same time that a significant economic recession hit the country. A two-year project stretched to six years, during which time law school enrollments both spiked and then sharply dropped. The Revised Standards, finally approved by the ABA in August 2014,⁸ in part took to heart the Carnegie and Best Practices recommendations by repealing the old standard that schools only had to provide “substantial opportunities” (no precise amount) for live client or other real-life practical experiences, and replacing it with the requirement that all students complete at least six credit hours of experiential courses—which must be “simulations, law clinics or field placements.”⁹

My epiphany came two years before the 2014 Revised Standards, when Maine Law’s Associate Dean for Academic Affairs gave me twenty-four hours to decide whether I would teach the upper-level Administrative Law course. Initially I was unsure, as I had for over thirty years thought of myself as a trial lawyer first and environmental lawyer second. But after reviewing the previous year’s casebook

<http://online.iaals.du.edu/2015/04/15/etl-consortium-schools-prominent-in-national-jurists-2015-best-schools-for-practical-training/>.

6. Myra E. Berman, *Portals to Practice: A Multidimensional Approach to Integrating Experiential Education into the Traditional Law School Curriculum*, 1 J. EXP. L. LEARNING 157, 162 (2014).

7. David I.C. Thomson, *Defining Experiential Legal Education*, 1 J. EXP. L. LEARNING 1, 3 (2014).

8. See REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS STANDARDS (AM. BAR. ASSOC. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE Bar 2014) [hereinafter ABA].

9. *Id.* at Standard 303(a)(3). The ABA’s minimum of six hours is contrasted with the recent California Bar proposal of a requirement of 15 “units of coursework designed to foster the development of professional competency skills”, or “in lieu of some or all of the required 15 units of law school coursework, participation in Bar-approved externships, clerkships or apprenticeships for courts, governmental agencies, law firms or legal service providers.” STATE BAR OF CALIF., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE 1 FINAL REPORT 24 (2013), http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_%28FINAL_AS_APPROVED_6_11_13%29_062413.pdf. Trustees of the state bar adopted the proposal on November 7, 2014, and it is pending approval by the California Supreme Court. However, the bar proposal drew opposition in July 2015 from the Association of American Law Schools’ Deans Steering Committee. See *Statement by the AALS Deans Steering Committee on Admissions Regulation Recommendations*, THE ASSOCIATION OF AMERICAN LAW SCHOOLS (July 6, 2015), <http://www.aals.org/tfarr-statement/>. The Deans’ actions drew concern from a former federal judge and now-Dean of Pepperdine Law School, Deanell Reece Tacha. Paul Caron, *Tacha: Why I Support California’s Proposed 15 Credit Skills Requirement*, TAXPROF BLOG (Oct. 7, 2015), http://taxprof.typepad.com/taxprof_blog/2015/10/tacha-why-i-support-californias-proposed-15-credit-skills-requirement.html. Moreover, in August 2015 the Association’s Section on Clinical Legal Education supported the proposal to add the requirement of 15 credits of experiential learning. *AALS Section on Clinical Legal Education Issues Statement on California Task Force on Admissions Regulation Recommendations (TFARR)*, LEGAL SKILLS PROF BLOG (Aug. 18, 2015), http://lawprofessors.typepad.com/legal_skills/2015/08/aals-section-on-clinical-legal-education-issues-statement-on-the-california-task-force-on-admissions-regulation-recommendatio.html

and syllabus, I realized that the nature of my practice had generally evolved more into one of an administrative lawyer.¹⁰ So I taught the course, and then realized that many students are not being sufficiently prepared for a 21st-century America where attorneys who litigate are largely doing so *not* before judges or juries, but before regulatory bodies or non-judicial officers, without discovery, rules of evidence, or many of the other trappings of civil litigation.¹¹

Thus, when I told the Dean a year later that, unlike trial practice, the art of advocating for clients in a regulatory arena is very different from that in the courtroom, she said, “Then why don’t you develop an Administrative Law Practicum?” This article is about the twelve months after I replied: “yes.”¹² It is the first law review article to address in detail, from start to finish, the many steps needed to blend, develop, and implement doctrinal and clinical pedagogies in one course, as envisioned by the new ABA Standards and the MacCrate, Best Practices, and Carnegie Reports. This article’s goal is to help interested deans and faculty to more effectively and successfully develop similar courses in a variety of substantive areas that, I am convinced, students both greatly need and will welcome.

I. RECENT LEGAL SYSTEM AND LEGAL EDUCATION TRENDS

A. *The Decline in Civil Trial Proceedings*

The ongoing decline in the number of jury trial proceedings in America has been well-documented.¹³ What has been less well-documented or discussed is the ongoing growth of the number of administrative agencies promulgating rules and regulations, conducting many more adjudicatory proceedings, and requiring very

10. I began as a criminal appeals public defender in New York City. After clerking for the Chief Justice of the Maine Supreme Judicial Court and then doing trial work for four years at a law firm, I became the Staff Attorney and Advocacy Director for Maine Audubon Society. Returning to law firm life, I developed over 25 years both a trial practice and environmental and energy law practice—though increasingly the trend was far fewer trials and hearings in court. Since 2011, I have been in-house counsel for the University of Maine’s energy and environmental projects, as well as Visiting Professor at UMaine and Maine Law School creating and teaching multi-disciplinary courses for law and graduate students. For the past two years I have been primarily teaching Administrative Law and, most recently, the Practicum examined in this article.

11. See *infra* notes 13-21, concerning the significant decline in the number of jury trials, and a similarly steep increase in the number of administrative agencies, regulations and consequent proceedings that law graduates increasingly will experience.

12. I said “Yes” even though I did not know exactly what a “practicum” was. The course was to meet 85 minutes twice a week, for three credits.

13. See, e.g., Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It?*, 45 ST. MARY’S L.J. 333, 333-39 (2014); Joe Forward, *The Disappearing Jury Trial: Implications for the Justice System and Lawyers*, INSIDETRACK, Mar. 19, 2014, <http://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?Volume=6&Issue=6&ArticleID=11435>; Mark Curriden, *Federal Civil Jury Trials Decline to New Lows*, VOIR DIRE 6, Fall/Winter 2013, <https://www.abota.org/docdownload/663059>; Brandon Gee, *As Jury Cases Decline, So Does Art of Trial Lawyers*, THE TENNESSEAN, Feb. 5, 2011, http://usatoday30.usatoday.com/news/nation/2011-02-05-jury-trial-lawyers_N.htm; Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 LITIG. 2 (2004), http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf.

different skill sets for lawyers representing clients impacted by those agencies. Law schools that have almost uniformly encouraged students to take trial practice courses are only now slowly beginning to develop comparable skills-based courses that involve regulatory hearing and rulemaking practice.

As John H. Langbein began in his recent article, *The Disappearance of Civil Trial in the United States*:¹⁴

A striking trend in the administration of civil justice in the United States in recent decades has been the virtual abandonment of the centuries-old institution of trial. As late as 1936, on the eve of the promulgation of the Federal Rules of Civil Procedure, a fifth of all civil cases that were filed in the federal courts were resolved at trial. The rest terminated either in the pleading and motions phase for failure to state a cause of action, or were settled before trial. That one-fifth trial rate was “a minority but a very substantial minority. Civil practice was still in significant measure a trial practice.” By 1940, the proportion of cases tried declined to 15.2%. In 1952, the figure was 12%; in 1972, 9.1%; in 1982, 6.1%; in 1992, 3.5%. By the year 2002, only 1.8% of federal civil filings terminated in trials of any sort, and only 1.2% in jury trials. At the state level, where most civil litigation takes place, trials as a percentage of dispositions declined by half between 1992 and 2005 in the nation’s seventy-five most populous counties. Jury trials in 2002 constituted less than one percent (0.6%) of all state court dispositions. Thus, in American civil justice, we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become “vanishingly rare.”¹⁵

During the same time period discussed by Langbein, “we have had an increase in population, an increase in the number of lawyers, and an increase in the number of civil case filings.”¹⁶ The trend has not been confined to the federal courts; for example, between 1976 and 2002, “[i]n the 22 states for which data is available, civil jury trials are down by 28 percent and, in 2002, represented 0.6 percent of the total civil dispositions. The rate of bench trials in civil cases has also dropped.”¹⁷

B. The Rapid Growth of Regulatory Agencies and Their Hearings

As one commentator has summarized the rapid growth of federal agencies:

For much of our nation’s history, the federal government was quite small. In 1790, it had just 1,000 nonmilitary workers. In 1962, there were 2,515,000 federal employees. Today, we have 2,840,000 federal workers in 15 departments, 69 agencies, and 383 nonmilitary sub-agencies The fourth branch now has a larger practical impact on the lives of citizens than all the other branches combined The result is that a citizen is 10 times more likely to be tried by an agency

14. 122 YALE L.J. 522, 522 (2012).

15. *Id.* at 524 (internal citations omitted).

16. Rodriguez, *supra* note 13, at 335-36. As Judge Rodriguez went on to note, “The U.S. population in 1960 was 179,323,175. The U.S. population in 2012 was estimated to be 313,914,040. In 1960, federal private civil filings in the federal district courts totaled 38,444. In 2010, that number increased to 239,858.” *Id.* at 336 n.9 (internal citations omitted).

17. See Refo, *supra* note 13, at 3. In 2012 “there were fewer than 1,200 civil jury trials in state district courts in Texas—a one percent decline from 2011 and down nearly 300% from 1997, when there were 3,369 jury trials.” Curriden, *supra* note 13, at 6.

than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000.¹⁸

At the state and local level, in March 2012 “[s]tate and local governments in the United States employed 14.4 million full-time and 4.9 million part-time employees . . . [whereas] [i]n March 2007, there were 14.7 million full-time and 4.7 million part-time employees of state and local governments”—about 75% were state workers, the rest local.¹⁹

But the number of employees is not the only measuring stick for the explosive growth of regulatory impacts upon our society. At the federal level,

The Code of Federal Regulations (CFR) is the codification of all rules and regulations promulgated by federal agencies. Its size (which has grown from 22,877 pages in 1960 to 175,268 at the end of 2014) provides a sense of the scope of existing regulations with which American businesses, workers, and consumers must comply.²⁰

Similarly, the number of pages annually in the *Federal Register*—the official source of the federal government’s proposed new rules, final adopted rules, notices of meetings and adjudicatory proceedings, and documents like executive orders and proclamations—has significantly grown in recent years, as has the number of rules issued:

The annual outflow of over 3,500 final rules—sometimes far above that level—has meant that 81,883 rules have been issued since 1993. . . . Specifically, 127 laws were passed in calendar year 2012, whereas 3,708 rules were issued. . . . The 2012 *Federal Register* stands at 78,961 pages. Although shy of 2010’s all-time record-high 81,405 pages and 2011’s 81,247 pages, it is the fourth highest [number of pages]. . . . *Federal Register* pages devoted specifically to final rules stand at 24,690. The 2,898 proposed rules of 2011 represented the highest count of the decade, and the 2,517 in 2012 the highest count since 2003.²¹

18. Jonathan Turley, *The Rise of the Fourth Branch of Government*, THE WASH. POST, May 24, 2013, http://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faad0c-2ed-11e2-9fe2-6ee52d0eb7c1_story.html. While Turley calls it the “fourth branch of government”, now-Supreme Court Justice Elena Kagan and others have described it as the rise of the “Administrative State”. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2246 (2001); DWIGHT WALDO, *THE ADMINISTRATIVE STATE* (1948).

19. LISA JESSIE & MARY TARLETON, 2012 CENSUS OF GOVERNMENTS: EMPLOYMENT SUMMARY REPORT 2 (March 6, 2014), <http://www.census.gov/content/dam/Census/library/publications/2014/econ/g12-cg-emp.pdf>.

20. *Reg Stats: Total Pages in the Code of Federal Regulations (1950 - 2014)*, GEORGE WASH. UNIV. REG. STUDIES CTR., <http://regulatorystudies.columbian.gwu.edu/reg-stats#Total%20Pages%20in%20the%20Code%20of%20Federal%20Regulations%20%281936%20-%202013%29> (last visited Nov. 20, 2015) [hereinafter *GW Studies*]. The length of the Code in 2012 is about double what it was in 1976. *Id.*

21. Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INSTITUTE 2 (2013), <https://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202013.pdf>. As late as 1990, the number of pages in the Federal register was under 50,000. See *GW Studies*, *supra* note 20.

C. *Administrative Law's Growing Importance to Practitioners*

United States Circuit Court Judge David S. Tatel recently wrote:

Now I realize that administrative law is something of an acquired taste. But like fine scotch, it's a taste worth acquiring [A]dmin is where the action is. An unbelievable portion of the law that structures the world around us is now only loosely connected to Congress. Capitol Hill still lies at the center of this city, but the heart of government may actually reside in those red-roofed buildings along Pennsylvania Avenue.²²

The Judge's assessment that administrative law is "where the action is" has been borne out by findings contained in a fascinating recent study, conducted for the National Council of Bar Examiners, of what new lawyers who have been in practice for up to three years have actually found themselves doing in terms of areas of legal work, knowledge domains, skills used, and tasks undertaken.²³

First, 21% of new lawyers say they practice administrative law—the second highest practice area for respondents, after civil litigation. I agree with one commentator who "doubt[s] that law students are aware of how many of them will end up doing administrative law."²⁴ Indeed, my sense is that even more lawyers are practicing some form of administrative law than are saying so in polls, because when dealing with state and local administrative or regulatory law issues, that work can be done by attorneys with more diverse practices and general backgrounds than she parks at a public ramp and paddles a few miles out to a small private. Second, while "Knowledge Domains" like Rules of Professional Responsibility and Ethical Obligations (#7) and Statutory Interpretation (#8) ranked highly out of 86 subject areas in their significance to new practitioners, so too did Agency Procedural Rules, (#17) and Administrative Law and Regulatory Practice (#18)—ranking higher than commonly-taught areas like Real Property Law, Constitutional Law, Basic Accounting, Family Law, Alternative Dispute Resolution, Labor and Employment Law, Debtor Creditor, Secured Transactions, Bankruptcy and Tax

22. David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 1 (2010). And for a slightly different perspective—that much of administrative law and practice is undertaken not at the federal level and Pennsylvania Avenue, but at the state and local levels—see Alexander, *infra* note 60 and accompanying text.

23. For a detailed summary of the study results, see Susan Case, *Summary of the National Conference of Bar Examiners Job Analysis Survey Results*, NAT'L CONF. OF BAR EXAM'RS, (Jan. 2013), <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F55> [hereinafter *Survey Results*]. For the report itself, see Steven S. Nettles & James Hellrung, *A Study of the Newly Licensed Lawyer* NAT'L CONF. OF BAR EXAM'RS, (July 2012), <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F56>.

24. Dan Farber, *Practicing Environmental Law: The World of New Lawyers*, LEGAL PLANET, Apr. 8, 2013, <http://legal-planet.org/2013/04/08/practicing-environmental-law-the-world-of-new-lawYERS/>; see also Ed Finkel, *Growing Practice Areas*, 42 STUDENT LAWYER, May 2014, http://www.americanbar.org/publications/student_lawyer/2013-14/may/growing_practice_areas.html (explaining that recent growth areas for employment of lawyers have been "health care, regulatory, and energy law"); WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PRACTICE AND PROCEDURE 6 (5th ed. 2014) ("Law students are often surprised that they end up practicing administrative law once in practice since most do not anticipate that they will work for a government agency. But it is difficult to imagine that, as a private lawyer, you would never represent a client who has some connection of difficulty with an administrative agency, be it local, state or federal.").

Law.²⁵ Third, with respect to “Research and Investigation” tasks undertaken by new lawyers, the most often performed (by 96% of respondents) were electronic legal research and “research regulations and rules”—even more so than researching either statutory or judicial authority.²⁶ And fourth, the most significant tasks for respondents practicing administrative law were Research agency procedural and substantive rules (#1, 99% reporting); Review agency opinions and determinations (#2, 98%); Request documents from administrative agencies (#3, 87%); Advise client on permitting or licensing decisions (#6, 53%); and Represent client before administrative agency (#9, 70%).²⁷

D. The ABA Revised Standards and the Teaching of Administrative Law

What must law schools do to meet the 2014 ABA Accreditation requirement of at least six credit hours of experiential courses? Standard 303(a)(3) states:

To satisfy this requirement, a course must be primarily experiential in nature and must: (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302; (ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.²⁸

As for the “skills identified in Standard 302,” those learning outcomes require competency in:

(a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.²⁹

Additionally, as for what the ABA Standards require of law schools for an experiential course using simulations, a “simulation course” is defined as one that

Provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following: (i) direct supervision of the student’s performance by the faculty member; (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and (iii) a classroom instructional component.³⁰

25. See *Survey Results*, *supra* note 23, at 1-2.

26. *Id.* at 4.

27. As demonstrated in Section II of this article, *infra*, these were also some of the tasks undertaken by students in the Practicum course. See *Survey Results*, *supra* note 23, at 6.

28. See ABA, *supra* note 8, at Standard 303(a)(3).

29. ABA, *supra* note 8, at Standard 302. More expansive delineations of the skills required to be a lawyer have been presented in BEST PRACTICES, *supra* note 3, at 48-54 (listing twenty-six skills, most of which are not assessed by a bar examination); see also Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 60 (1992).

30. ABA, *supra* note 8, at Standard 304.

While the Standards do not use the term “practicum,” in practice such a course is the same as a simulation course—a hybrid mixture of doctrinal and clinical learning for students in the classroom.

Changes in law school curricula have also created a greater need, in particular, for a skills-based administrative law program. In recent years, many law schools, including mine, have integrated “Legislation and Regulation” or “Administrative State” courses into a required first-year offering.³¹ Often these courses include some, but not all, of the material forming the core of a traditional upper-level administrative law course. But while some people may think that administrative law is merely a “counterpart” course akin to the first-year civil procedure course,³² there are significant differences between both the teaching and practice of administrative law compared with civil litigation or procedure.

Administrative law “generally involves broader issues than a two-party dispute.”³³ Administrative decisions “are the products of multi-faceted agencies with a professional staff—i.e., bureaucracies,” who also engage in rulemaking proceedings.³⁴ Each agency, be it at the local, state, or federal level, may be subject to a generally applicable statute like the Administrative Procedure Act, but also “will be governed by substantive statutes which define its powers and jurisdictions, the policies it is to implement . . . and specific procedural requirements which supersede general statutes.”³⁵ Additionally, each agency likely will have “its own regulations and a body of decisional precedent . . . its own rules of procedure,” and possibly also its own “procedures for judicial review.”³⁶

Moreover, administrative law processes generally are permeated with policy questions and issues across substantive areas that may well make up more than 75% of the course offerings in a typical law school:

Virtually every aspect of public policy is addressed by one administrative agency or another. Topics include immigration, telecommunications, energy projects, environmental protection, food safety, securities and commodity trading, banking regulation, building codes, zoning, social security, utility rates, customs, and so on [and on and on, like workers compensation, unemployment compensation, employment discrimination, driving licenses, licensing of doctors, lawyers, dentists, plumbers, electricians etc.; forestry and agricultural practices; health care; insurance; intellectual property; consumer safety and more].³⁷

Additionally, when an administrative law course focuses on problems involving environmental and land use law issues, it necessarily incorporates an

31. Edward Richards, *Schools that Teach Administrative Law in the First Year of Law School*, LA. STATE UNIV. LAW, http://biotech.law.lsu.edu/cases/adlaw/1st_year_regulatory_requirements.htm (last visited Nov. 20, 2015).

32. One of the leading administrative law casebooks said as recently as 2011: “In the law school curriculum, [Administrative Law] is the upper-level counterpart to the first-year course in Civil Procedure, with a shift in focus from courts to agencies.” STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 3 (7th ed. 2011).

33. ALFRED C. AMAN, JR. & WILLIAM PENNIMAN, *SKILLS AND VALUES: ADMINISTRATIVE LAW* 1 (2012).

34. *Id.* at 3.

35. *Id.* at 2.

36. *Id.*

37. *Id.* at 6.

interdisciplinary approach across

many traditionally distinct pedagogical silos, requiring both students and practitioners to have a mastery of the substantive subject matter of, at a minimum, property, contracts, constitutional law, administrative law, environmental law, state and local government law, alternative dispute resolution, negotiation and legislative interpretation.³⁸

Consequently, when it came time for me to follow through on my commitment to teach an administrative law practicum, and I discovered how little precedent there was for such a course, there were many challenges and hours of planning lying in wait—a path definitely not for Justice Scalia’s sissies. Having now created and successfully taught the course, it is clear that an administrative law practicum or integrated simulation course is an excellent means of meeting both the ABA Standards and the old adage, “Knowledge becomes wisdom only after it has been put to good use.”³⁹

II. CREATION AND EXECUTION OF THE ADMINISTRATIVE LAW PRACTICUM COURSE

A. Course Conceptualization

First, I needed to figure out what is meant by a “practicum” and how one is structured. I found differing definitions;⁴⁰ eventually I decided that it is a teaching methodology enabling students to develop practical research, writing, and oral advocacy skills using real-world problems from a substantive area of the law in a classroom setting.⁴¹ It might also be called a “simulation-based course[,]” which is

38. Patricia E. Salkin & John R. Nolon, *Practically Grounded: Convergence of Land Use Law Pedagogy and Best Practices*, 60 J. LEGAL EDUC. 519, 529 (2011). This certainly correlated with my own experience practicing environmental and land use law for thirty years prior to developing this practicum.

39. I used this quote at the start of my syllabus; I have seen it attributed generally to Mark Twain, but usually it is attributed to “Anonymous.” The quote is similar to the student mantra, “I read and I forget; I see and I remember; I do and I understand.” Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 DREXEL L. REV. 1, 9-10 (2009) (quoting Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 943 (1996)).

40. I did find useful an article by Robert Dinerstein, *Experiential Legal Education: New Wine and New Bottles*, 44 SYLLABUS 2 (2013), http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/winter_2012-2013/experiential_legealeducation.html. In it, Dinerstein describes simulation-based courses as placing “law students in one or more of the many roles that lawyers play in society: litigator, counselor, mediator, legislative lawyer, public policy advocate, and so on. Identifying issues from a role-based perspective provides a kind of learning that often is more immediate and has a greater impact on the student than more traditional classroom-based learning.” *Id.*

41. As one source puts it, a practicum is “[a] course focused on a discrete area of law that integrates a requirement that students engage in practical fieldwork or complex simulations on the topic of study. Experiential education is an integral part of the class but a secondary method of instruction.” Alliance for Expt’l Learning in Law, *Experience the Future: Papers from the Second National Symposium on Experiential Education in Law*, 7 ELON L. REV. 1, 23 (2015). My concept and application of a law practicum thus differs in some key respects from this definition; I disagree that experiential education is a secondary method of instruction, especially given that the Elon Symposium defined it as “an active method of teaching that integrates theory and practice by combining academic inquiry with actual

“a course[] in which a significant part of the learning relies on students assuming the roles of lawyers and performing law-related tasks in hypothetical situations under supervision and with opportunities for feedback and reflection.”⁴²

I also aimed to deploy techniques required by ABA Standard 303 to

- (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;⁴³
- (ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.⁴⁴

I wanted to create a course that would, in a classroom, help students “to think, to perform and to conduct themselves (that is, to act morally and ethically) like professionals,”⁴⁵ as well as to learn how to “engage in complex practice[,] . . . make judgments[,] . . . [and] learn from experience.”⁴⁶ Based on my decades of representing clients, I agreed with commentators that law students must develop the skill of problem-solving because it “is the single intellectual skill on which all law practice is based.”⁴⁷ But I also wanted to develop, in addition to those mandated by ABA Standard 302,⁴⁸ other critical skills necessary for effective lawyering such as fact-finding, efficient research and analysis, confident oral and written advocacy, practical judgment, diligence, and passionate engagement with the issues.⁴⁹ Moreover, I wanted students to better learn and—most importantly—remember long-term the key doctrines of administrative and environmental law they encountered in the simulated exercises and project.

In sum, I wanted the course to be practical for students who, whether or not they became attorneys after graduation,⁵⁰ would likely be professionals and community leaders for many years. Given our growing regulatory government, and need to train tomorrow’s lawyers to be “legal knowledge engineers,” “legal

experience[,]” —exactly the primary teaching approach utilized in the Administrative Law Practicum. *Id.* at 15 (internal citations and quotation marks omitted).

42. BEST PRACTICES, *supra* note 3, at 132; *see also* ABA, *supra* note 8, at Standard 304.

43. This integration of doctrine and skills was central to my vision for the practicum. *Cf.* Kathryn M. Stanchi, *Step Away From the Casebook: A Call for Balance and Integration in Law School Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 611, 612-13 (2008) (urging more integrated skills-oriented courses that incorporate doctrine, skills, and theory, thereby better reflecting what it means to “think[] like a lawyer”).

44. *See* ABA, *supra* note 8, at Standard 303.

45. Am. Bar Ass’n Section of Legal Education and Admissions to the Bar, *Report of the Outcome Measures Committee 7* (2008) (quoting the CARNEGIE REPORT, *supra* note 4, at 22).

46. *Id.* (quoting CARNEGIE REPORT, *supra* note 4, at 22).

47. *Id.* at 9 (quoting Myron Moskowitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 245 (1992)) (citations omitted); *see also* Hirokawa, *supra* note 39, at 7-8.

48. *See supra* note 29 and accompanying text.

49. These are among the twenty-six skills identified in a recent study on effective lawyering. *See* BEST PRACTICES, *supra* note 3, at 48-67. Additionally, the recent study of what new lawyers are actually doing is valuable in identifying the skills and knowledge actually needed and used by law graduates to do their jobs. *See Survey Results, supra* note 23; *see also supra* notes 24-27 and accompanying text.

50. Early on, several students told me they did want to become attorneys; by the end, they admitted both to enjoying the skills built in the course but to reconsidering their career path.

technologists,” “legal hybrids,” “legal process analysts,” or “legal project managers”;⁵¹ I especially wanted the course not to be part of a “doomed”⁵² legal education program. Instead, I wanted students to discover for themselves that “law is not just the province of judges and lawyers,”⁵³ and that the vast majority of attorneys do not focus primarily on appellate decisions each day.

Having taught semester-long doctrinal administrative law courses, and knowing the breadth of substantive law areas within the ballpark of “administrative law,” I knew I had to focus more narrowly the practicum’s doctrinal portion.⁵⁴ But how? I searched for comparable administrative law practicum or simulation course syllabi, but found few relevant examples. I read many syllabi, articles, and books written by faculty at Maine and other law schools, then spoke with Environmental and Administrative Law Professors like Doug McClure at Michigan, Vicki Arroyo and Scott Hempling at Georgetown, Gerald Torres at Cornell, and Robert Dinerstein at American, and then also visited Wendy Jacobs at Harvard to review course materials for her ocean wind power practicum. I attended the Best Law Teachers Conference hosted at Northwestern Law School with the Institute for Law Teaching and Learning,⁵⁵ which provided many productive ideas about how to undertake the course which are still brewing in my head, as well as the excellent book⁵⁶ underlying the Conference.

Ultimately, I decided for a number of reasons to focus the course largely on the many statutory, regulatory, scientific, policy, and courtroom issues involved in the licensing of wind power projects. First, such projects can involve over 20 different areas of legal issues encountered by students in their law school courses and attorneys in their practices.⁵⁷ Second, every proposed wind power project in Maine has had opposition, resulting in a body of local, state, and federal regulatory and judicial decisions. I also knew I could access all of the court and agency pleadings and testimonies, as well as many of the involved attorneys and expert witnesses. Third, I knew there would be several wind farm cases pending during

51. See Peter A. Joy, *Law Schools and the Legal Profession: A Way Forward*, 47 AKRON L. REV. 177, 194 (2014) (quoting RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 128-30 (2013)).

52. See Ray Worthy Campbell, *The End of Law Schools: Legal Education in the Era of Legal Service Businesses* 4 (Nov. 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530051

53. *Id.* at 69.

54. I considered using JERRY L. ANDERSON & DENNIS D. HIRSCH, *ENVIRONMENTAL LAW PRACTICE* (3d ed. 2010), but decided that like administrative law, the field of environmental law was in itself too broad for my practicum purposes.

55. Information on the Conference can be found at <http://www.law.northwestern.edu/research-faculty/conferences/>. The speakers were very educational; one, Roberto Corrada of the University of Denver Sturm College of Law, gave a particularly relevant talk entitled “Ill-Structured Simulations in Law School.” By “ill structured” he meant, I believed and agreed, that with administrative law proceedings students must learn there may be no one pat, ready answer; instead, there may be a range of reasonable responses.

56. MICHAEL HUNTER SCHWARTZ, GERALD F. HESS & SOPHIE M. SPARROW, *WHAT THE BEST LAW TEACHERS DO* (2013).

57. For example, legal counsel for a possible wind power project could be required to address and advise on issues involving administrative, banking and finance, civil procedure, climate change, constitutional, construction, contract, criminal, employment, energy, environmental, evidence, insurance, legislative, negotiation, ocean and maritime, professional responsibility, property, public utility, real estate, secured transactions, and tax law.

the fall semester, all of them controversial and thus likely to be in the news.⁵⁸ Fourth, I also knew that not just in Maine but nationally, there is a steady increase in wind farm applications, and thus it and other renewable energy technologies are a growth area for lawyers. Thus, the frame of wind power projects could engage students in current social, legal, and policy issues, and the issues' relevance would more readily and effectively help students remember both doctrine and skill lessons.⁵⁹

I decided not to use a casebook for a two reasons—first, because I could not find one that was sufficiently current and practice-based, and second, because almost all books primarily focus on federal administrative law, on which relatively few lawyers will ultimately spend much time compared with state and local regulatory matters. As an experienced trial and appellate judge wrote to me, “Federal administrative law requires highly specialized practices that most law graduates will not see. Most state and local administrative law can be done by attorneys with more diverse practices and general backgrounds”⁶⁰—meaning far more law students, when they graduate, will be dealing with state and local administrative law, which in many key respects differs from the casebook federal administrative law generally taught in law schools. While I did teach some federal administrative and environmental law doctrine, I used (and made the students use in their work) a significant volume of Maine cases, statutes, and regulations.

I also knew that I needed to develop my own Case Study for the students; there was no one project development that I felt had the range of issues that I wanted students to wrestle with, plus I wanted to be able to modify some of the facts to better teach the doctrinal points of law. As will be discussed in Section C *infra*, I wanted the Case Study to simulate, from an attorney's perspective, how the actual receipt of facts from a client occurs in practice. In other words, I developed a scenario that provided sufficient facts and available legal arguments for all sides of the controversy, while not giving students too many details right off the bat. I wanted students to dig deeper on their own for more information, just as they would in real-life practice. Thus, “Chapter 1” of the Case Study was only two single-spaced pages—it set up the basic facts for a proposed thirty-turbine, \$200 million wind project spreading across several communities in western Maine (one of which had a noise ordinance different from the State statutes and regulations), with four different groups involved: the developer Clean Energy & Air National (CLEAN); the local opposition group called Citizens Against Giant Energy Systems (CAGES); a regional hiking group opposing the project; and a clean

58. I thought about splitting the course between on-shore and off-shore project case studies, but decided that would not leave enough time to fully explore a particular simulated project. Instead, I chose to develop an on-shore case to evolve throughout the semester.

59. See Jeremiah A. Ho, *Function, Form and Strawberries: Subverting Langdell*, 64 J. LEGAL EDUC. 656, 676-77 (2015) (“According to adult learning theory, adult learners tend to capture material more readily and effectively if they find that there is some relevance to the material.”); see also Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 BERKELEY LA RAZA L.J. 1, 57-59 (2015) (suggesting that professors should use modern cases and discuss current political and social issues).

60. E-mail from Honorable Donald G. Alexander, Justice, Maine Supreme Judicial Court, to author (April 24, 2014) (on file with author).

energy group supporting the project. Local, state, and federal issues all were involved in Chapter 1. As the semester evolved, so did the Case Study, into three more Chapters, with new or changed facts and legal issues—as in real life.⁶¹

Last, but not least, just after student registration was completed in the spring for the fall semester courses, I asked each registered student (and the first few on the waitlist) to meet with me for thirty minutes, so that they would have a clear idea of what I was planning for this new course. I wanted to ensure that students understood that this would be an atypical course, with lots of exercises. Additionally, I used the meetings to learn more about each student's education and work background, interests, knowledge of environmental law issues, and professional goals. I also asked what skills each student hoped to strengthen. I used all of this information to, in part, help me develop the syllabus as well as Case Study issues that would be addressed.

B. Syllabus Development

When I began to outline the syllabus, however, I realized that I had to be careful not to overwhelm students with too much substantive information. I could easily have spent the whole semester teaching administrative and environmental law, but that would not build the desired skill sets. The difficult challenge I had throughout the planning and execution of the course was to provide enough substantive content for students who knew little or nothing about regulatory, environmental, or wind issues⁶² to be able to competently research and analyze the relevant legal and scientific issues, while not just having a course of outside speakers and simplistic exercises. What follows is how I ended up with a twelve-page, single-spaced syllabus⁶³ and a constantly-evolving, multi-page Case Study that challenged even me to learn unexplored subtleties in the law.

I first drafted an Introduction in which I stressed, “The best lawyers know how to collaborate and work well with a wide range of people, to listen and then question effectively, all with the goal of meeting the critical statutory and regulatory requirements facing their client.” I warned that the course would

involve active learning and engagement that will demand your full participation and preparation. I will have high expectations for you, just as will the clients and colleagues waiting for you after graduation. My job is to push you to do excellent quality work; I know you can do so, and I expect all of you to succeed and do

61. In part, the goal of having one case simulation run throughout the entire semester, with uncertain or changing facts and with ambiguous law (often the case in administrative cases and proceedings) was to provide “a unifying theme or narrative throughout the semester to help students make links across material. These themes and narratives facilitate deeper concept comprehension and content retention.” Darling-Hammond, *supra* note 59, at 33.

62. Of the nine students in the class, only a couple had previously studied environmental law.

63. The length was because I wanted to provide a very clear roadmap for students of what was expected of them in the course, and of the many exercises they would be undertaking. Similarly, because the practicum would be new and experimental, I met in the spring with each registered student, including those waitlisted, so they would know what they were getting into. I also wanted to learn about each student's background, experience and interests, in case I could add something particularly relevant to the course responding to their interests. For example, one student indicated an interest in Indian law, so I wove into the Case Study and some of the hypothetical exercises facts involving tribal issues.

well.⁶⁴

I next provided a list of learning goals, including one I stressed throughout the semester: that by the end each student would be more self-confident, and also better able to:

[P]repare and present persuasive, focused, and compelling oral and written communication of your issues, regardless of whether you are representing the project developer, opponent, or agency, and regardless of whether your audience is a professional or lay person; and make better oral presentations without reading verbatim from an outline, while maximizing eye contact with your listeners.

I also stressed that each student would have the ultimate responsibility for her or his own learning and skills development, and that I expected them to act—toward each other and me—as professionals would act in a court, hearing, or conference room. Thus, attendance, preparation, and punctuality were mandatory. To maximize active learning, I banned laptops except for specified classes where they would be used as part of an exercise.⁶⁵

Key to the course were multiple exercises, providing increased assessment points throughout the semester with ongoing specific feedback,⁶⁶ divided into five categories:

A. Class Participation (20%): (1) Prior to the first class, each student would submit a 3-5 page memo, which would be the basis of a 4-5 minute ice breaking presentation in class to practice not reading from a script; the topic was for each to present about him or herself—pre-law school background, skills, hobbies, family, goals, and interests⁶⁷ (12%); (2) For the four classes where panels of professionals

64. It is important to convey to all students both high expectations and the professor's desire that they all succeed, so that they feel you really care about helping them grow. See Darling-Hammond, *supra* note 59, at 17, 19, 23. Interestingly, a student told me after the semester that "several class members commented at different times that their grade didn't matter—worse was disappointing you or their classmates for any given day or exercise."

65. I had not banned laptops in my previous courses, and talked with many faculty members about their practices. Most allowed laptops. But as I explained to students in the syllabus, "Laptops interfere with face-to-face connectivity, and recent studies demonstrate that taking handwritten notes increases how much your brain is processing information and thus increases how much you are likely to remember later." See, e.g., Anne Mangen et al., *Handwriting versus Keyboard Writing: Effect on Word Recall*, 7(2) J. WRITING RESEARCH 227 (2015), http://www.jowr.org/articles/vol7_2/JoWR_2015_vol7_nr2_Mangen_et_al.pdf; Cindi May, *A Learning Secret: Don't Take Notes with a Laptop*, SCIENTIFIC AMERICAN (June 3, 2014) <http://www.scientificamerican.com/article/a-learning-secret-don-t-take-notes-with-a-laptop/>.

66. I provided written feedback and scoring within a day or two on all student submissions during the semester, as well as feedback in class on oral exercises. "By adding more writing and oral presentations, the professor has increased assessment points and can provide particularized feedback from a lawyer and constructive critique." Wes Porter, *When Experiential Learning Takes Center Stage—Not Yet*, 1 J. EXPTL. LEARNING 79, 90 (2014); see also *Experience the Future*, *supra* note 41, at 29 ("Student learning is accelerated when the students receive specific, individualized, and constructive feedback on their performance."). An additional benefit is that "smaller class sizes and a pedagogy based on simulations, writing, and feedback (instead of a single exam at the end of the semester) reduced or eliminated a gender-correlated gap in law school grades." Darling-Hammond, *supra* note 59, at 15.

67. I chose these topics because they are what people (hopefully) know the best—themselves. This was also, in part, to make it more comfortable for students to begin to learn how to speak from the head

would come into class, students were to send me, beforehand, at least three questions to be shared with panelists (2% each).

B. Written Exercises (22%): (1) I would pre-assign pairs⁶⁸ of students to represent different interests involved in the Case Study—the developer, supporting nonprofit group, opposition citizens and public interest groups, or the reviewing board. Each team would submit before class a minimum five-page memorandum to its client identifying the issues and requirements involved for that client’s position, as well as an action plan identifying strategies and needed expert witnesses. Each team would give an in-class 13-15 minute oral presentation of the memo to the client (me); each team member had to present (15%); (2) Each student would write an op-ed (650-750 words) promoting a particular client’s views on a wind project case that had just been argued in the Maine Supreme Judicial Court, and then orally summarize it (5-7 minutes) (7%).

C. Expert Witness Examination (18%): Each student would prepare, and then have 10 minutes to crisply conduct the direct or cross-examination of an actual expert witness. Each student would also provide short feedback to the student conducting the opposing examination.⁶⁹

D. Opening/Closing Argument (18%): Each student would be pre-assigned to conduct an opening or closing argument, no more than 12 minutes, on behalf of a particular client in the Case Study, and provide a three-minute evaluation of the student arguing the opposite position. Students were to work from an outline.

E. Final Exercise (22%): Each student would be pre-assigned to draft a recommended outcome and analysis of the relevant law and facts to the Maine BEP on the Case Study, in an 8+-page memorandum and give a 10-12 min. presentation in class.⁷⁰

I also encouraged students to visit an actual wind farm and to attend an agency or court proceeding during the semester.

Both the sequencing of classes and the changes and additions to the Case Study were designed to encourage students to continually reflect on and reuse information and skills from earlier in the semester, so that the final exercise would

and heart, and not from a script. Additionally, this exercise can serve as a means of self-assessment and reflection—both important skills and pedagogies in experiential education. See Cheryl B. Preston et al., *Teaching “Thinking Like a Lawyer”: Metacognition and Law Students*, 2014 BYU L. REV. 1053, 1084-85 (2015).

68. A number of the problem-solving exercises during the semester required collaboration by the students, which “can be both a learning *tool* and a learning *goal*.” Hirokawa, *supra* note 39, at 14 (emphasis added).

69. I utilized peer assessment techniques several times during the semester; I was never quite sure how productive many of the student comments were, but in the course evaluations several students wrote how much they liked that feature. I want to refine this activity the next time I teach the course by having “peers ask questions that require self-assessment of the tasks involved” (such as by asking why the other student did or did not make X or Y argument). See Preston et al., *supra* note 67, at 1065.

70. There were two other team-based exercises I developed as the course went along that were not explicitly graded, but for which I gave feedback to each student after class. These were the administrative law and professional responsibility hypotheticals described *infra* in text accompanying notes 75-76 and Part II.C.iv.

approximate a mini-final examination.⁷¹ What follows is how it all worked in reality.

C. Practicum Implementation

1. Introduction and Administrative Law Refresher

At the opening icebreaker class, I spent the first ten minutes reviewing the syllabus. I provided students with a fairly lengthy set of materials providing an overview of administrative law; the federal Administrative Procedure Act; the Maine Administrative Procedure Act, Freedom of Access Act (FOAA), and relevant Rules of Civil Procedure, as well as regulations relating to hearings before the Maine Department of Environmental Protection (DEP); a number of Maine environmental statutes and regulations providing the relevant standards and criteria applicable to proposed project developments; court decisions on FOAA and wind power project issues; local ordinances for the location described in the Case Study; materials concerning wind turbine technology and impacts upon wildlife; relevant provisions of the Maine Rules of Professional Conduct; and tips for conducting witness examination as well as opening and closing statements.⁷² Two years earlier, Maine had changed the Administrative Law course from an upper-level elective to a required, second-semester Legislative and Administrative Law class. My students were split between 2Ls and 3Ls, who had been taught by different professors in the first-year course. Therefore, I wanted to ensure that not only did they have roughly comparable knowledge about environmental law, but also comparable knowledge about administrative law concepts and issues, while also focusing more on Maine administrative procedures.

The materials, which I reviewed in the second class, contained summaries of federal and state adjudicatory and rulemaking processes; the Maine and federal Administrative Procedures and Freedom of Information or Access Acts; some of the Model Rules of Professional Conduct; and, for a later class, the key Maine statutes and regulations for wind power projects and the DEP. In the second class, I familiarized the students with such concepts as legislative and non-legislative rulemaking, deference, delegation, standing, *ex parte* and ethical issues, and judicial review of agency adjudications and rulemaking.⁷³

The same day as the second class was the Maine Supreme Judicial Court hearing on the proposed Passadumkeag wind farm project; because most students had course conflicts that kept them from attending, I required that they read the

71. There was no midterm or final examination.

72. I three-hole punched course materials, urging students to use 3-ring binders to keep things organized for class and for presentations. Most did. I modeled that myself by keeping and bringing all course materials in a large binder while having materials for that day's class in a smaller binder. I also gave them a copy of my Maine Environmental Law Handbook, so that those students with no background in environmental law would have an accessible resource aid. JEFFREY A. THALER & GREGORY M. CUNNINGHAM, MAINE ENVIRONMENTAL LAW HANDBOOK (2d ed. 2002). Although outdated, the book was useful for students to grasp the different statutory and regulatory schemes.

73. Cramming a semester of administrative law into one class was difficult both for me and for the students; next time I likely will use two classes, possibly with some experiential work in the second class session.

briefs and listen to the court's online audio recording of the hearing, for use in later classes and exercises.⁷⁴ The third class was our first panel, with two State administrative lawyers—one a recent Maine Law graduate, the other a veteran regulatory attorney—talking about how the regulatory process differs from the adjudication of court cases.⁷⁵ Because I wanted to ensure students actually understood the administrative law materials from the second class, in the fourth class they worked with nine hypotheticals I provided beforehand. I divided students into three teams, each responsible for presenting an analysis of three hypotheticals in class. Topics included the admissibility of hearsay evidence, equitable estoppel of a governmental entity, *ex parte* activities, bias, standing, doctrines of vagueness and delegation,⁷⁶ and determining when rulemaking requires notice and comment.

2. *Wind Power Overview and How the Legal System Addresses It*

In the next class, I presented on the basics of wind power technology, as well as on issues like noise and impacts on the landscape and wildlife. This was also when I introduced them to the Case Study. To ensure that students understood the wind power science and legal materials, in the sixth class they could use laptops for in-class searches to review, word-by-word, statutes and regulations at the federal, state, local, and tribal levels. I taught this class Socratically, using focused questions and calling on each student multiple times. I also distributed a “roadmap” of exercises for the remainder of the semester showing which client or side each student would be representing; where there were teams, I made sure to pair second-year students with third-year students, as well as those with environmental law experience with those who had none. I also made sure that each student would have opportunities to both advocate for and against approval of the proposed wind project, and I sequenced presentations so that if a student went early in one class exercise, she would go near the end of the next one.⁷⁷

Students prepared their client memoranda and then gave their first substantive oral presentations.⁷⁸ Subsequently, that weekend, several students and I toured an operating wind farm in western Maine; afterwards, I sent the class photographs of the wind turbines and surrounding area.⁷⁹ In the next class, we had our second

74. Just after the semester ended an oral argument was held on another wind project we had discussed; this time, despite reading period for final exams, half the class went with me to court.

75. For this panel, and the three following, I sorted all of the students' questions by topic and panelist. I then sent the compilation to panelists at least twenty-four hours beforehand to help them prepare, and used the list in class so that as many student questions as possible could be addressed.

76. For example, are requirements such as “fitting harmoniously into the existing natural environment,” 38 M.R.S.A. § 484, or “conserve natural beauty,” *Kosalka v. Town of Georgetown*, 2000 ME 106, 752 A.2d 183, unconstitutionally vague?

77. This took much charting and juggling, but proved worthwhile. Said a student at semester's end, “As the semester went along it became surprisingly easy to find some passion for opposing the position last taken. Toward the end it was even a little hard to keep straight what side I was arguing!”

78. After this and every in-class exercise thereafter, I provided same-day emailed feedback to each student on her or his work. I also provided their score and encouraged students as much as possible.

79. One student later astutely used some of those photographs, blown up, as exhibits in a course exercise. In the second year of the course, we went to a new, nearby wind project operated by the same

panel: attorneys who had argued two weeks earlier in the Maine Supreme Judicial Court about the Passadumkeag project. We discussed not only the substantive and procedural issues of that case, but also environmental and administrative lawyering practices.

3. *Active Representation of the Case Study Client*

Most students (and even practitioners) do not have very much experience with freedom of access laws, which are often the only means of pre-hearing “discovery” that might be available in certain regulatory proceedings. Therefore, I prepared an exercise where students had to compare and contrast the Maine Freedom of Access Act with the federal Freedom of Information Act, followed by a discussion of nearly ten specific and diverse court decisions. Switching gears, for the next class students had to prepare and present competing op-eds about the Passadumkeag wind project. Surprisingly, this proved more difficult than expected; students were challenged by thinking and writing in a way very different from the style that had previously been drilled into them.⁸⁰ The exercise thus was more “subversive” than I had expected—making it even more valuable.

I chose the third panel’s members to represent the diversity of professionals who make up a team that must collaborate with each other on complex projects. One was an experienced attorney representing developers; the second a Maine Law graduate who had been Deputy Commissioner at the Department of Environmental Protection before going in-house with an environmental engineering firm to be project manager for many proposals; and the third was an experienced communications specialist generally working on behalf of development proposals. As with all panels, I encouraged panelists to explain how students could best find work opportunities and be successful with clients and regulators.

Based on what had unfolded during the first dozen classes, I then created Chapter 2 of the Case Study to set up the expert witness exercise. I had felt that the four most important issues in most projects involved wetland, wildlife, noise, and scenic impacts, so I had recruited consultants experienced in those fields. With tweaks to Chapter 1 to make the examination work-up more feasible,⁸¹ I developed additional facts in each of the substantive areas, resulting in the Case Study becoming seven single-spaced pages. Each student had one substantive area to handle on direct or cross-examination.⁸² I compiled a list of “tips” for opening and closing statements, as most students had never done an opening or closing before. The first class involved wetlands and wildlife witnesses; the second class was the scenic and noise issues. The exercises went well, despite the tight time

developer, and again shared photographs with the class for possible future use. Two students did use some in their client issues exercise.

80. Many students confessed they never read op-eds. I told them to imagine they were presenting at a local Rotary or Lions Club breakfast—something I frequently had done, but was new to them.

81. For example, I told students not to deal with the local ordinances, but to focus only on the DEP regulations. This also made it easier for the consultants to prepare, since unlike a real-world scenario the students were not meeting with their consultants beforehand to prepare for the examination.

82. I told students to assume that each expert had been previously qualified to testify.

constraints.⁸³

To give students a breather and time to prepare their opening and closing statements, after the witness examination week I provided them with materials about offshore wind project permitting at the Maine and federal levels. For this class, I decided to work through key provisions Socratically—I gave them a photograph of the only floating offshore wind turbine deployed in the Americas (off Castine, Maine) and asked, “How would you get it approved in the first place?” I also gave out Chapter 3 of the Case Study, which had some discrete, redlined changes to the facts based on what had developed during the expert witness examinations. I did not want too many changes, as I was hoping students would continue to master the basic facts and issues for their arguments. I then devoted the next class to discussing strategies, lessons learned, and any lingering questions that they had. I also urged them to “dress the part” for class exercises going forward, such as when giving opening or closing statements. I wanted them to feel professional; by the end, I did not have to remind them—they had all dressed up for the last week’s proceedings.

The following week, we had two days of opening statements and closing arguments. Just as students who had cross-examined witnesses seemed more comfortable than those who had done direct examinations, this time students with closing arguments seemed better able to advocate than those who were opening. Some students still struggled to get their presentations done within the time limits, but I kept working with them to do so.

4. Regulatory Perspectives and Ethical Challenges

Our last panel consisted of local, state, and federal environmental and utility agency staff from the U.S. Army Corps of Engineers, Maine DEP, and Maine Public Utilities Commission.⁸⁴ I wanted students to hear what decision-makers think about the lawyers who advocate competing outcomes to them so that students could get a better perspective on the best ways to shape their presentations. This class also proved especially fruitful for those students more interested in policy development and possible governmental employment.⁸⁵

At the end of the regulatory panel class, I provided to students updated excerpts from the Maine Model Rules of Professional Conduct, as well as nine hypothetical scenarios involving a range of ethical issues. I asked them to prepare for each one, as I would call on two students at a time for each set of questions. I based the questions on the Case Study, and from different perspectives (representing a business, an NGO, or individuals); students had to tackle such

83. During the third panel discussion the experienced environmental attorney had reinforced one of my recurring admonitions to the students: be focused and concise. She had said that ten minutes should suffice to develop and provide your essential facts and themes; coincidentally, that was exactly how much time each student had for his or her expert questioning.

84. The latter panelist was also the City of Portland’s Planning Board Chair.

85. Students liked the panels; said one, “I knew we would have visitors but had not imagined it would be the people presently and intimately involved in the most pressing issues in wind farm siting. To have access to experts, regulators, lawyers, and to ask candid questions of them exceeded already high expectations of what visitors from the real world have to offer law training.” David Robertson ’16, *Course Evaluation*, Dec. 11, 2014 (on file with author).

issues as conflict of interest, confidentiality, *ex parte* contacts, organization as client, and false testimony, again within relatively tight time limits. The class went very well, as I kept switching a fact here or there to demonstrate different possible ethics results; additionally, students were able to look back over issues that had arisen during the semester's exercises with more sensitivity to the underlying professional responsibilities they would be held to as practitioners.

5. Recommended Decisions

After the ethics class I distributed a final, fourth version of the Case Study. Now, the project had been approved by the DEP Commissioner, after a hotly-contested hearing. The matter was appealed and cross-appealed to the BEP for a *de novo* decision, with no supplemental evidence. The Board Chair retained outside counsel to prepare written and oral analysis and recommended outcomes for the appeals. Half the class was to recommend outcomes sought by the developer, the other half outcomes sought by opponents. Each student was a solo practitioner, required to review all notes and materials from the semester. Each was to apply, in a memorandum format, key facts to the four specific administrative and environmental legal questions I asked them to address.⁸⁶ No outside research was needed; I wanted them to demonstrate mastery of the materials and data provided during the semester.

I spent one whole class going over the final Case Study scenario and questions, so students would be clear and comfortable about the proceedings. They were to submit their memoranda to me beforehand and present on them in the two remaining classes the last week. Somewhat surprising (to me) was that while the written memoranda were generally strong, one or two students did not spend enough time preparing simplified presentation outlines. It may also have been that this was the end of the semester, with competing course demands.

D. Practicum Assessment

What did I learn from how the course worked in practice, and what changes have I made in the Fall 2015 edition?⁸⁷ For a number of sessions, eighty-five minutes were not enough; when I asked students whether next year the course should be offered as four credits (for longer classes), they were divided.⁸⁸ A real challenge was having enough time for students to present well, answer questions, get and give feedback—and to do that for each student within the class time allotted. Students struggled with the ten-to-twelve minute limits, but given that

86. These involved (1) a freedom of access request for the files of a scenic impact consultant retained by the DEP; (2) evidence admitted, over objection of CLEAN's counsel, of cumulative impacts and of hearsay concerning the possible presence of Canada lynx; (3) the standing of two individuals opposing the project who lived miles away from it; and (4) whether or not CLEAN had met its burden of proof for the wetland, scenic, wildlife, and noise issues.

87. This edition had six 3Ls and four 2Ls; 6 men and 4 women; and a range of backgrounds, with several students having had extensive energy or environmental experience, while several others had neither course nor work experience in the subject areas.

88. The second edition of the course was three credits; the Deans felt that few upper-level courses should be four credits, other than Tax and possibly Business Associations.

attorneys arguing before many appellate courts only have fifteen minutes, including responding to judges' many questions, in my view practicing to hit key points hard and fast is worth doing repeatedly. I tried to increase students' reflection work by asking them, throughout the semester in class and in my written comments to them after class exercises, "Why did you make that tactical choice or decision in your written or oral work?"⁸⁹

For the second edition of the practicum, I dropped noise as a core Case Study topic—it has very prescribed, objective standards (decibel levels) and thus is difficult to create sufficiently conflicting facts to support meaningful direct and cross-examinations. Instead, I broke wildlife and scenic impact into several sub-issues, so that several students would have different cross-examinations to prepare for the same expert witness. With the panels, I dropped two (the administrative and wind appeal lawyers), and installed a new, very successful one on public utility and transmission issues that are increasingly playing a key role in wind and energy project developments.⁹⁰ Additionally, I changed the questioning of panelists—everyone had the students' pre-class questions, from which I selected representative ones to ask each panel member, and then opened the class up for every student to ask at least one additional question. Last, I continually updated the Case Study and materials based on new laws, regulations, policies, court rulings, and project applications.

III. CONCLUSIONS

What did the experts—the students—think overall? Said one evaluator:

The Case Study, crafted of issues actively litigated in Maine, was particularly helpful in that it showed that administrative law is not at all clear and straightforward, however it might seem from the formal appearance of the statutes and rules. I knew we would do presentations but I did not expect the critical need for such skills in oral hearings. Case books in administrative law fail to mention the importance of advocacy before boards and judges, as if getting the evidence on the record is all there is to agency decision making.⁹¹

Another evaluator articulated better than I could why practicum or simulation courses like this one must grow and multiply:

89. This is again to promote metacognitive learning, to help further develop the students' lawyering and reasoning skills. See Preston et al., *supra* note 67, at 1083-85.

90. The panelists were the Maine Public Advocate, a leading utility and energy law attorney, a transmission engineer, and an upper-level administrator from Maine's largest public utility. The session was very lively and thought-provoking. Wrote one student after class, "I thought the discussion was phenomenal. I was initially concerned that as experts, I wouldn't be able to fully comprehend some of their responses; however, I found the panelists extremely engaging and the topics fascinating. I appreciated coming up with questions beforehand, as it really got me thinking about who they were and what I wanted to know. Even though the majority of my questions were not answered, I learned a tremendous amount. I could have questioned and listened to them for hours. I also thought the panelists themselves were well selected—as a group, they seemed a good match of subject-matter expertise and experience. I wish all of my classes presented information as you have in this class. It seems as if every type of learner can be engaged with a variety mix of lecture, reading, discussion, class trip, presentations, and panelists." Betsy Wakefield '16, email to author, Oct. 7, 2015 (on file with author).

91. David Robertson '16, *Course Evaluation*, Dec. 11, 2014 (on file with author).

The Practicum turned out to be unlike any other course I've ever taken in law school, in that we applied concepts through practical exercises *in a manner that mattered for something*. What I mean by that is . . . this course's practical exercises were decidedly different from Trial Practice, for example, because they "mattered." Specifically, other "practical" courses . . . seem to be seminars or courses in which you get up and conduct a cross/direct and call it a day. In this Practicum, not a week went by when I didn't feel like I actually had a client or interest I was representing. My work followed me home. I spent countless hours researching, practicing, and reviewing my notes. I felt, for all intents and purposes, more like an actual attorney than I even had clerking for a local firm. So, in sum, this course exceeded my expectations by injecting something unique—something *useful* and invaluable—into my expensive legal education. It's something that I wholeheartedly feel was finally worth the cost of tuition, and something I desperately wish was injected into all of my other classes: real discussions of how to succeed as an attorney.⁹²

After the last class all of the students and I went out for barbecue and beverages, and they presented me with an autographed exhibit used by a student in examining the noise expert witness. As evidence that they had all worked well together as a team, and that the positive practicum experience outlasted the end of the semester, six months later, on their own initiative, they planned a similar outing—not something contained in the ABA Standards, but still positive proof of the worthiness of designing and implementing comparable practicum and simulation courses at any law school.

92. Joseph Gousse '15, *Course Evaluation*, Dec. 4, 2014 (on file with the author).

