January 31, 2014

Dear Members of the Council of the Section of Legal Education and Admissions to the Bar:

I am writing to comment on the proposal by the Clinical Legal Education Association, circulated for comment by the Council, to require all law students to take 15 credits of experiential courses. It is certainly possible to debate some of the details of this proposal, but my purpose here is to defend its central proposition: that all law students should receive significant training in the practice of law before they graduate. This is one of those propositions that almost seems not to need defense: who would imagine a professional school that did not give its graduates training in how to practice their future profession?

To endorse the value of significant training in the practice of law is not at all to deny the value of other things law students do, notably in studying rules of law, cases and statutes, and the ways that lawyers employ these fundamental tools of their trade. The traditional classroom is one way of teaching students this skill, and an important one. But one might think that this method should normally be able to accomplish its central goals in 5 semesters, or about 75 credits’ worth, of classes, and that if students have pursued their classroom studies for that long and have not yet learned how these critical elements of legal reasoning, then it might well be time for some other approach – for example, an experiential one, in which the way students master law’s intellectual moves is by making them on behalf of real (or simulated) clients.

Nor is the endorsement of the value of significant training in the practice of law a rejection of the utility of students’ pursuing advanced study in particular course areas they view as directly related to their future practice. Five semesters of classroom study is a lot of time – time, probably, for the usual required first year courses, for a battery of upper-level courses that many or most law schools require or encourage, and time for some further specialization as well.

But even if we accept the fundamental proposition that law students should get significant training in the practice of law before they graduate, it might be argued, nonetheless, that regular law school classes are an engagement with practice. There is some force to this point. Socratic classrooms are much more engaged, I believe, than lectures. Langdell, as I understand it, aimed to teach students the skill of legal reasoning - and I certainly agree that's a practice skill.

There are two major problems, however, with the "regular coursework as engagement with practice" argument. First, the traditional study of legal reasoning is an engagement only with a fraction of the skills a lawyer needs. It includes no interviewing, no counseling, no trial skills (except a measure of advocacy training gained by some

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1 These comments are based on arguments I laid out in an online dialogue with Professor Brian Leiter (and others) on his blog.
students from the give-and-take of class discussion), no negotiation - and actually not much training in legal research nor, in many courses, more than a final exam's worth of training in the many challenges of legal writing. Second, the sad truth is that the charm of this method wears off. Two years of Socratic dialogue does not make the third year of it more profoundly rewarding. Instead, it evidently leaves our students often deeply disengaged, as Mitu Gulati, Richard Sander & Robert Sockloskie have shown in “The Happy Charade: An Empirical Examination of the Third Year of Law School” (2001/02) available at http://www.seaphe.org/richardsander/pdf/Sander-Gulati-HappyCharade-final.pdf.

I think that clinical legal educators have demonstrated over the past forty years that the other skills of legal practice are also, like legal reasoning and legal doctrine, susceptible of scholarly study and capable of being taught. Experiential courses, including clinics, externships and simulation classes, aim to do just that and so to add crucial depth to the practice preparation that law schools provide. Clinics now are offered in a wide range of substantive areas, including not only litigation but also mediation and public policy advocacy, and not only poverty law and criminal law but also corporate and transactional work as well. Even skills that may not be within the range of clinics (merger & acquisition techniques, for example, for which few clients would welcome student representation) can be addressed in simulation courses, and we have good reason to believe, from two different NALP studies (the “2010 Survey of Law School Experiential Learning Opportunities and Benefits” and the “2011 Survey of Law School Experiential Learning Opportunities and Benefits – Responses from Government and Nonprofit Lawyers”), that simulation courses are valuable even though law graduates rank clinics and externships even more positively.

One might accept all this, and respond that law schools actually already do give students the experiential learning they need, by means other than course work. It might even be contended, as one blog commenter suggested, that two summer jobs are “not dissimilar” to medical school clinical rotations. I certainly don’t deny that summer jobs can be very valuable. In fact, data from the After the J.D. study, as examined by Rebecca Sandefur and Jeff Selbin in The Clinic Effect, 16 Clinical L. Rev. 57, 85 (2009), suggest that new lawyers viewed summer work as the single most useful experience of their law school years in preparing them for practice, with school-year legal employment coming second. It is not surprising that students find legal work a valuable training ground for future legal work – wouldn’t it be odd if they didn’t? – but isolated summer jobs, as valuable as they are, are not school. Nor do they compare to medical school clinical rotation, which is not only part of the medical school educational program but a very extensive and intensive part. (A program like Northeastern’s, in which four different work experiences are deliberately made an integral part of the students’ overall law school experience, might well be another matter – but that goes to the question of how to define eligible practice training experiences, not to the basic need for significant practice training before graduation.)

One might accept this point too, yet respond that the choice of what courses to take should belong to the students themselves. Certainly choice is important. But we teach in
law schools, and it’s built in from the start in our schools that most of the courses students take must be law courses – rather than, say, political science or humanities. Even within the domain of law courses, many or most schools restrict student choice significantly – notably by prescribing most or all of the first-year curriculum and sometimes parts of the upper-year curriculum as well. I think the question is not whether we will limit students’ choices, but how much and for what reasons. And on that score, I wonder whether part of the sense that 15 credits of experiential learning is too much might arise from a perception of “skills” as a single subject, rather than as a very wide range of different competencies that get used in different ways in different settings. We routinely allocate 60 credits or more to teaching “doctrine” and the skill of legal reasoning; it does not seem too much to allocate 15 (or some comparable amount) to other skills of practice. Within those practice credits, I’d certainly hope that law schools will offer their students a substantial range of courses from which to choose.

One last point on the question of “how much?” Bob Kuehn, in his essay “Pricing Clinical Legal Education,” available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318042, has compiled figures on the “practice-based and clinical education” requirements in a range of other professions: architecture, dentistry, medicine, nursing, pharmacy, social work, and veterinary. Each of these requires at least one quarter of students’ training to be in clinical settings; some require one third and, last but not least, medicine requires one half (and that doesn’t include the years of supervised post-graduate clinical training that follow receiving the M.D.) Kuehn also presents cogent evidence that law school budgets can handle the cost of clinical education – not that this education is costfree (it obviously isn’t), but that the costs can be handled. The CLEA proposal is that approximately one-sixth of law students’ training be in experiential courses. It seems to me that the burden is on those who disagree with this proposal to explain why law students, unlike their peers in other professions, do not need this level of experiential preparation for the work they will soon be doing.

I appreciate the opportunity to submit these comments, and hope the Council will find them helpful.

Sincerely,

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