Experiential Legal Education: New Wine and New Bottles

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Experiential Legal Education: New Wine and New Bottles

By Robert Dinerstein

About the Author
Robert Dinerstein is professor of law and associate dean for experiential education at American University, Washington College of Law, and director of the law school’s Disability Rights Law Clinic. From 2006 to 2011, he was a member of the Council of the ABA Section of Legal Education and Admissions to the Bar.

Of all the current critiques of legal education—it is too expensive, students undertake excessive debt to finance their education, the economy will not support the number of newly minted lawyers seeking jobs in the legal profession, law schools do not offer enough of the kind of training that nascent lawyers need—the latter critique is the least accurate. To the contrary, law schools are offering an ever-increasing array of classes, courses, programs and experiences that provide students with the opportunity to learn, and reflect upon, legal skills, doctrine, ethics and theory in the context of real and simulated legal work. Under the capacious umbrella of “experiential education,” law students have opportunities to be active, engaged learners not only in the law school classroom but in the world beyond. But what do legal educators mean by experiential education and how can the term be a useful one and not simply the latest rhetorical flourish?

Within education generally, experiential education has a distinguished history and lineage, and draws heavily on the theories and practices of John Dewey, David Kolb, Paulo Freire, and others. It can include programs as diverse as outdoor education and service learning. Its emphasis is on student self-reflection on experience as an entry point into learning. The experiential educator seeks to structure experiences that permit students to “plan, do and reflect,” a mantra that will sound very familiar to clinical legal educators. Thoughtful repetition of experiences, with changes and adaptations made in response to new information and insights (including those based on external critiques), provides space for the students’ growth and development.

But what exactly is experiential education in law? I admit I have been thinking about this question with somewhat greater urgency lately since being appointed in September 2012 to a new position in my law school, associate dean for experiential education. (A number of schools have created similar positions in recent years.) At American, at least, the position includes directing our extensive in-house clinical program and interacting with our supervised externship program and simulation courses and programs. But does it also include involvement with faculty who use role-plays and simulations in doctrinal or subject-matter classes, co-curricular activities, pro bono opportunities, legal writing, part-time student employment, grant-funded projects on which students work (either for credit or compensation), and newly developing practicum or other so-called hybrid programs? Perhaps.

One recent report on legal education provides some guidance on the definitional question. The authors of Best Practices for Legal Education (CLEA, 2007) write (at 165) that “Experiential education integrates theory and practice by combining academic inquiry with actual experience.” The report distinguishes experiential education from experiential learning (which can occur in many informal settings) in its focus on academic inquiry, and in the role the instructor plays in designing and structuring the student’s experience. (Id., citing Moliterno). Best Practices distinguishes experiential courses—“those courses that rely on experiential education as a significant or primary method of instruction”—from subject-matter courses in which “experiential education is a valuable but secondary method of instruction,” mentioning such examples as court observations and role-plays. (Id. At 165-66). Although noting that some legal educators would restrict experiential education to real-life experiences, the Best Practices authors include simulation-based courses, along with in-house clinics and externships, in their definition of experiential education courses. (Id. 166). (In a recent article, Prof. Susan Brooks also includes simulation-based courses in her definition of experiential education.) What these courses have in common—and what is distinctive about experiential legal education—is that they place 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.

How does the above discussion relate to the regulatory framework in which law schools operate? Existing ABA Standards do not mention experiential education. Rather, they require that law schools provide substantial opportunities for “live-client or other real-life practice experiences” (Standard 302(b)(1)), which can be “clinics or field
placements” (Interpretation 302-5). (The Standards further elaborate on the requirements for field placement programs in Standard 305, Study Outside the Classroom, though they do not define or provide criteria for live-client (or in-house) clinics.) The Standards currently require that all students receive substantial instruction in “other professional skills” (other than legal writing) “generally regarded as necessary for effective and responsible participation in the legal profession.” (Standard 302 (a)(4)). The Interpretations define substantial instruction as requiring students to engage in skills performances that an instructor assesses (Interpretation 302-3), and Consultant’s Memo #3, March 2010, states that “at least one solid credit (or the equivalent) of skills training” is required to meet the Standard. These provisions may not exhaust the areas that might constitute experiential education. Arguably, Standards and Interpretations addressing legal writing (Standard 302 (a)(3)), pro bono opportunities (Standard 302 (b)(2)), and small group work (Standard 302 (b)(3)) could be characterized as part of experiential education.

The most recent draft of the 300 series standards that is part of the ongoing comprehensive review of the Standards has in fact adopted the terminology of experiential courses and provides guidance that, if adopted, may prove helpful to some extent. Proposed Standard 303 (a) provides that:

A law school shall offer a curriculum . . . that requires every student to complete satisfactorily at least: . . . (3) one or more experiential course(s) totaling at least three semester hours (or equivalent quarter hours) after the first year that must integrate doctrine, theory, skills and legal ethics and engage students in performance of one or more professional skills identified in Standard 302. An experiential course or courses must be: (i) simulation course(s); or (ii) in-house clinical course(s) in which students represent clients; or (iii) field placement(s) as defined in Standard 310(3). (Comprehensive Review of Standards, Standards Review Committee, Drafts for Consideration at Committee Meetings, November 16-17, 2012, Meeting Materials, p.14 of 116). Proposed Interpretation 303 -2 states that:

To qualify as experiential, a course must be primarily experiential in nature and:

(a) Integrate doctrine, theory, skills and legal ethics, and engage students in performance of one or more professional skills identified in Standard 302;
(b) develop the concepts underlying the professional skills being taught;
(c) provide multiple opportunities for performance; and
(d) provide opportunities for self-evaluation.

These definitions and criteria, although adopting the Best Practices typology of experiential courses (and therefore providing an important clarification regarding which courses can satisfy Standard 303, presumedly excluding the legal writing, pro bono and small-group experiences mentioned above), do not in fact define experiential education, except tautologically. (An experiential course “must be primarily experiential in nature.”) The proposed Standard and Interpretation also seem to equate experiential education with skills training, and although there is an overlap between these concepts they are hardly identical. Indeed, experiential education can play an important role in helping students to develop their professional identity (a key recommendation of the Carnegie Foundation’s influential book, Educating Lawyers: Preparation for the Profession of Law (2007)) or a commitment to social justice. The latest draft also has deleted the prior draft’s inclusion of faculty critique, feedback and evaluation of student performance, as well as enhancement of students’ capacity to engage in guided reflection, as part of the requirements for experiential courses, which could diminish the emphasis on “academic inquiry” that Best Practices highlighted (and reduce the role of faculty involvement in this important enterprise).

So, although the new Standard and Interpretation, if adopted, can provide a modest push for the development of experiential courses, they will not—and, I would argue, should not—establish the outer limits of what the concept of experiential education can mean for law schools legal education. For that, we must turn to the increasing number of efforts by individual faculty, law schools, law school symposia and law school consortia to disseminate information about, and to present models demonstrating, various forms of experiential education. The three post-Carnegie Report Crossroads Conferences, the Alliance for Experiential Learning in Law (hosted by Northeastern University School of Law), and the Educating Tomorrow’s Lawyers consortium (hosted by the University of Denver) are just three recent examples of exciting developments in the area of experiential education. These entities have provided important sites for interchange among law faculty, law schools, practitioners, and law students committed to expanding the number of experiential opportunities law schools offer to their students. Although continued growth of in-house clinical, externship and simulation courses will be an integral part of this movement, experiential education will not be limited to these formats. Capstone
courses, courses that provide experiential “add-ons” to subject-matter courses (e.g., through partnerships between law faculty and local practitioners), an enhanced number of inter-disciplinary courses, increasing use of experiential methods in mid-size and large subject-matter or doctrinal courses (e.g., increased use of role-plays, small group collaboration, mock hearings and negotiations between law students taking courses in different law schools), as well as more thorough-going curricular changes, such as Washington & Lee’s “Third Year Reform”—all of these developments, and more, will serve to flesh out the meaning of experiential education in the legal education context.

Our conception of the goals of legal education is evolving, as it must, and experiential education is an important part of that process of change. Modes of education that emphasize active student engagement and the ability to learn from experience resonate with the increasingly complex needs of society and the expectations of our students. Experiential education can contribute to our students not only being “practice-ready” but “life-ready.” The opportunities are exciting, if we will only take advantage of them. Experiential education may be a new term for legal educators, but the lessons it can offer are timeless.

References:
Professionalism: What Does it Take to Satisfy Character and Fitness Requirements?

By Lori Shaw

Lori Shaw is dean of students and professor of lawyering skills at the University of Dayton School of Law. (This article was originally published in the Student Lawyer, Volume 37, Number 2, October 2009. Reprinted with permission.)

The bar exam—the final hurdle on the way to practice. Or maybe not. Each year more than a few law grads are devastated to learn that for reasons having nothing to do with the bar exam they will not be permitted to practice law. Character, not competence, is the issue.

The good news is that there are things these grads could have done, things that you can do while you are in law school, to overcome past mistakes. Every jurisdiction requires bar applicants to meet the burden of showing they are of good moral character and otherwise fit to practice law. Are you ready to meet that burden?

The first step toward satisfying the Character and Fitness requirement is understanding what is expected of you. Whether you are a first-year student just walking through your law school’s front door or in your final year, about to head out that door, you need to be able to answer two questions:

1. Is there anything in my past (or my present) that might bring my character and fitness into question?
2. If my character is in question, what can I do now to begin to rehabilitate my reputation?

The top four areas of concern for most bar examiners are existence of a criminal record, untreated mental illness and substance abuse, lack of candor, and financial irresponsibility.

Criminal record. Grads with a criminal record are typically not terribly surprised when the bar takes a close look at their character. What is surprising is how many of these grads have failed to be proactive about rebuilding their reputations. In many cases, it’s possible to overcome a criminal record, but you may face an uphill climb.

Actions speak so much louder than words. When you are standing before the Character and Fitness Committee, you will want evidence to support your claim that you are a good citizen. If you were building your case for admission today, what evidence would you point to?

If you’ve had a brush with the law, it’s important that you do more than simply stick to the straight and narrow. You need to actively seek to make a difference in the world. Volunteer whenever you can, whether it’s doing research for Legal Aid or serving in a soup kitchen. Not only will service make you feel better about yourself, but it may well provide you with positive references from respected members of the community.

Untreated mental illness and substance abuse. The most common mistake among grads suffering from mental and substance abuse issues is the failure to get help. In recent years bar examiners have come to accept mental illness as exactly that—illness. There’s an excellent chance that your state will not even inquire about mild depression, anxiety, and so on.

But without treatment, mild illnesses can become severe, and if you do suffer from an illness that may impair your ability to practice, the first question you’re likely to hear is, “Tell us about your treatment.” Remember that treatment is viewed as a plus, not a minus. Taking responsibility for your life evidences strength of character.

And you’re likely to hear exactly the same question if there’s even a hint of a substance abuse problem in your record. Substance abuse is viewed by the bar as an extremely serious issue. Bar examiners will not respond to that DUI with a wink and a nod.

Make sure that you are assessed by a trained professional. If you’re found to have a problem, seek treatment and coun-
selying. Work with your state’s Lawyer Assistance Program. Seeking help is the smartest thing you can do for yourself and your career.

**Lack of candor.** Many grads are caught by surprise when they are called out by the bar for lack of candor. Bar officials will double-check everything their investigators find against your law school and bar applications, and if something significant is missing from either, you’ll find yourself in a world of trouble.

Do you have any doubts about the accuracy of your law school application? If you suspect that you omitted any required information, ask for a copy, and if you did omit something, notify your law school as soon as possible. If there are consequences—and there may or may not be—it’s better to face them now.

Also, keep in mind that many law schools impose a continuing duty to report upon their students. That public intoxication conviction that you picked up last summer should be reported. This is one instance in which the truth really shall set you free.

**Financial irresponsibility.** The final area of concern, financial irresponsibility, seems shrouded in mystery to many law students. They don’t know what can get them into trouble and what they can do to get out of trouble. To help solve the mystery, I queried bar examiners from across the nation about what matters to them when it comes to financial issues.

The first thing you need to understand is why bar examiners are so concerned about your financial history. In the words of one bar examiner, “I think the concern ultimately centers around the issue of protection of the public. Before admitting someone to the bar, I believe that the members of Character and Fitness Committees want to be sure that the financial pressures on a new lawyer will not be such that the lawyer will be tempted to take advantage of a client, for example. Also, a poor financial record can be indicative of a lack of financial responsibility.”

Among the items that bar examiners will review are your credit reports, income tax returns, and records relating to any civil litigation or criminal prosecution you’ve been involved in. If an applicant has ever failed to live up to a financial obligation, it will likely be discovered.

One item you should have in hand before you even apply for the bar is your own credit history. Credit histories can be wrong. You do not want to find out after the bar has already red-flagged your file that you were the victim of an inaccurate credit report.

Past-due debts, bankruptcies, failure to file or pay taxes, failure to pay child support, and bad checks are among the items that may raise a red flag. If you want to learn more about this issue, two Florida cases, Florida Board of Bar Examiners re: J.A.F., 587 So. 2d 1309 (Fla. 1991), and Florida Board of Bar Examiners re: M.A.R., 755 So. 2d 89 (Fla. 2000), illustrate the type of financial irresponsibility that can result in denial of admission.

Several bar examiners stressed to me that the amount of debt is not the most important thing. “It is not the debt itself that causes an applicant to have problems but how the applicant incurred, dealt with, and resolved the debt,” noted one. For example, bar examiners typically take a far dimmer view of someone whose bankruptcy resulted from massive credit card debts than from illness, divorce, or a failed business.

No matter how you acquired your debt, the worst thing that you can do is nothing. As one examiner explained, “In evaluating financial irresponsibility, we do not require applicants to be current with all creditors, and we do not serve as a collection agency, but we do require honesty in dealing with creditors and do not look favorably on attempts to deceive or hide from them.”

If you owe someone money, you need to set up a payment plan. Work with a reputable credit counseling service to develop your plan. Every month, pay something, even if it is not as much as your creditor would like, and even if your creditor is not actively seeking payment at the moment. And don’t forget to save copies of any cancelled checks or other receipts.

You can also provide evidence of responsibility by living frugally now. Your current lifestyle choices are fair game. Have you cut out everything from your budget that is not an absolute necessity?
One examiner shared the tale of an applicant who felt it unnecessary to attempt to pay a debt of several years because the creditor had seemingly given up trying to collect. What do you think the ruling on his application was? He could have changed so much by paying at least a few dollars a month while in law school.

Remember, rehabilitating your reputation takes time. The sooner you begin paying your debts, the sooner you are likely to be admitted to the bar.

**Be proactive.** Whatever issues you face, don’t be afraid to get the help you need to make the right choices. Your law school is a great place to start. Share your concerns with the bar passage director or dean of students. They can help you find answers or direct you to those who can.

And make a point of working with your local bar examiners. They are not the enemy. If you are unclear as to a requirement, confused about a procedure, or simply worried about where you are likely to stand, contact them. Some states, like Indiana, even provide preliminary Character and Fitness reviews for anyone admitted into law school.
Standards to Foster Best Practices in Law School Curriculum Development

The American Association of Law Libraries (AALL) has approved Legal Research Competencies and Standards for Law Student Information Literacy. The organization’s goals in presenting these competencies and standards is to “foster best practices in law school curriculum development and design; to inform law firm planning, training and articulation of core competencies; to encourage bar admission committee evaluation of applicants’ research skills; to inspire continuing legal education program development; and for use in law school accreditation standards review.”

The competencies and standards are grouped within five principles:

Principle I: A successful legal researcher possesses fundamental research skills.

Principle II: A successful legal researcher gathers information through effective and efficient research strategies.

Principle III: A successful legal researcher critically evaluates information.

Principle IV: A successful legal researcher applies information effectively to resolve a specific issue or need.

Principle V: A successful legal researcher distinguishes between ethical and unethical uses of information and understands the legal issues associate with the discovery, use, or application of information.

The complete set of competencies and standards can be found on the AALL website.
Gary Munneke: 1947–2012

Gary Munneke, professor at Pace University School of Law, passed away suddenly on Thanksgiving Day, November 22. A enthusiastic member and tireless leader of the American Bar Association, Gary was actively involved in the work of the Section of Legal Education and Admissions to the Bar, serving most recently as chair of the Finance Committee. He served as a member of the ABA Board of Governors and was recently a Section Office Council (SOC) liaison to the Board. Gary also devoted much time and energy to the ABA’s Law Practice Management Section including a term as Section chair. In 2011, Gary received that Section’s highest award, the Sam Smith Award, in recognition of his many contributions to its work.

A native of Texas, Gary earned both his undergraduate and law degrees at the University of Texas. Prior to joining Pace Law School, he worked at Widener University School of Law in Wilmington, Delaware, and the University of Baltimore School of Law. He was a prolific writer, well-known for his books on law practice management and non-legal careers for lawyers. Gary was also well-known for his zest for life, infectious laugh, and generous support of his students and colleagues.

In a resolution adopted at its November 30 meeting, the Council of the Section expressed its condolences on behalf of the Section to Gary’s wife, Sharon Walla, to his children and grandchildren and to the extended family. “We appreciated Gary as a person and as a professional. We very much regret his passing. We will miss him.”
Nominating Committee Solicits Names for 2013–2014 Council Slate

The Section’s Nominating Committee invites suggestions for nominations to the 2013-2014 Council of the Section of Legal Education and Admissions to the Bar.

Four member-at-large seats and the vice chair position are to be filled for the 2013-2014 term. Nominees in the categories of judges, academics, practitioners, and public members are sought. The slate of Section officers and Council members will be presented for election at the Section’s business meeting during the ABA Annual Meeting in San Francisco in August.

The deadline for nominations is April 15. All nominations must be submitted through the online Council Nominations process.

2012–2013 Nominating Committee
Nominations Sought for 2013 Robert J. Kutak Award

Nominations are sought for the 2013 Robert J. Kutak Award. Established in 1985 by the Section and the national Kutak Rock law firm, the award honors an individual who has made significant contributions to the collaboration of the academy, the bench, and the bar. The award is in memory of Mr. Kutak, a distinguished Omaha lawyer, champion of legal reform, and advocate for legal education.

Nominations can be mailed to:

Kutak Award Committee
Attention: Carl Brambrink
Director of Operations
American Bar Association
Section of Legal Education and Admissions to the Bar
321 N. Clark Street
M.S. 21.2
Chicago, IL 60654

or sent via email to carl.brambrink@americanbar.org

The deadline for submitting nominations is March 29, 2013

The 2013 Kutak Award will be presented at a reception in August at the ABA Annual Meeting in San Francisco. For more information about Robert J. Kutak and the list of past winners, visit the Kutak Award page.
American Bar Foundation Invites Visiting Scholars
Application Deadline is April 1, 2013

The American Bar Foundation (ABF) invites scholars to join its intellectual community for the 2013-2014. The ABF encourages national and international scholars on leave or sabbatical to take advantage of its diverse community and excellent facilities in Chicago. The foundation offers an office, telephone, and computer, but no stipend.

Preference will be given to visitors whose scholarship coincides with the research agenda of the ABF, and who will be in residence full-time for all or part of the year. Summer visits are possible. Visitors are expected to participate in the intellectual life of the foundation, including a weekly seminar.

If you are interested in this opportunity, send an email to Robert Nelson at rnelson@abfn.org with the subject line: Visiting Scholars Program and stating (1) the topic on which you are working, (2) preferred dates for residence, (3) the days each week you would expect to be at the ABF, and (4) attach a CV.

Applications should be received by April 1, 2013. Applications will be considered as space allows. The ABF Appointments Committee will review applications and prospective visitors will be notified accordingly.

American Bar Foundation
NAWL Selma Moidel Smith Law Student Writing Competition

The National Association of Women Lawyers (NAWL) is a national, voluntary legal professional organization whose mission is the advancement of women in the legal profession and women’s rights. Since 1899, NAWL has served as an educational forum and active voice for the concerns of women lawyers in this country and abroad. NAWL continues to support and advance the interests of women in and under the law, and in so doing, supports and advances the social, political, and professional empowerment of women. Through its programs and networks, NAWL provides the tools for women in the profession to advance, prosper and enrich the profession. NAWL has established the annual Selma Moidel Smith Law Student Writing Competition to encourage and reward original law student writing on issues concerning women and the law. The rules for the competition are as follows:

Entrants should submit a paper on an issue concerning women’s rights or the status of women in the law. The most recent winning paper was “All Things Being Equal, Women Lose. Investigating the Lack of Diversity Among the Recent Appointments to the Iowa Supreme Court” written by Abigail Rury, Michigan State University School of Law.

Essays will be accepted from students enrolled at any law school during the 2012–2013 school year. The essays must be the law student author’s own work and must not have been submitted for publication elsewhere. Papers written by students for coursework or independent study during the summer, fall or spring semesters are eligible for submission. Notwithstanding the foregoing, students may incorporate professorial feedback as part of a course requirement or supervised writing project.

FORMAT: Essays must be double-spaced in 12-point font, Times New Roman font type. All margins must be at least one inch. Entries must not exceed fifteen (15) pages of text, excluding notes, with footnotes placed as endnotes. Citation style should conform to The Bluebook — A Uniform System of Citation. Essays longer than 15 pages of text, excluding notes, or which are not in the required format may not be read.

JUDGING: NAWL Women Lawyers Journal designees will judge the competition. Essays will be judged based upon content, exhaustiveness of research, originality, writing style, and timeliness.

QUESTIONS: Questions regarding this competition should be addressed to the chair of the Writing Competition, Professor Jennifer Martin at jmartin@stu.edu.

SUBMISSION AND DEADLINE: Entries must be received by May 1, 2013. Entries received after the deadline will be considered only at the discretion of NAWL. Entries must provide a cover letter providing the title of your essay, school affiliation, email address, phone number and mailing address. Entries must be submitted in the following format: email an electronic version (in Microsoft Word or PDF format) to jmartin@stu.edu.

AWARD: The author of the winning essay will receive a cash prize of $500. NAWL will also publish the winning essay in NAWL’s Women Lawyers Journal in the summer of 2013.
Comments Invited for Upcoming Site Visits
Deadline for Spring 2013 Visits is February 15, 2013

Pursuant to the U.S. Department of Education criteria, the Section is required to give notice of, and solicit comments about, the law schools scheduled for upcoming site visits. Interested parties wishing to comment on current compliance with accreditation standards of law schools undergoing site visits in spring 2013 are encouraged to submit signed, written comments. Law schools undergoing accreditation site visits in spring 2013 are:

Albany Law School
Arizona State University Sandra Day O’Connor College of Law
Cleveland State University Cleveland-Marshall College of Law
Golden Gate University School of Law
Gonzaga University School of Law
University of Kansas School of Law
University of Kentucky College of Law
University of La Verne College of Law
Lincoln Memorial University Duncan School of Law
University of Massachusetts School of Law-Dartmouth
University of the Pacific, McGeorge School of Law
Mississippi College School of Law
North Carolina Central University School of Law
Northeastern University School of Law
Rutgers University School of Law-Newark
Seattle University School of Law
University of South Dakota School of Law
Touro College, Jacob D. Fuchsberg Law Center
Vermont Law School
Western New England University School of Law
Whittier Law School
Widener University-Delaware, School of Law
Widener University-Harrisburg, School of Law
University of Wisconsin Law School

Written comments must be received by February 15, 2013 and sent to Shirley Gonzalez, American Bar Association, Section of Legal Education and Admissions to the Bar, 321 N. Clark Street, Chicago, IL 60654.

Note: Your comments must be signed. Comments, with the signatures redacted, may be provided to the law school and to members of the site team reviewing the law school. Only comments directly relating to the ABA Standards and Rules of Procedure for Approval of Law Schools will be considered.