

Chapter Five

Best Practices for Experiential Courses

A. Experiential Courses, Generally.⁵³⁷

1. Introduction to Experiential Courses.⁵³⁸

Experiential courses are those courses that rely on experiential education as a significant or primary method of instruction. In law schools, this involves using students' experiences in the roles of lawyers or their observations of practicing lawyers and judges to guide their learning.

Experiential education integrates theory and practice by combining academic inquiry with actual experience. "Learning is not education, and experiential learning differs from experiential education. Learning happens with or without teachers and institutions. For example, eavesdroppers learn about the things they hear, yet they are not educated simply by the fact of eavesdropping because the activity is not accompanied by a teacher's or institution's participation in the learning process. Education, in contrast to a learning opportunity, consists of a designed, managed, and guided experience."⁵³⁹ Thus, while part-time work experiences of law students in legal settings can be valuable learning experiences, they are not considered experiential education because the learning in such environments is not necessarily accompanied by academic inquiry.

Our discussion of experiential education is primarily concerned with those courses in which experience is a significant or primary method of instruction, as opposed to courses in which experiential education is a valuable but secondary method of instruction. In some subject matter courses, law teachers encourage or require students to spend time in legal settings that illuminate issues considered in the course. For example, a course on judicial management of litigation may arrange for students to observe pretrial or settlement conferences in judges' chambers. A family law professor teaching a seminar on "the child and state" may have students visit family court, the child advocate, or a law guardian. Courses that use Socratic dialogue or discussion as the principal pedagogical methodology also may employ simulation exercises or role-playing from time to time.⁵⁴⁰ For example, in an

⁵³⁷ This section and the sections on simulations, in-house clinics, and externships combine materials prepared for the Best Practices Project by J.P. (Sandy) Ogilvy, Catholic (best practices for simulation-based courses); Mike Norwood, New Mexico (best practices for in-house clinics); and Harriet Katz, Rutgers, Camden, incorporating edits by Alex Scherr, Georgia; Cynthia Barr, Temple; Francis Catania, Jr., Widener; Mary Jo Eyster, Brooklyn; and Liz Ryan Cole, Vermont (best practices for externships). Roy Stuckey is primarily responsible for the subsections on setting clear, explicit learning objectives. To learn more about best practices in clinical legal education, see J. P. Ogilvy with Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography* (3d ed.): *Part Three: Synopses of Articles, Essays, Books and Book Chapters*, 12 CLINICAL L. REV. 101 (2005), available at <http://faculty.cua.edu/ogilvy/Index1.htm>.

⁵³⁸ This section should be read in conjunction with the earlier section, "Employ context-based instruction throughout the program of instruction."

⁵³⁹ James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 78 (1996) (citations omitted).

⁵⁴⁰ See HESS & FRIEDLAND, *supra* note 304, at 108-09.

Evidence class, the instructor may create an on-the-spot role play to teach a concept by designating one student in the class as a prosecutor in a criminal case who is seeking to admit a piece of evidence, another student as defense counsel who is to resist admission, and a third student as the judge who is to rule on the proffer.⁵⁴¹ Although we are not focusing on such uses of experiential education, many of the principles set forth in this section are applicable to them.

Experiential education is the primary mode of instruction in various law school courses, especially courses that are generally described as “clinical:” simulation-based courses, in-house clinics, and externships.⁵⁴² These courses in law schools differ from each other in the following ways:

- in **simulation-based courses**, students assume professional roles and perform law-related tasks in hypothetical situations,
- in **in-house clinics**, students represent clients or perform other professional roles⁵⁴³ under the supervision of members of the faculty, and
- in **externships**, students represent clients or perform other professional roles under the supervision of practicing lawyers or they observe or assist practicing lawyers or judges in their work.

All of these pedagogies are based in an understanding that students must perform complex skills in order to gain expertise. They also recognize that students do not get better through practice alone. If their performance is to improve, they need practice accompanied by informative feedback and reflection on their own performance. And their learning will be strengthened further if they develop a habit of ongoing self-assessment.⁵⁴⁴

Optimal learning from experience involves a continuous, circular four stage sequence of experience, reflection, theory, and application.

Experience is the immersing of one’s self in a task or similar event – the doing. Reflection involves stepping back and reflecting on both the cognitive and affective aspects of what happened or was done. Theory entails interpreting the task or event, making generalizations, or seeing the experience in a larger context. Application enables one to plan for or make predictions about encountering the event or task a second time.⁵⁴⁵

⁵⁴¹ See Maranville, *supra* note 404, at 63-65 (providing examples from courses in Criminal Law and Civil Procedure and a chart that suggests several types of integrated simulation exercises and add-on simulation-based lab courses); *id.* at 66; Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 470 (1995) (explaining that a continuum of simulations includes doctrinal problems, single-experience exercises, extended exercises, continuing exercises, and simulation courses); McAninch, *supra* note 476 (explaining how experiential education can be employed as an adjunct to traditional methodologies regardless of class size).

⁵⁴² We acknowledge that some people define experiential education as involving “real life,” not simulated, experience. See, e.g., HESS & FRIEDLAND, *supra* note 304, at 105. We include simulated as well as real life experience. Although law students certainly learn from their experiences while working for legal employers, such learning does not fit within our concept of experiential education because it is not accompanied by academic inquiry.

⁵⁴³ Two examples of “other professional roles” are serving as mediators or teaching street law.

⁵⁴⁴ SULLIVAN ET AL., *supra* note 7, at 178.

⁵⁴⁵ Steven Hartwell, *Six Easy Pieces: Teaching Experientially*, 41 SAN DIEGO L. REV.

There are three domains of learning, and students who are being educated experientially are involved in all three:

- the cognitive domain (increasingly complex sorts of understandings and analytical processes),
- the psychomotor or performance domain (complex patterns of physical or motor activity such as lawyering activities), and
- the affective or feeling domain (values, attitudes, and beliefs).⁵⁴⁶

Jay Feinman further described the cognitive, performative, and affective skills that law students need to develop.

- *Cognitive skills* range from simple recall of facts, through the ability to apply prior knowledge to solve new problems, up to the ability to evaluate the use and implications of one's knowledge. In law school, these skills involve the understanding of substantive law, legal process, and related matters such as professional responsibility.
- *Performative skills* in law are increasingly defined by the MacCrate Report's catalog of skills beyond legal analysis and reasoning, including legal research, factual investigation, counseling and the management of legal work.
- *Affective skills* include personal and professional issues: how students feel about their competency as lawyers, how they relate to the client, how they respond to problems of professional responsibility, and how their values inform their role.⁵⁴⁷

Experiential education gives students opportunities to be actively involved in their own education, and it has positive effects on their motivation, attitudes toward the course, willingness to participate in class, ability to ask insightful questions, and acquisition of knowledge and skills.

When seen as parts of a connected whole, the practical courses in lawyering and clinical-legal education make an essential contribution to responsible professional training. These courses are built around simulations of practice or law clinics involving actual clients. But they can do more than expand the apprentice's repertoire of knowledge and skill. Critically, they are the law school's primary means of teaching students how to connect the abstract thinking formed by legal categories and procedures with fuller human contexts.⁵⁴⁸

Experiential education is a powerful tool for forming professional habits and understandings. We encourage law schools to expand its use.

1011, 1013 (2004).

⁵⁴⁶ Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn From Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 287 n.10 (1981).

⁵⁴⁷ Feinman, *supra* note 541, at 472.

⁵⁴⁸ SULLIVAN ET AL., *supra* note 7, at 52-53.

2. Best Practices for Experiential Courses, Generally.

a. Provide students with clear and explicit statements about learning objectives and assessment criteria.

Principle: Experiential teachers provide students with clear and explicit statements about the learning objectives of their courses and assessment criteria.

Comments:

In order to maximize the effectiveness of instruction, both faculty and students must be aware of and share a common set of instructional goals and objectives, which should be explicit, published, and widely disseminated.

To the extent that the teacher has defined the goals of an exercise, it is important to communicate those goals clearly to the students. People generally learn better when they know what they are supposed to be learning. And explicitly specifying the goals helps avoid two common, conflicting reactions. Students are wont to regard a lawyering simulation as something added on the periphery of a traditional course – more work, not central to the experience, not as important as the substantive material that will be on the exam. Conversely, students can view an exercise as the best thing in the course for the wrong reason: that it is the only practical or meaningful part of the course. If the objectives of the exercise are made clear and explicit, either reaction is less likely.⁵⁴⁹

Faculty who teach experiential courses should cover in depth their learning objectives and assessment processes with students at the beginning of their enrollment. These matters are important enough to the success of the course and students' goals to be put in writing.

b. Focus on educational objectives that can be achieved most effectively and efficiently through experiential education.

Principle: The teachers focus on educational objectives that can be achieved most effectively and efficiently through experiential education.

Comments:

Any subject can be taught using experiential education. The challenge is to determine what lessons can be taught more effectively and efficiently using experiential education than through other methods of instruction and to focus our time and energy on accomplishing those educational objectives.

In the early years of clinical legal education when the survival of clinical education was uncertain, there were many efforts to describe the educational goals of clinical courses and, thereby, justify their existence in law schools.⁵⁵⁰ As one

⁵⁴⁹ See Feinman, *supra* note 541, at 471-72.

⁵⁵⁰ See, e.g., Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH LAW REV. 287 (1986); Jane Aiken, David A. Koplow, Lisa G. Lerman, J.P. Ogilvy & Philip G. Schrag, *The Learning Con-*

might imagine, the proposals were diverse and wide-ranging. One of the more insightful statements about the general goals of clinical education was made by Tony Amsterdam in 1982.⁵⁵¹ Amsterdam presented the following list of the objectives and potential uses of clinical techniques.

- to expose students to the demands, constraints, and methods of thinking in role, and to explore the impact of role on thinking.
- to expose students to the demands, constraints, and methods of analyzing and dealing with unstructured situations, in which the “issues” have not been pre-identified.
- to give students a basis for examining the interaction of legal analysis and human behavior, including interpersonal dynamics and communication.
- to give the students an opportunity to learn how to learn from experience.
- to provide professional skills instruction.
- to provide the basis for insights into the functioning of the legal system and to raise questions about its capacities and limitations.⁵⁵²
- in general, to provide students with the opportunity to develop and to guide them in developing – a breadth of perspective, a depth of insight, and a rigorously systematic set of analytic and behavioral techniques, which they can train on the varied problems that confront lawyers and the law.

While one may be struck by how often Amsterdam described these objectives in terms of “exposing” and “providing opportunities” rather than “teaching” or “learning,” we can see that he was emphasizing the value of clinical education for helping students:

- adjust to their roles as professionals,
- become better legal problem-solvers,
- develop interpersonal and professional skills, and
- learn how to learn from experience.

We will discuss each of these objectives in order.

tract in Legal Education, 44 MD. L. REV. 1047 (1985); Peter Hoffman, *Clinical Course Design and the Supervisory Process*, 2 ARIZ. ST. L. J. 277 (1982); Frank Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982); Kreiling, *supra* note 546; AALS/ABA GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) [hereinafter, AALS/ABA GUIDELINES]; Gordon Gee & Donald Jackson, *Bridging The Gap: Legal Education and Lawyer Competency*, 4 BYU L. REV. 689 (1977); David Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 4 BYU L. REV. 1025 (1977).

⁵⁵¹ Anthony G. Amsterdam, Remarks at Deans’ Workshop, ABA Section of Legal Education and Admissions to the Bar, Jan. 23, 1982 (unpublished) (copy on file with Roy Stuckey).

⁵⁵² This objective and the next one were not included in Amsterdam’s remarks at the Dean’s Workshop but were added to the preceding goals in an internal NYU memo dated Mar. 23, 1983, from the Clinical Faculty Group to the Personnel Committee on the Status of Clinical Faculty, “Background Paper on ‘Objectives and Methods of Clinical Legal Education, As Relevant to Issues Regarding the Status of Clinical Faculty’” (copy on file with Roy Stuckey).

(1) Help students adjust to their roles as professionals.

Principle: The course helps students adjust to their roles as professionals.

Comments:

Gary Bellow explained the important role that experiential courses play in helping students learn about and adjust to their future roles as professionals.

The central feature of the clinical method is its conscious use, both conceptually and operationally, of the dynamics of role adjustment in social life. . . . As used in this essay, a person's role refers to the set of actions and qualities which are expected in a given social position or status. To perform in a role – that is to “validate one's occupation of the position” – the actor must learn: 1) the duties, rights, obligations, and privileges that are the defining characteristics of the position; 2) the cues, signs, behaviors, and demands which enable the actor to choose the appropriate role manifestation in a particular situation, i.e., “he must locate others and himself in social space;” 3) the aptitudes (cognitive, perceptual, verbal, gestural) needed to perform in the position.⁵⁵³

There is no more effective way to help students understand what it is like to be a lawyer than to have them to perform the tasks that lawyers perform or observe practicing lawyers at work.

(2) Help students become better legal problem-solvers.

Principle: The course helps students become better legal problem-solvers.

Comments:

As explained earlier a primary goal of legal education is to help students begin developing expertise in solving legal problems. All forms of experiential education involve problem-based learning, so one of the strengths of experiential education is that it gives students opportunities to practice solving problems and to receive feedback on the quality of their efforts.

(3) Help students develop interpersonal and professional skills.

Principle: The course helps students develop interpersonal and professional skills.

Comments:

Experiential education is an effective way to help students develop interpersonal and professional skills. One cannot become skilled simply by reading

⁵⁵³ Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING: WORKING PAPERS PREPARED FOR CLEPR NATIONAL CONFERENCE, BUCK HILL FALLS, PENNSYLVANIA, JUNE 1-9, 1973, at 374, 381 (1973).

about skills or watching others perform lawyering tasks. One must perform the skills repeatedly, preferably receiving expert feedback.

Unfortunately, a common misunderstanding about the educational potential of experiential education in law schools is that clinical courses are primarily vehicles for instruction in the mechanical techniques of lawyering skills. Instruction in interpersonal and professional skills is an important part of clinical education, but skills instruction is seldom, if ever, limited to technique alone. Such matters as the theoretical underpinnings of skills, strategic considerations, preparation for performance, the values and ethical constraints inherent in the performance of the skills, the assumptions of the adversary system underlying the application of the skills, and the efficacy of skills being taught are all part of the educational objectives of “skills instruction” in clinical courses.

Instruction about skills also includes consideration of when and why lawyering skills are employed including the role of personal and professional values. Just teaching technique is not sufficient; “[o]ur additional obligation to law students is to teach the norms and values in support of which those skills will be applied.”⁵⁵⁴ Among the values that we should include in our instructional design are the lawyer’s obligations to truth, honesty, and fair dealing; the responsibility to improve the integrity of the legal system within which the lawyer exercises the skills that are taught; the obligation to promote justice; and the obligation to provide competent representation.⁵⁵⁵

Within clinical legal education, the principal theoretical objectives are to describe and explain the dynamics of legal practice. Sometimes these theories embrace a critical perspective. They point out the limitations, shortcomings, contingencies, and contradictions inherent in the practice of law and in theories about the practice of law. At other times, their function is principally prescriptive. Their purpose is to highlight conceptually what ought to be considered and weighed before lawyers act or proceed. Prescriptive theories about legal practice provide a perspective on what needs to be done but not a mechanical how-to-do-it approach. The details and choices have to be worked out in the particular context.

Pedagogically, clinical legal education seeks not just to impart legal skills, but to encourage students to be responsible and thoughtful practitioners. There is considerable emphasis on problem-solving approaches, such as ends-means thinking; on skills training in addition to legal reasoning; on making ethically responsible decisions, particularly when obligations are in conflict; and on being continually self reflective and critically analytical about one’s own experiences.⁵⁵⁶

The truth of the matter is that few, if any law schools, have programs or resources to develop the full range of the skills needed for law practice to the degree of proficiency expected of practicing lawyers. This reality makes it all the more

⁵⁵⁴ Steven Lubet, *What We Should Teach (But Don’t) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 126 (1987).

⁵⁵⁵ *Id.* at 139-41.

⁵⁵⁶ Aaronson, *supra* note 176, at 249 (citations omitted).

important to help students learn how to learn from experience.

(4) Help students learn how to learn from experience.

Principle: The course helps students learn how to learn from experience.

Comments:

Developing lifelong learning skills may be the most important goal of legal education. In his 1982 remarks, Amsterdam stressed that “the most significant contribution of the clinical method to legal education” is giving students an opportunity to learn how to learn from experience.

The students who spend three years in law school will next spend 30 or 50 years in practice. These 30 or 50 years will be a learning experience whether we like it or not. It can be, as conventional wisdom has it, merely a hit-or-miss learning experience in the school of hard knocks. Or it can be a mediated and systematic learning experience if the law schools undertake as part of their curricula to teach students techniques of learning from experience. Clinical courses can do this – and should focus on doing it – because their very method is to make the student’s experience the subject of critical review and reflection.⁵⁵⁷

One of the reasons why helping students develop their ability to learn from experience should be a core goal of clinical courses is that students are unlikely to develop their problem-solving expertise fully before beginning law practice, particularly in systems of legal education such as the United States’ where legal education only lasts three years before a person can obtain an unrestricted license to practice law. No matter how long it takes to become a lawyer, however, lawyers continue to develop problem-solving expertise throughout their careers. Lifelong learning skills are, therefore, important for all lawyers to acquire.

Ken Kreiling pointed out that an effective way to learn from experience is to use “theories of practice” to develop and articulate “espoused theories of action.”⁵⁵⁸ “Theories of practice” provide a basis upon which students can evaluate behaviors they observe and their own performances. These theories may involve information about how lawyers should conduct themselves, how certain aspects of the judicial system should work, or whatever else is relevant to understanding the legal profession and the roles of lawyers.

“Theories of action” explain how a student hopes to perform in a lawyering situation, for example, to build a close and trusting relationship in an initial client interview, to use only leading questions during a cross examination, or to be flexible about means and rigid about goals in negotiation. Following a performance, the espoused theory of action can be compared to the behavior actually exhibited, the “theory in use.”⁵⁵⁹ If the comparison discloses that the student was ineffective in applying the espoused theory of action, the student and the teacher can analyze what caused the ineffectiveness – the quality of the espoused theory; the student’s skills,

⁵⁵⁷ Amsterdam, *supra* note 551.

⁵⁵⁸ Kreiling, *supra* note 546, at 286.

⁵⁵⁹ *Id.* at 291-97.

values, or knowledge; or some other factor.

It is therefore important for clinical teachers to:

- teach students theories of practice and provide them with information, models, and frameworks that will enable them to develop espoused theories of action against which their performances can be compared. “Without theory and the ability to theorize, one muddles through, is often ineffective, and cannot generalize from experience.”⁵⁶⁰
- help students learn how to analyze their performances and generalize from those experiences.

Experiential education is the best tool for helping students develop self-directed learning skills, if it is done properly.

We should also keep in mind that a significant part of student learning in experiential courses depends on the individual experiences of each student. Each student’s experience is unique, and each student’s perceptions of his or her experiences is unique. Thus, it is impossible to determine in advance everything that a student will have an opportunity to learn in a clinical course, to control its delivery, or to evaluate how well students understand what they have learned. We can, however, assist individualized student learning by seizing “teaching opportunities” when they arise or by working with students to help them select and achieve student-specific learning objectives.⁵⁶¹

We can also assist students’ self-learning by creating structures and protocols that will help them reflect on and understand better what they are learning from experience, whether or not it is something we intend for them to learn. For example, teachers can give students materials on the value of reflective thinking, require students to write reflective journals, and have students perform self-evaluations at one or more points during the semester and at the end of the term.

c. Meet the needs and interests of students.

Principle: The program of instruction includes enough experiential education courses to meet the needs and interests of its students.

Comments:

If experiential education courses are essential for preparing students for practice, law schools cannot meet their obligation to prepare students for practice unless they offer enough experiential education courses to meet the needs of their students. The types and number of experiential education courses that a school should offer will vary from school to school depending on the mission of the law school, the law practice settings in which the school’s students are likely to find their first professional jobs, and post graduation bridge-the-gap or other educational requirements and opportunities.

⁵⁶⁰ *Id.* at 306 n.73.

⁵⁶¹ *See, e.g.,* Aiken et al., *supra* note 550, at 1064 n.66 (describing learning contracts in which students select three learning objectives from a list of thirty seven potential learning objectives to pursue during a client representation course).

d. Grant appropriate credit.

Principle: The school grants appropriate credit to students enrolled in experiential education courses.

Comments:

Experiential education courses should be structured so that students spend approximately the same amount of time per credit hour as they spend in non-experiential courses.⁵⁶² Credit should be awarded commensurate to the credit given in the rest of the curriculum for comparable expenditures of student time. A typical calculation is 1 credit for every 3.5 hours a week that students are expected to spend, on average.

Credit should be given for all the time that the course requires of students. For example, in-house clinical and externship students expend time and effort completing the tasks necessary to represent clients or perform other assigned tasks, attending supervision sessions with their instructors, preparing for and attending classroom components, adhering to case management protocols, and reflecting on their experiences. Workloads, frequency of classes, requirements for supervision sessions, and expectations of time on task should all be part of the calculus of determining appropriate credit for in-house clinics and externships.

e. Record student performances.

Principle: Student performances are recorded and used for providing feedback or self evaluation.

Comments:

Students' performances in the roles of lawyers should be digitally recorded or videotaped as often as possible. Digitally recorded performances can be stored indefinitely at no cost. This facilitates student and faculty review and enables students to include performances in their portfolios.

Even when a performance is observed by a member of the faculty or field supervisor, the quality of the learning experience is enhanced if the teachers use recordings to point out specific behaviors to reinforce or to suggest changes.⁵⁶³ The recordings can be used by the students for self-evaluation and by the faculty for giving further out-of-class critique and feedback to students. Inexpensive web cameras can be used to record performances directly into students' laptop computers.

f. Train those who give feedback to employ best practices.

Principle: Individuals who give feedback are trained to do so and employ best practices for providing feedback.

⁵⁶² See *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 561 (1992) [hereinafter *Future of the In-House Clinic*], and AALS/ABA GUIDELINES, *supra* note 550, at 27.

⁵⁶³ "The Committee concluded that the capacity to evaluate student performances and examine the dynamics of the lawyering process is greatly enhanced by recording and replaying simulations." AALS/ABA GUIDELINES, *supra* note 550, at 75.

Comments:

The guidance and feedback that students receive in experiential education courses influences the quality of the experience more than any other component. A positive relationship between student and supervisor is of paramount importance. Teachers of simulation courses must be knowledgeable about lawyering theories and actual practices. Supervising attorneys in in-house clinics and externships must be knowledgeable about law practice and competent practitioners. They all must be effective teachers to provide positive learning experiences for their students.

Faculty members and field supervisors must decide what information to provide and under what circumstances. In making these decisions, they need to evaluate not only the student's learning experience, and possibly a client's needs, but also how her decision may affect the relationship with the student. If a student does not get the information she seeks, she may feel the supervisor is playing a game of "hide the ball" that is unnecessary. An effective supervisor will explain the reasons behind her teaching methods so that the student will understand and may be more accepting.⁵⁶⁴

Teachers should give students candid constructive views of their development. Students should be encouraged to seek such evaluations. Clinical faculty who are in charge of externship courses should teach externship supervisors how to provide such feedback, take steps to assure that the process takes place, and prepare students to use this information effectively.

Feedback about their performances should help students understand what conduct is inappropriate (and requires avoidance) and what conduct is acceptable (and deserves repeating). It may be more important to praise the positive aspects of students' performances than to point out the negative aspects. "[L]earning exercises are almost meaningless unless the learner is evaluated and good habits rewarded."⁵⁶⁵ "There is 'conclusive evidence that nonreward (when reward is expected) has an adverse effect much like punishment.' This theory of 'frustrated nonreward' places a heavy burden on the clinical teacher to give effective feedback and to reinforce good performance."⁵⁶⁶

The way a person approaches feedback has a substantial impact on the quality of the learning experience for the student. The success of the feedback process depends on both the quality of the feedback and the receptiveness of the student. To be useful to the student, feedback should be relevant and focused on learning dilemmas. Feedback must also be acceptable to the student, who may become defensive and reject criticism. By providing feedback in a way that is constructive, but also readily acceptable to the student, the person providing feedback helps facilitate growth rather than frustration, self-criticism, or complete disconnect on the part of the student.

⁵⁶⁴ See, e.g., Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 146-48 (1993-1994); David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 S.M.U. L. REV. 1507, 1539 (1998).

⁵⁶⁵ Joseph D. Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education*, in AALS/ABA GUIDELINES, *supra* note 550, at 208.

⁵⁶⁶ *Id.* at 210 (quoting E. HILGARD & G. BOWER, THEORIES OF LEARNING (4th ed. 1975) (citing the studies of Amsel and Wagner)).

The ideal is for all student activities to be observed by faculty or field supervisors who have been trained to provide feedback and critique. However, students can also benefit by receiving feedback from properly trained peers. In some instances, students' self-critiques may provide adequate feedback if they are given information and guidance for self-critiquing.

These are some guidelines for performing effective critiques:

- *Be prepared to critique.* Take [time] to organize your critique before delivering it.
- *Be selective.* Select one or two points on which to critique and fully develop these points.
- *Start with a positive comment.* People tend to be more open to constructive criticism if they hear it after being reassured of their "worth." In every performance, there is something that can be praised.
- *Be specific.* Relate your critique to specific events in the student's performance To do this well, you need to take accurate, detailed notes during the [performance].
- *Be constructive.* If you offer negative feedback, don't just criticize but suggest alternatives of what the person could have done differently. Focus your critique on an area you think the student will be able to improve.
- *Be succinct.* Get to the point of your critique. Don't ramble on.
- *Be honest.* Your job is not to be popular, but to help the student improve. Tell it like it is, but be supportive. Note what was done well, but only if it was done well.
- *Take responsibility for your critique.* Present the critique in the first person ("I think..."; "In my experience..."; "I think the better practice is..."). Avoid presenting points of critique as universal principles unless, of course, they are (i.e., "Never address the court as "Hey, dude!").
- *Critique the performance, not the person.* Do not be judgmental or sarcastic. Tell the person what you saw or heard and the effect it had on you. Don't just label it as "good" or "bad."
- *Make the student a partner in the critique.* Ask questions: "What were you trying to achieve?"; "What do you think went wrong?"; "What alternative approaches might you have tried?"
- *Teach by example.* A critique is a performance unto itself. People learn as much or more from how we say things as from what we say. Incorporate good communication skills into your critique. Use eye contact. Listen intently. Use gestures. Put emphasis in your voice. Be adaptable. Speak in plain English.⁵⁶⁷

g. Train students to receive feedback.

Principle: Students are trained to maximize the learning potential from feedback.

Comments:

Feedback to students is more effective if the students are receptive to

⁵⁶⁷ Ralph M. Cagle, *Guide for Evaluators*, in HESS & FRIEDLAND, *supra* note 304, at 311-12 (modified here to fit all forms of experiential education, not just simulations).

feedback and understand how to maximize its value to them. Some guidelines for students are:

- To maximize the learning opportunities . . . you need your own “critique skills,” – that is, the techniques of how best to receive and implement critique. The following guidelines should be helpful to you:
- *Listen to the critique with care and an open mind.* Try not to take the critique as personal criticism. Don’t get defensive or immediately argue with or reject the critique.
 - *Be sure you are clear about what has been said.* If you are not clear or don’t understand, ask.
 - *Focus on specifics.* Try to learn as specifically as possible things you might do to improve your performance in the future.
 - *Keep your perspective.* See the critique as offering you new choices, rather than dictating the one right way to do something.
 - *Clarify.* If you disagree with the critique, respectfully – but directly – raise the issue and ask for comment (but only after the instructors have completed their critique).
 - *Ask questions.* If you want feedback on a specific matter and didn’t receive it, ask (time permitting).
 - *Don’t overly rely on anyone person’s critique.* Compare it, to the extent possible, with others’ Ask others who may know you and whom you trust about the substance of the critique.
 - *Pay careful attention to the critique of other [students].* This is an opportunity to learn additional aspects of the [lessons] involved. It also is a more objective perspective from which to observe the dynamics of the critique method.
 - *Look for ways to use the information.* At the end of the critique session, ask yourself: “What do I know now (or know better than before)?” Write it down. That is the standard of success of a . . . critique
 - *Say “thank you.”*
 - *Look for opportunities to implement what you learned from the critique.*
 - *Save your evaluation forms (self and faculty) or any notes of what you learned.* Review them the next time you are about to perform the activity that was the subject of the critique. Learning [about law practice] is an incremental process.⁵⁶⁸

h. Help students identify and plan how to achieve individually important learning goals.

Principle: Each student has opportunities to achieve individually important learning goals.

Comments:

Each student has a unique set of strengths and weaknesses, and experiential courses not only provide instruction that is tailored to the student’s personal needs, they also give the student opportunities to pursue individually important learning goals.

⁵⁶⁸ *Id.* at 312-13.

In some in-house clinics and externship courses, students and teachers enter into “learning contracts” that describe individualized learning objectives for the student and how they are to be achieved. Regardless of whether a learning contract is used, students in such courses should be encouraged to articulate their own goals so the instructor can advance these goals to the extent possible in the course.⁵⁶⁹ Simulation-based courses also allow students to pursue learning goals in addition to those selected by the instructor.

- i. **Give students repeated opportunities to perform tasks, if achieving proficiency is an objective.**

Principle: If proficiency in the performance of specific lawyering tasks is an educational objective, students have repeated opportunities to perform the tasks to be learned or improved upon until they achieve the desired level of proficiency.

Comments:

“Virtually all learning theorists agree that most learning is enhanced by repetition.”⁵⁷⁰ This is certainly the case with respect to the development of professional skills. Repetition is not necessary, however, if the goal of a course or an exercise is to enhance students’ knowledge and understanding of law, law practice, or professional skills rather than to develop proficiency.

It is not necessary to develop skills proficiency in a single course. Law schools already spread development of analytical, research, and writing skills through all three years of the curriculum. The development of proficiency in other skills should likewise occur in multiple courses throughout all three years of law school.

A shortcoming of skills instruction in law schools in the United States, including the development of analytical, research, and writing skills, is that we have not established benchmarks that describe desired levels of proficiency at various stages of a student’s law school career or upon graduation. Nor have we required students to demonstrate a desired level of proficiency before they advance to the next level of instruction. This is an issue that warrants our attention.

- j. **Enhance the effectiveness of faculty in experiential courses.**

Principle: The school uses qualified faculty, provides professional development opportunities, and assigns reasonable workloads in its experiential education courses.

Comments:

The effectiveness of full-time and part-time faculty in experiential courses is enhanced by hiring qualified faculty, providing professional development opportunities, and assigning reasonable workloads.

Effective experiential teachers must have the skills, knowledge, and

⁵⁶⁹ See *Future of the In-House Clinic*, *supra* note 562, at 562.

⁵⁷⁰ Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 885 (1996).

commitment to teach students using experiential education and other techniques. In-house clinical teachers and externship supervisors must have adequate and appropriate experience, skills, knowledge, and values to represent clients and perform any other professional roles required by the job.

Encouraging and providing resources for regular attendance and participation in professional meetings promotes the professional development of experiential teachers. Participation in internal and external teacher training programs is beneficial, especially for new teachers.⁵⁷¹ Developing supervision skills and classroom teaching skills are both important. Simulation-based courses, in-house clinics, and most externships include classroom components.

The opportunity to engage in scholarship is one of the main attractions of an academic career for many experiential teachers. Publication is essential for those on a tenure track or who have similar publication expectations from their institutions. Law school support for publication should include reduced course loads, research assistance, funds for travel, staff support, and computer equipment. An in-house clinician may need relief from responsibility for clinical supervision in order to pursue writing projects. When that is required, the law school should provide for clinical coverage in the instructor's absence through a visitor or other workable arrangement that will not harm clients, students, or the clinic's relationships with the community.⁵⁷²

The demands of experiential teaching are different from non-experiential teaching, and schools should take care to ensure that student-faculty ratios, caseloads in in-house clinics, and the overall obligations of experiential teachers are conducive to achieving the educational and programmatic goals of their courses. One must balance the need to give students meaningful experiences against the risk of overloading students or teachers and interfering with their abilities to achieve the educational goals of their courses.⁵⁷³

B. Simulation-Based Courses.⁵⁷⁴

1. Introduction to Simulation-Based Courses.

Simulation-based courses are courses 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.

Simulations, role plays, and games have an important place in legal pedagogy.⁵⁷⁵ Some courses commonly denominated as skills courses are taught

⁵⁷¹ See Justine A. Dunlap & Peter A. Joy, *Reflection-In-Action: Designing New Clinical Teacher Training by Using Lessons Learned From New Clinicians*, 11 CLINICAL L. REV. 49 (2004).

⁵⁷² See *Future of the In-House Clinic*, *supra* note 562, at 557.

⁵⁷³ See Guidelines VII (E) & (F), AALS/ABA GUIDELINES, *supra* note 550, at 24-25. Caseload is also identified as an important consideration at 552.

⁵⁷⁴ This section was originally prepared by J.P. (Sandy) Ogilvy, Catholic. Roy Stuckey is primarily responsible for the subsection on setting clear, explicit learning objectives.

⁵⁷⁵ Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE L. REV. 1, 30-31 (1996); MICHAEL MELTSNER & PHILIP G. SCHRAG, TOWARD

principally through simulated lawyering tasks,⁵⁷⁶ for example, Interviewing, Counseling, Negotiating, Fact Investigation, Law Office Management, Trial Practice,⁵⁷⁷ and Appellate Practice, as well as specialized courses denoted as practicums such as Education Law Practice. Most instructors of these courses utilize a series of discrete, role playing exercises that mimic some aspect of law practice. Other courses use a single, comprehensive simulated scenario that is developed throughout the course. In this category, for example, are courses where students represent a simulated client from an initial interview through post-trial motions over the course of a semester or full academic year.

In client-based clinics and some traditional classroom courses, simulations and role plays are used as an adjunct or supplemental pedagogy to the principal pedagogical methodology.⁵⁷⁸ For instance, clinical pedagogy principally involves close supervision of student representation of clients by a faculty attorney. However, clinic students often will simulate lawyering tasks in a classroom setting before attempting the same tasks with clients or on their behalf.

This section is concerned principally with best practices for the design and implementation of simulation-based courses. Many of the principles, however, are applicable in other courses in which simulated lawyering exercises or role plays are used as a supplemental pedagogy.

2. Best Practices for Simulation-Based Courses.

Remember that the best practices described below are in addition to the best practices for experiential courses discussed earlier.

a. Use simulation-based courses to achieve educational goals more effectively and efficiently than other methods of instruction could achieve.

Principle: The school uses simulation-based courses to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction could achieve.

SIMULATION IN LEGAL EDUCATION: AN EXPERIMENTAL COURSE IN PRETRIAL LITIGATION 10-20 (1975); HESS & FRIEDLAND, *supra* note 308, at 193-22 (simulations & role plays). Simulation is used extensively in other disciplines, notably medicine. See J. Lindsey Lane, Stuart Slavin & Amitai Ziv, *Simulation in Medical Education: A Review*, 32 SIMULATION & GAMING 297 (2001); CLARK C. ABT, SERIOUS GAMES 13 (1970) (“Games are effective teaching and training devices for students . . . because they are highly motivating, and because they communicate very efficiently the concepts and facts of many subjects. They create dramatic representations of the real problem being studied. The players assume realistic roles, face problems, formulate strategies, make decisions and get fast feedback on the consequences of their actions. Also, with games, one can evaluate the students’ performances without risking the costs of having errors made in “real-world” tryouts . . .”).

⁵⁷⁶ Friedland, *supra* note 575, at 30.

⁵⁷⁷ Lubet, *supra* note 554, at 125.

⁵⁷⁸ See Paul Bateman, *Toward Diversity in Teaching Methods in Law Schools: Five Suggestions From the Back Row*, 17 QUINNIPIAC L. REV. 397, 420 (1997) (“[S]ound educational theory supports the use of games at least as a supplement to a law school class. Perhaps most surprising, educational theory actually suggests that games as a supplement to the traditional class setting are particularly effective when that traditional setting employs the Socratic method as its main teaching method”).

Comments:

There is general agreement that simulation-based courses can be an important site for developing the professional skills and understandings essential for practice, including self-directed learning skills. They “can also provide the setting for teaching the ethical demands of practice,”⁵⁷⁹ when they require students to resolve ethical as well as technical problems and work through professionalism issues in contexts that replicate actual practice.

Decades of pedagogical experimentation in clinical-legal teaching, the example of other professional schools, and contemporary learning theory all point toward the value of clinical education as a site for developing not only intellectual understanding and complex skills of practice, but also the dispositions crucial for legal professionalism. In their modeling of and coaching for high levels of professionalism, clinics and some simulations exemplify the integration of ethical engagement along with knowledge and skill.⁵⁸⁰

Simulation-based courses can also help students improve their practical reasoning and judgment.

Other professional fields provide some well-tested instances of pedagogies that teach complex practical reasoning and judgment, blending the cognitive and practical apprenticeships. For example, medical schools use various simulation devices, even professional actors, as “simulated patients,” in order to train clinical skills. In such simulations, performance can be rehearsed, criticized, and improved “off-line.” This removal from the exigencies of actual practice permits the instructors to focus on particular aspects of the complex ensemble of skills they are trying to teach. The elements and sequence of skills can then be modeled and rehearsed in safety – without real-world consequences or immediate responsibility for the welfare of others. This kind of teaching makes it more likely that students will reach a basic level of competent practice from which expertise can be subsequently developed.⁵⁸¹

Once an institution decides which skills and understandings it wants to achieve with simulation courses, it should then decide where in the program of instruction students will be introduced to each subject of study and how instruction should progress until students achieve the desired level of proficiency. In the ideal world the targeted level of proficiency would be the level of proficiency that a new lawyer needs to provide competent legal services.

Professional skills instruction in most United States law schools does not produce sufficiently proficient graduates. The fact of the matter is that very few, if any, simulation courses develop proficiency in any professional skill to the level that a new lawyer needs. Some skills instruction is better than none at all, but law students will not develop adequate entry level lawyering skills as long as professional skills instruction for most law students is relegated to one course in the second or third year of law school.

⁵⁷⁹ SULLIVAN ET AL., *supra* note 7, at 196.

⁵⁸⁰ *Id.* at 141.

⁵⁸¹ *Id.* at 112-13.

Consider, for example, the current approach to teaching professional skills in simulation courses, using as an example the approach that many teachers use to teach students how to conduct an initial client interview. The teacher begins by giving students information about the goals of client interviewing and techniques for conducting one and then provides demonstrations of interviewing techniques to help illustrate key points. The teacher tries to persuade students to employ client friendly philosophies of lawyering. Students are given one or more opportunities to practice applying what the teacher tried to teach, and receive feedback about how well they performed. Sometimes teachers grade the students' performances. What teachers usually do not do is to require them to continue practicing with feedback until they demonstrate an acceptable level of proficiency. In many lawyering skills courses, for example, students may conduct only one simulated client interview before moving on to another skill where they once again may have only one opportunity to perform the skill and receive feedback. Students in such courses do not develop proficiency.

This criticism is not to demean the value of what simulation-based courses are accomplishing. The current approach gives students a better understanding of the complexities of interviewing, information about how to conduct interviews, and some insights into their level of competence. As Tony Amsterdam explained,

It is not necessary or possible for the law school to turn out accomplished trial lawyers, counselors, negotiators, etc. But it is possible and desirable to get the students past the kind of first-level errors that are so disruptive of performance and so unnerving to the performer that they cannot even serve as a valuable learning experience in the school of hard knocks. By giving students the opportunity to commit these first-level errors in law school, and by giving them the opportunity and assistance which only an educational institution can provide to reflect upon the errors and develop some initial insight into their causes and probable cures, clinical courses can aim to graduate lawyers capable of making educationally productive second-level errors and learning from them in practice.⁵⁸²

Jay Feinman observed that “[i]n a large basic course, a reasonable performance objective is to make students aware of the importance of skills in the lawyering process and of the possibility of treating skills learning as a subject requiring the same kind of conceptual generalization that helps one understand other subjects in law school. With this introduction, students can proceed to advanced courses that are more appropriately skills-focused.”⁵⁸³

Introductory courses are important for developing important skills and understandings, but they are only the first step toward professional competence.

In learning lawyering skills, rules and procedures are essential scaffolds that enable beginners to gain a grasp on how to function in a variety of practice situations. Law students at this

⁵⁸² Amsterdam made his remarks during a Dean's Workshop conducted by the ABA Section of Legal Education and Admissions to the Bar on Jan. 23, 1982. Amsterdam, *supra* note 555. Although we agree with the sentiment that some instruction is better than none, we believe (and we think Amsterdam likely agrees with us) that law schools can accomplish more ambitious skills development goals than were thought possible in 1982.

⁵⁸³ Feinman, *supra* note 541, at 473.

stage are what the Dreyfuses call the novice. The prime learning task of the novice in the law is to achieve a basic acquaintance with the common techniques of the lawyer's craft. The novice should not be asked to exercise judgment or interpret a situation as a whole. Instead, the novice must learn to recognize certain well-defined elements of the situation and apply precise and formal rules to these elements, regardless of what else is happening. Following the rules allows for a gradual accumulation of experience. But in order to progress, the student has to attend to the features of the context, events that occur even outside the rules.

With proper coaching and sufficient experience, the novice can progress toward competence.⁵⁸⁴

Unfortunately, most law schools do not yet provide all students with an introduction to professional skills, much less opportunities to develop proficiency. Our current failure to help students develop skills proficiency during law school is a shortcoming to keep in mind. It also highlights the need for us to be careful in articulating the educational objectives of simulation courses, both to keep from misleading students and ourselves about what we can accomplish and also to make us more thoughtful about which skills we choose to teach and to what level of proficiency. If we assert that "students who complete this course will be able to conduct an initial client interview at an appropriate level of competence for a new lawyer," then we would have an obligation to work with each student until that level of proficiency is achieved. On the other hand, if our goal is that "students who complete this course will be able to describe the goals and components of an effective client interview," our educational obligations would be quite different, as would our assessment efforts.

Simulation courses are well-suited for achieving additional educational goals beyond providing an introduction to professional skills, but one must make a decision to pursue them and then design the course accordingly. Without suggesting that they are the only or even the most appropriate goals, many simulation courses can achieve the following objectives that were identified as desirable goals in Chapter Two, Section F:

- to begin developing a student's "capacity to recognize personal and professional strengths and weaknesses, to identify the limits of personal knowledge and skill and to develop strategies that will enhance professional performance."
- to develop a student's "ability to recognize and resolve ethical dilemmas" and "employ risk management skills."
- to give students "a practical understanding of and commitment to the values, behaviors, attitudes, and ethical requirements of a lawyer (professionalism)," at least partially. For example, one cannot teach negotiation without discussing the conventions about lying during negotiation and their potential implications, and students participating in simulated negotiations must decide whether to misrepresent relevant facts or otherwise engage in deceitful conduct.

In order to achieve these or any other educational goals, however, it is important that we provide students with relevant instructional materials and lessons

⁵⁸⁴ SULLIVAN ET AL., *supra* note 7, at 137.

to enable them develop “espoused theories of action” and deliberately design our simulations and feedback mechanisms to help achieve the desired educational goals.

We also need to improve our methods for determining whether simulation courses are achieving their goals. A serious question is whether we are approaching evaluation correctly in simulation courses. Typically, a teacher will observe a student’s performance, provide feedback, and assign a grade (or determine whether to pass or fail the student). It may not be fair, or educationally effective, to grade students on performances without first giving them opportunities to practice and receive feedback before being graded. Perhaps in courses that can only provide limited opportunities to perform, we should use those practice opportunities to help students better understand the information being delivered in the course but not assign grades to their performances. We should also consider how accurately we can evaluate student performances without first establishing performance benchmarks. It may be a fairer and more accurate measure of student learning to test students’ understanding of the materials and lessons, that is, to test their knowledge and understanding of lawyering rather than their skills. Issues related to assessing student learning are discussed more fully in Chapter Seven.

- b. Ensure that each simulation is appropriate for the participants and its purposes and instructions are clear.**

Principle: The simulations are appropriate for the participants and their purposes and instructions are clear.

Comments:

The appropriateness of an exercise for the intended participants should be measured by several criteria, including the likelihood that the exercise will achieve one or more of the instructor’s course goals in a cost effective manner and serve the learning needs of the intended participants.

[A]t the outset of simulation building, the teacher must decide what students do not know (e.g., “law students are unaware of the dynamics of multiple-party negotiations;” “telephone interviewing skills are underdeveloped in students;” “students understand the law surrounding motion practice, but are unaware of the lawyering tactics involved”). This is necessary in order to isolate the learning problem to be addressed by the simulation. Other considerations include whether the environment is right for gaming? (time, space, furnishings, tolerance); whether the learners are open to gaming? (fear of looking foolish, distrust, flexibility); and whether the content lends itself to gaming? (some content is inherently too serious).⁵⁸⁵

“[T]he teacher introducing the simulation should initially choose a task that correlates well with students’ prior experiences (e.g., virtually all students have successfully interviewed in other contexts) and explicitly call attention to the correlation.”⁵⁸⁶ The time available for the exercise and the size of the participant

⁵⁸⁵ Harbaugh, *supra* note 565, at 211-12.

⁵⁸⁶ *Id.* at 204.

group also must be considered.⁵⁸⁷

Student learning is enhanced when students understand why they are performing an activity and the rules and procedures are clear. “The clinical teacher who creates a simulation must establish the rules and communicate them in advance to the student participants.”⁵⁸⁸ “An important role of the instructor . . . is to ensure that students have actual notice of what is entailed . . . the instructor should seize every available opportunity to inform potential students that the simulation is difficult and time-consuming, that it may be stressful, and that it involves teaching methods and subject matter which are radically different from those found in other courses The opening class should include an overview of the simulation and some explanation of the instructor’s goals and methods”⁵⁸⁹

Of course, this principle does not apply if the educational objectives are served better by not informing students of the goals, rules, or procedures in advance, as when it is designed explicitly to be performed prior to instruction to provide context for instruction subsequent to the exercise.⁵⁹⁰ Even here the students will need information about the rules and procedures for the exercise. Typically, this will include assigned readings, classroom discussion, live or recorded demonstrations of similar performances, and perhaps in-class opportunities to practice some or all of the skills to be developed.⁵⁹¹

c. Base simulations on articulated theories of practice.

Principle: Simulations are based on articulated theories of practice.

Comments:

“[I]n order to create a teaching simulation in law, the legal educator must build a *dynamic model* of a portion of the *legal process* by *abstracting, simplifying, and substituting* parts of the *actual legal system* so that the model presents the underlying *theories* to the learner in a clearer fashion than would another teaching model.”⁵⁹²

The theories of lawyer advocacy are at best tentative and underlying data . . . virtually nonexistent . . . [but] the weakness of the theory and the absence of the data . . . should not preclude clinical legal educators from constructing simulations that test . . . theories of advocacy. Such exercises will aid students in developing litigation

⁵⁸⁷ See Donald B. King, *Simulated Game Playing in Law School: An Experiment*, 26 J. LEGAL EDUC. 580, 581 (1974) (noting that more complex games take longer to play and that large groups are not workable for some complex simulations).

⁵⁸⁸ Harbaugh, *supra* note 565, at 213.

⁵⁸⁹ MELTSNER & SCHRAG, *supra* note 575, at 64-65.

⁵⁹⁰ For example, a teacher may have students participate in a simple negotiation exercise with a wide settlement range, such as Sally Swansong and the Lyric Theater, before providing any instruction about negotiation. Most students accept the first offer put on the table. The teacher would not want to explain before the exercise that the goals of the exercise are to help students understand the difference between making a deal and negotiating a deal and to begin considering the lawyer’s obligation to seek the best possible result for the lawyer’s client and how a client’s view of the best result may differ from the lawyer’s.

⁵⁹¹ Peters, *supra* note 570, at 904 (recommending using video vignettes as demonstrations of skills to be learned preceding student performances).

⁵⁹² Harbaugh, *supra* note 565, at 195-96.

skills and provide a laboratory for clinical teachers to examine the theory. . . . In designing the problem the teacher *must* have a theory or a set of theories about the real world capable of being isolated, manipulated, and examined in the simplified environment of the simulation. Without an articulated theory about the real legal world, the simulation model cannot guarantee that either the clinical teacher will teach or the student will learn anything about lawyering.⁵⁹³

“The clinical teacher must take the time to sort out the theories he or she has about the lawyering process in order to build the simulated circumstances that will allow the theories to be tested.”⁵⁹⁴

d. Balance detail, complexity, and usefulness.

Principle: Each simulation appropriately balances detail (faithfulness to reality), complexity, and usefulness.

Comments:

In designing simulation exercises, the instructor must balance the desire and need for congruity between the exercise and the referent system (some aspect of the legal system) and the usefulness of the exercise.

Fidelity of the simulation to the real world analog is a critical aspect of design, because it fosters transference of learning from the exercise to the real world and motivates students to engage in the exercise and to suspend disbelief. Yet too much detail can increase the complexity of the exercise. If the exercise is too complex, there may be insufficient time available for it, the students may become focused on trying to learn the rules and procedures, and the exercise founders because students are too discouraged to participate fully in the exercise.⁵⁹⁵

The degree of uncertainty in a problem is usually a major source of challenge and interest for students. First, there is uncertainty about the facts themselves, particularly in a simulation in which students must do some fact investigation (as through interviewing). Second, there is the uncertainty about which doctrines apply to a problem, or which doctrines should apply. A business dispute can be viewed as the basis for either an antitrust claim or an unfair competition action; in a transactional setting, students can choose partnership, corporation, limited liability company, or S corporation as the form of business organization. Third, the law and facts can give rise to uncertainty about how to apply a doctrine once it is identified;

⁵⁹³ *Id.* at 197.

⁵⁹⁴ *Id.* at 212.

⁵⁹⁵ See Maranville, *supra* note 404, at 68 (“Simulation exercises . . . can be designed to achieve differing levels of detail. Typically there is a tradeoff between detail and manageability, in the form of narrowing the issues and the complexity of the simulation. Detail can play an important role in creating a sense of reality that will engage the students and provide a useful level of lawyering-task context.”); MELTSNER & SCHRAG, *supra* note 575, at 67-68 (describing the choice between complexity and simplicity the authors made in light of their teaching goals and time frame for the simulation they designed to teach pretrial litigation); JOHN R. RASER, *SIMULATION AND SOCIETY: AN EXPLORATION OF SCIENTIFIC GAMING* 12 (1969) (“It is not possible, however, to judge the merits of a simulation on the basis of its simplicity or complexity except in terms of its purpose”).

this is a richer version of the typical classroom situation in which students argue different sides of a question. The difference here is that they must make a judgment about the relative merits and take action based on their judgment. All three types of uncertainty are beneficial, at least in moderate amounts. Some uncertainty teaches important lessons about doctrine, lawyering, and legal process, and it forces students to exercise judgment – usually a primary objective of the simulation. But students must have a reasonable basis for exercising judgment. When facts become so uncertain that students have no rationale for choosing among them or using them as a basis for applying the law, frustration and paralysis will inhibit learning.⁵⁹⁶

Ideally, students should participate in increasingly complex simulations throughout their law school careers as their knowledge, self-efficacy, and problem-solving skills progress.

e. Debrief simulations with all students in the course.

Principle: Simulations are debriefed and evaluated with all students in the course.

Comments:

It is valuable for students and faculty to debrief each simulation. The goals of debriefing are different from providing feedback to individual students on their performances. The goals of debriefing are to explore issues that were encountered by multiple members of the group, consider how they should have been resolved, and evaluate the effectiveness of the exercise.

“[D]ebriefing is perhaps the most important part of a simulation/game. . . .”⁵⁹⁷
 “An important element of any simulation is an opportunity for students to reflect on the cognitive, performative, and affective elements of their experience” through class discussion, journals, and response to questions.⁵⁹⁸

When attempting to teach certain skills by means of gaming simulation, a reflection phase is necessary to evaluate the experiences gathered during the game session. During this process, the experiences of the participants are consolidated by means of reflection, evaluation, and open feedback, which are key social skills in carrying out cooperative actions. The reflection phase allows participants to apply the knowledge acquired during the gaming simulation to the real world Debriefing offers . . . an opportunity wherein participants can compare their view of reality with the simulated reality, find differences and commonalities, and achieve a transfer of the acquired knowledge for reality.⁵⁹⁹

⁵⁹⁶ Feinman, *supra* note 541, at 473-74.

⁵⁹⁷ David Crookall, *Debriefing*, 23 SIMULATION & GAMING 141 (1992).

⁵⁹⁸ Feinman, *supra* note 541, at 477-78.

⁵⁹⁹ Willy C. Kriz, *Creating Effective Learning Environments and Learning Organizations Through Gaming Simulation Design*, 34 SIMULATION & GAMING 495, 497 (2003). See also Vincent A. M. Peters & Geert A. N. Vissers, *A Simple Classification Model for Debriefing Simulation Games*, 35 SIMULATION & GAMING 70, 71-74 (2004) (discussing the origins of debriefing and presenting a model for debriefing); Charles F. Petranek, *Written Debriefing: The Next Vital Step in Learning With Simulations*, 31 SIMULATION & GAMING 108 (2000) (arguing for the use of private, written debriefing in addition to oral, public debriefing of exercises).

“Following the use of a simulation, the teacher should reflect on the operation, seek out the evaluations of those who participated in the game and use that information to modify the problem for future use.”⁶⁰⁰

Students should also be given an opportunity to evaluate each exercise.⁶⁰¹

f. Provide adequate facilities, equipment, and staffing.

Principle: The school has sufficient facilities, equipment, and staffing to achieve the educational goals of its simulation-based courses.

Comments:

Ideally, the settings in which simulated lawyering performances occur should resemble the real world settings where such activities take place, most commonly law offices and courtrooms. If student performances are recorded, adequate provision for playback and viewing of the recordings is important. Students should be afforded the opportunity to review their performances privately or with other students. In addition, facilities should be available to enable review by the student and faculty member as well as the entire class, when appropriate. “The enactment of simulations and the use of video equipment requires appropriate space to conduct the simulations, as well as classrooms and offices to view the tapes.”⁶⁰² The availability of inexpensive web cameras that record performances onto students’ laptops reduces the need for schools to provide extensive equipment or facilities.

Support staff should handle administrative tasks such as scheduling the recording facilities for out-of-class simulations, preparing and distributing simulation packets, engaging and scheduling actors (if used), providing videotapes, recordable DVDs, or web cameras, maintaining the equipment and space, and either instructing students in the operation of the recording equipment or operating it for them.⁶⁰³

C. In-House Clinical Courses.⁶⁰⁴

1. Introduction to In-House Clinical Courses.

In-house clinics are courses in which a significant part of the learning relies on students representing clients or performing other professional roles under the supervision of members of the faculty.

In-house clinics offer a wide variety of experiences to students in assuming personal professional responsibility for cases assigned to them. Some clinics expect students to serve as “lead counsel” for clients on matters within their level of competence, while others expect students to be responsible for more narrowly defined tasks on complex matters that remain the primary responsibility of the clinical

⁶⁰⁰ Harbaugh, *supra* note 565, at 215.

⁶⁰¹ MELTSNER & SCHRAG, *supra* note 575, at 65.

⁶⁰² AALS/ABA GUIDELINES, *supra* note 550, at 75.

⁶⁰³ *See id.* (“The video specialist is becoming a crucial member of the clinical legal studies staff.”)

⁶⁰⁴ This section was drafted by Mike Norwood, New Mexico. Roy Stuckey is primarily responsible for the subsection on setting clear, explicit learning objectives.

faculty. The design and operation of the in-house clinic considers the nature and the quantity of the cases it undertakes in awarding credit and assigning professional responsibility to students.⁶⁰⁵

2. Best Practices for In-House Clinical Courses.

Remember that the best practices described below are in addition to the best practices for experiential courses, in general, discussed earlier.

a. Use in-house clinical courses to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction could achieve.

Principle: The school offers in-house clinical courses to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction could achieve.⁶⁰⁶

Comments:

It is impossible to describe fully what a student might learn by participating as a lawyer in the representation of real clients. Potentially it encompasses everything about being a lawyer. The almost infinite opportunities for teaching and learning in client representation courses makes it particularly important to have clear understandings about what we want students to learn, especially in light of the high cost of in-house clinics.

Some of the educational goals of client representation courses are predetermined and unavoidable. We must teach students about office procedures, including the central importance of avoiding conflicts of interests and maintaining confidences. We also have to teach students about the law, procedures, systems, and protocols of the types of practice settings in which they will be engaging. We have to teach students about their relationships with us and the restrictions we are placing on their freedom to act as lawyers. Sometimes we have to teach things students should have learned before enrolling in client representation courses such as the rules of evidence and professional conduct and basic lessons about lawyering skills.

While these are important topics, we should dispatch with these matters as efficiently as we can by giving students manuals and by setting up our office systems to make it as easy as possible for them to process the legal work. If we can help students process the legal work efficiently, we will have more time to help them learn the really important lessons that supervised practice can teach.

The most important lessons that can be learned in client representation

⁶⁰⁵ See *Future of the In-House Clinic*, *supra* note 562, at 565.

⁶⁰⁶ We acknowledge that there are some sound justifications for having in-house clinics that are unrelated to their educational effectiveness or efficiency. Some schools see in-house clinics as a way to demonstrate their role in providing services to their communities. Others include in-house clinics as part of specialty tracks. Another valid justification is to use clinics as laboratories for studying law practice and how one learns to become a lawyer. And some schools use clinics to provide a place for nurturing their students who are committed to social justice issues. All of these are valid reasons for law schools to house in-house clinics that serve a small percentage of the student body. Schools that are satisfied with these justifications will continue to support the existence of in-house clinics irrespective of their educational effectiveness or efficiency.

courses include many of the same lessons that can be learned through simulations or observation, including the values, behaviors, attitudes, and ethical requirements of a lawyer (professionalism). However, the learning is deeper and more meaningful when a student is participating as a lawyer, rather than as an observer or assistant or in a make believe simulation. This is particularly true of the key values of the profession: the importance of seeking justice and providing access to justice, the reasons for fostering respect for the rule of law, the essentiality of integrity and truthfulness, the need to deal sensitively and effectively with diverse clients and colleagues, and the value of nurturing quality of life in light of the stresses and time commitments of law practice.

[C]linics can be a key setting in which students learn to integrate not only knowledge and skill but [also] the cognitive, practical, and ethical-social. The experience of clinical-legal education, corroborated by the research of Dreyfuses and Benner on the acquisition of practical expertise, points toward actual experience with clients as an essential catalyst for the full development of ethical engagement. This position is bolstered by analysis of medical training. There, beyond the inculcation of knowledge and the simulation of skills, it proves to be the assumption of responsibility for patient outcomes that enables the student for the first time to fully enter and grasp the disposition of a physician. In legal education, too, there is much to suggest that ethical engagement provides a pivotal aspect in the formation of lawyers.⁶⁰⁷

Many in-house clinical courses and internships give students opportunities to meet and serve people who have few other resources for resolving legal problems and seeking justice. The process of providing services to under-represented segments of society helps develop positive professional characteristics.

The kind of personal maturity that graduates need in order to practice law with integrity and a sense of purpose requires not only skills but qualities such as compassion, respectfulness, and commitment. Coursework can contribute to the development of moral values, goals, identity and compassion as well as ethical understanding and skills. These outcomes depend even more on pedagogies that actively engage the students than do more traditional dimensions of academic understanding. Compassion and concern about injustice become much more intense when students develop personal connections with those who have experienced hardship or injustice.⁶⁰⁸

Representing clients presents opportunities for students to test for the first time on a personal level a number of abilities that are essential for lawyers and which are included on the list of desirable outcomes for legal education in Chapter Two. These include, for example, such challenges as whether they:

- can “communicate effectively with clients, colleagues, and members of other professions,”
- have “effective skills for client relationship management and knowledge of how to act if a client is dissatisfied with the advice or service rendered,” and

⁶⁰⁷ SULLIVAN ET AL., *supra* note 7, at 198 (citations omitted).

⁶⁰⁸ *Id.* at 179.

- can “handle personal workload and to manage efficiently, effectively, and concurrently a number of client matters.”

More importantly, representing clients tests a student’s ability:

- to engage in “appropriate behaviors and integrity in a range of situations,” and
- to deal sensitively and effectively with clients, colleagues, and others from a range of social, economic, and ethnic backgrounds, identifying and responding positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client’s objectives.”⁶⁰⁹

In sum, students in client representation courses are beginning to learn the extent to which they are able to conduct themselves professionally.

Students participating as lawyers also test their intellectual and analytical skills, and they learn how well they are able to apply practical judgment to the situations they encounter.

As we observed clinical instruction, one of its striking features was the pedagogical shift from reliance on the hypothetical questions typical of other phases of legal education (such as “What might you do?”) to the more immediately involving and demanding: “What will you do?” or “What did you do?” Responsibility for clients and accountability for one’s own actions are at the center of clinical experiences. Assuming responsibility for outcomes that affect clients with whom the student has established a relationship enables the learner to go beyond concepts, to actually become a professional in practice. Taught well, it is through this experience of lived responsibility that the student comes to grasp that legal work is meaningful in the ethical as well as cognitive sense. Or rather, the student comes to understand that the cognitive and the practical are two complementary dimensions of meaningful professional activity that gets its point and intensity from its moral meaning. Taking the role of the lawyer in real cases makes visible the ways in which the lawyer’s decisions and actions contribute to the larger functioning of the legal order. At the same time, it also reveals the value of that activity as part of the larger function of the law in securing justice and right relations for actual persons in society.

Clinics can be a key setting for integrating all the elements of legal education, as students draw upon and develop their doctrinal reasoning, lawyering skills, and ethical engagement, extending to contextual issues such as the policy environment.⁶¹⁰

Thus clinical courses can go well beyond simply filling gaps in students’ legal preparation. If one were to search for a single term to describe the ability they hone best, it is probably “legal judgment.” In

⁶⁰⁹ A similar, but somewhat different list and a brief explanation of appropriate goals of in-house clinics is in *Future of the In-House Clinic*, *supra* note 562.

⁶¹⁰ SULLIVAN ET AL., *supra* note 7, at 142-43.

a wide sense, of course, this is the end of all legal education.⁶¹¹

Watching lawyers and judges in practice helps students understand these things, but students must practice law themselves before they can evaluate how far they have to go before they will be effective, responsible lawyers. Only in real life contexts can students learn how they measure up to the requirements and expectations of the legal profession. Only then can they really test how their “espoused theories of practice” play out in the actual practice of law.

An issue that legal educators should carefully evaluate is the degree to which externships in which students engage in practice under supervision can achieve the educational objectives described above. One of our operating assumptions is that in-house clinical faculty have superior one-on-one teaching skills for helping students learn how they function as lawyers and how they can grow. Perhaps only in in-house clinics are they likely to encounter teachers who will help them learn about their strengths and weaknesses and develop strategies for improving.

In-house clinic teachers may be uniquely situated to help students “recognize personal and professional strengths and weaknesses, to identify the limits of personal knowledge and skill and to develop strategies that will enhance professional performance.” Such instruction requires the teacher to be attentive to individual students’ attributes and to develop specialized teaching skills that neither externship supervisors or students’ first employers in practice are likely to have. At least that is the theory.

We are unaware of any data comparing the teaching effectiveness of externship supervisors with in-house clinic faculty. In theory, the lessons described above could be taught and learned in externships in which students participate as lawyers under the supervision of practicing lawyers. This would be possible, however, only if the externship supervisors embrace their educational functions and work to develop their teaching knowledge and skills. This is not likely to happen unless the law school makes this expectation clear, selects externship supervisors based on their teaching potential, provides training about the educational goals of its externships and methods of instruction, exercises control over the tasks to be assigned to students, establishes protocols for observing student performances and providing feedback, coordinates the fieldwork experience with assigned readings and classroom discussions, and closely monitors the performance of externship supervisors.

Another way in which the potential value of in-house clinics may surpass that of externships is that in-house clinics can afford the time to encourage students “to aim beyond the typical standard of the marketplace, a standard often based on ‘theories’ that do more to make the lawyer’s work easier than to serve the clients, and that include elaborate rationalizations for ineffectiveness so as to make it easier to externalize failure. The law school clinical program must start the student on the road to excellence.”⁶¹² Perhaps only in-house clinical courses can give students an “attitudinal and learning model sufficiently strong to insulate the student from external pressures toward mediocre practice.”⁶¹³

⁶¹¹ *Id.* at 144.

⁶¹² Kreiling, *supra* note 546, at 305.

⁶¹³ *Id.* at 306.

We are unsure how closely this vision of the educational potential of courses involving supervised law practice resembles reality. We worry that too many in-house clinics are overwhelmed with processing cases and with teaching those matters described earlier that we cannot avoid teaching, for example, office procedures and how to process certain kinds of cases. As mentioned earlier, it is important and valuable for students to learn these things. We just do not believe they are the most valuable lessons that students can learn in in-house clinics, and there may be more efficient and effective ways to teach these lessons. If an in-house clinic cannot demonstrate that it is doing more than teaching office procedures and how to process certain types of cases, perhaps it should be replaced with a less expensive simulation-based or externship courses that can achieve the same objectives.

As with every other course in the law school, we would benefit from developing clear statements of the outcomes that each client representation course seeks to achieve. Until we do this, we will be less focused on accomplishing our objectives and less able to evaluate the success of our efforts.

We also need to improve our methods for determining whether supervised practice courses are achieving their goals. The authors do not know if there is a typical way in which students in such courses are graded. We know that some teachers base a student's grade on an evaluation of the student's overall effort and abilities in handling the casework. Some evaluations are linked to written descriptions of lawyering competence that are handed out at the beginning of the semester. We do not know of any in-house clinic or externship that gives written or oral exams, nor do we know of any that evaluate what students know at the end of the semester about the lessons that were the subject of instruction during the semester. The focus is almost always on how the student performed rather than what the student learned except, perhaps, in those situations that also incorporate students' end of the semester self-evaluations. We do not propose an answer, but evaluating student learning in client representation courses is an issue that legal educators have not yet adequately addressed.

b. Be a model of law office management.

Principle: The in-house clinical courses provide a model of law office management in which appropriate case and office management systems are utilized.

Comments:

The important role in-house clinics perform in assisting students in transitioning from law school to practice cannot be overstated. Many students leave law school to enter solo or small firm practices. Exposure to robust and well-run office management systems is critical for students' professional development as effective, responsible practitioners. Many students in these settings adopt the management practices they experience in their in-house clinics to their own practices upon graduation.

Tracking case status, docketing and calendaring, file maintenance, clearly delineating case responsibilities, conflict checking, and balancing trust and office accounts according to acceptable accountancy and ethical practices are all part of providing ethical and competent legal services. In-house clinics should have management systems that assure their clients receive quality legal services. In

low caseload clinics this can be done with manual systems aided by “home grown” computer programs. In higher volume and long-standing clinics, up-to-date computerized law office management systems should be expected.

In-house clinics should have clear, written protocols for monitoring the quality of law practice and for responding effectively if issues arise. Clients’ opinions about their satisfaction with the quality of representation should be systematically canvassed, including whether they felt treated with dignity and respect. Surveys about the quality of in-house clinics’ law practice, including professionalism, should be conducted periodically and should canvas people who interact with the program’s faculty and students, such as judges, hearing officers, judicial and agency staff, and opposing counsel.

There should be clear, written guidelines regarding who has the authority and responsibility for making decisions about case intake and representation, including the role of law school administrators, nonclinical faculty, and the clinical faculty individually and collectively. These written guidelines should comply with applicable ethical rules, and issues such as client confidentiality and client decision-making prerogatives should never be compromised. In-house clinics should have a system for identifying and dealing with possible conflicts of interests between potential clients and the law school and any parent university, preferably before undertaking representation.

c. Provide malpractice insurance.

Principle: The school provides adequate malpractice insurance for students and faculty in the in-house clinical program.

Comments:

Students and their clients should not be put at risk of financial loss if malpractice is committed by a student or faculty member that results in harm to a client, opposing party, or someone else. Therefore, the school should provide malpractice insurance for students and faculty. Affordable malpractice insurance is available to most clinical programs through the National Legal Aid and Defender Corporation. Also, some state bar associations provide malpractice coverage for attorneys when they handle pro bono cases. Students and faculty may be eligible for this coverage, too.

d. Approve student work in advance and observe or record student performances.

Principle: All student lawyer activities that are client- or outcome-significant are approved in advance by clinical faculty and either directly observed by clinical faculty or recorded for subsequent review. Other activities of students are similarly reviewed if learning to perform those activities and demonstrating skill in performing them are educational objectives of the course.

Comments:

Clinical faculty have obligations to their clients and their students. In order to protect clients’ interests, clinical faculty should approve in advance and monitor student activities that could affect the client’s interests or, in the absence

of an individual client, the outcome of the representation. At a minimum, the clinical faculty should review all correspondence and legal documents prepared by students, observe meetings with clients or opposing parties or counsel, monitor students' adherence to office and practice management protocols, and attend all court appearances by students.

Clinical faculty can discharge their responsibilities as teachers only when they observe or review student activities that are related to the educational objectives of the course. At the same time, observation or review of mundane, routine activities is not necessary if they are unrelated to educational objectives or clients' interests. Students may also be given more autonomy as they demonstrate proficiency in specific activities.

e. Balance student autonomy with client protection.

Principle: The clinical faculty appropriately balances the goal of giving students independence and responsibility with the goal of protecting clients' interests.

Comments:

Every in-house clinical teacher seeks cases that provide students with challenging but manageable learning experiences, cases in which students can have significant responsibility for determining the outcome without unduly risking harm to clients' interests. The goal of most clinical teachers is to allow students to carry complete responsibility for their cases while the teacher serves as a resource when needed. There are times, however, when the clinical teacher should intervene to protect clients from harm.

Deciding when and how to intervene in a student's representation of a client is one of the most difficult decisions faced by clinical teachers. When a supervisor intervenes too early in the process, the student is not afforded the opportunity to learn from approaching the problem by herself. While a supervisor may be committed to particular concepts, she must be careful in attempting to shape a student's experience, as a primary goal is for the student to develop a reflective and critical approach to her own experience. Furthermore, a clinical teacher who is constantly "rescuing" a student is likely to undermine the student's confidence in her ability to become a capable lawyer. At the other extreme, a supervisor who provides little or no intervention when it is apparent the student is beyond his or her capabilities risks real harm to the client.

The highest quality experience comes from a supervisor who can strike the appropriate balance. Every choice a supervisor makes should be a conscious choice with a specific goal in mind. The clinical supervisor leads with respect for the student and with the clinical method's cornerstone of providing opportunities for the student to experience primary professional responsibility for real legal matters. But the supervisor never loses sight of the requirement that no client be subjected to incompetent representation.

In coming to supervisory choices, a great deal of student-specific diagnosis is required. The characteristics and needs of individual students should be a main consideration in all supervisory decisions. Ann Shalleck identified three aspects

that should be considered in each decision.⁶¹⁴ First, the supervisor must be aware of the scope of the student's knowledge, including the student's grasp of end-means thinking in planning and the student's mastery of reflective learning. Second, the supervisor must be aware of situations that create difficulties for the student. Finally, the supervisor should be aware of how characteristics such as gender or race affect the student's experience.

In addition to the effect of supervisory choices on the student, the supervisor must also consider the relationship with the client. David Chavkin pointed out that the presence of a supervisor, or "real" attorney, may distort the student-client relationship.⁶¹⁵ The client may look to the "real" lawyer for definitive answers, impeding the student in developing a true lawyer-client relationship. Before intervening in a way visible to the client, the supervisor must evaluate whether the benefits of intervention will outweigh the negative aspects. One way to avoid this issue is to use a closed circuit television system that enables the supervisor to observe and listen to students' meetings with clients without being in the same room. This allows the faculty member to intervene if necessary by telephoning the student during the meeting or to be prepared to answer students' questions either before clients leave the office or immediately afterward. Closed circuit systems are inexpensive and simple to install in most buildings, especially where the students' interview rooms are located near the clinical teachers' offices.

While supervisors should strive to empower students to become their own lawyers, there are elements of clinical practice where a supervisor's direction may be appropriate. For example, one area in which the supervisor's guidance is important is in the planning stages of a case. Translating case theory into action is not a skill easily taught in the traditional law school setting, and it is at times critical to a client's case. Supervisors can provide a forum for discussion as well as help students confront conflicts they might feel while developing a case strategy.

As with almost all areas of the clinical experience, the supervisor must evaluate the need for supervision. Each decision is individually tailored to the student's abilities and needs. The supervisor may consider such factors as whether the student has had previous opportunities to address the lawyering task, whether the student has shown a capacity to learn and reflect without supervision, and how the exercise of responsibility has affected the student's learning. Students often look to supervisors for knowledge and may expect the supervisor to provide a variety of information such as procedural rules, legal arguments and others. The supervisor must decide what information to provide and under what circumstances. In making these decisions, the supervisor not only needs to evaluate the student's learning experience and the client's needs, but also how her decision may affect the teacher's relationship with the student.

f. Have a classroom component.

Principle: In-house clinical courses include classroom components that help accomplish the educational goals of the courses.

Comments:

A clinical seminar or classroom component reinforces and advances the

⁶¹⁴ Shalleck, *supra* note 564.

⁶¹⁵ Chavkin, *supra* note 564, at 1539.

shared learning experience of students enrolled in an in-house clinic. The classroom component can be used to transmit knowledge and information necessary for competent representation of the population of clients served by the clinic, for “grand rounds” sharing of learning experiences, for group case planning exercises, for simulations directly related to the actual case experiences of students, for group discussion on perspectives of lawyering in context, for providing a forum for outside professionals to share their perspectives on legal concerns, and for other matters directly connected to the advancement of students’ professional development.⁶¹⁶

g. Provide adequate facilities, equipment, and staffing.

Principle: The school provides adequate facilities, equipment, and staffing for in-house clinics.

Comments:

In-house clinics are responsible for the competent representation of actual clients by law students working under the supervision of qualified instructors. The facilities, equipment, and staffing must be appropriate for providing both competent representation to clients and meaningful instruction to students. This means that clinical offices should include reception areas, confidential client interviewing space, appropriate work areas for students, adequate room for professional staff and faculty, supportive staff services, means for investigation, research resources, classrooms, and multimedia technology.⁶¹⁷

h. Respond to the legal needs of the community.

Principle: The school has in-house clinics that respond to the legal services needs of the communities in which they operate.

Comments:

Providing access to justice and seeking justice are two of the most important values of the legal profession. One way in which a law school can impart these values to students is by establishing and supporting in-house clinics that respond to the legal service needs of the communities in which they operate.

In-house clinics are all too familiar with the tension between providing needed legal services and educating students through the clinical method. Education should be the first priority. Nevertheless, several pedagogical goals available to in-house clinics are best pursued when they are designed and operated mindful of the social justice mission assigned to the legal profession, including “imparting the obligation for service to indigent clients, information about how to engage in such representation, and knowledge concerning the impact of the legal system on poor people.”⁶¹⁸ In-house clinics that relate to and respond to the under-served legal needs of the communities in which they operate have the best chance of imparting this knowledge.

⁶¹⁶ See *Future of the In-House Clinic*, *supra* note 562, at 569.

⁶¹⁷ See *id.* at 550 and AALS/ABA GUIDELINES, *supra* note 554, at 25.

⁶¹⁸ *Future of the In-House Clinic*, *supra* note 562, at 515. A discussion of the history and continuing significance of the social justice dimension of clinical legal education is included in Barry et al., *supra* note 283, at 12-16.

D. Externship Courses.⁶¹⁹

Principle: The school employs best practices in externship courses.

1. Introduction to Externship Courses.

Externships are courses in which a significant part of the learning relies on students either representing clients or performing other professional roles under the supervision of practicing lawyers or observing or assisting practicing lawyers or judges at work. Note that if students in an externship course are actually engaging in law practice, not just observing or assisting lawyers, many of the principles of best practices for in-house clinics are equally applicable to such externships, in addition to the ones set forth below.

In this section, “faculty” refers to members of the law school faculty who have control over or other responsibilities related to externship courses. “Field supervisors” refers to lawyers or judges who supervise and teach students at the field placement sites where students are working.

2. Best Practices for Externship Courses.

Remember that the best practices described below are in addition to the best practices for experiential education discussed earlier.

- a. Use externship courses to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction could achieve.**

Principle: The school offers externship courses to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction could achieve.

Law teachers have had a surprisingly difficult time articulating the educational goals of externship courses in which students observe or assist lawyers or judges and figuring out what to do with their classroom components. We understand, of course, that putting students in prosecutors’ or defenders’ offices will help students learn about criminal law practice, that placing students with judges will help them learn about the workings of the judiciary, and so forth. These are all valid purposes for externships that suggest natural topics for materials and class discussion.

What is surprising is the apparent absence of our collective appreciation of practice observation courses as a forum for studying the values, behaviors, attitudes, and ethical requirements of lawyers (professionalism). Perhaps, this is such an obvious benefit that it is not always articulated.⁶²⁰ In-house clinics have special strengths, but most do not accurately replicate the atmosphere of law practice in terms of their office settings, workloads, and ivory tower approaches to practice.

⁶¹⁹ This section was originally prepared by Harriet Katz, Rutgers, Camden, incorporating edits by Alex Scherr, Georgia; Cynthia Batt, Temple; Francis Catania, Jr., Widener; Mary Jo Eyster, Brooklyn; and Liz Ryan Cole, Vermont. Roy Stuckey is primarily responsible for the subsection on setting clear, explicit learning objectives.

⁶²⁰ See Backman, *supra* note 494 (recounting a discussion of the BYU faculty in which some defended “the value of the externship as a means of providing a crucial practice-oriented opportunity to learn about the legal profession”).

Placing students in practicing lawyers' and judges' offices removes this artificiality, and students know they are working in contexts similar to those that await them after graduation. Students' observations and experiences in all types of externships can provide rich fodder for discussing and reflecting on professionalism issues, if protocols are established to avoid jeopardizing confidences.

The problems that supervising lawyers and judges encounter and the environments in which they work are not artificial. When a student sees a lawyer turn away a potential client because of a remote possibility of a conflict of interest arising, it affects the student's opinion of the relationship of the rules of ethics to real life practice. When a student hears a judge describe how a particular lawyer cannot be trusted because he makes up reasons for requesting delays of hearings, the student learns a lesson in a more meaningful way than can be learned from a book or a law professor.

Some externships also provide excellent opportunities to study and learn about the functioning of the legal system and its capacities and limitations. It is especially important for students to study issues of justice in our society and to learn to appreciate the importance of the rule of law for ensuring justice to all members of society. Only in a real world context can students examine the interaction of legal analysis and human behavior, including interpersonal dynamics and communication. They should learn during law school how the law can affect people's lives by bringing fear or hope, sadness or joy, pain or relief, frustration or satisfaction.

Externships in which students primarily observe lawyers and judges at work can also help students develop insights into professional skills and problem-solving expertise.

Much of the learning in apprenticeship is by observation and imitation because much of what experts know is tacit. It can be passed on by example, but often it cannot be fully articulated. By carefully observing expert performance, however, learning theorists argue, it is possible to render important aspects of practice explicit. As in the case of simulation techniques employed in clinical domains, these articulations of good performance can then become objects of imitation and practice for learners. By making explicit important features of good performance through various conceptual models and representations, teachers can guide the learner in mastering complex knowledge by small steps. These devices of representation serve as "scaffolds," in the language of learning theorists, to support efforts at improved performance. Feedback from more accomplished performers directs the learner's attention, supporting improved attempts at a goal.⁶²¹

Externships would benefit from developing statements of expected outcomes that participants in the course will achieve. It is common for externships to require supervisors to give students opportunities to observe or participate in a range of activities, such as observing an initial interview, drafting interrogatories, and attending a trial. A statement of outcomes would be better. A statement of an outcome would begin "upon completion of the externship, students will be able to ____." The blank would contain a statement of what students would know,

⁶²¹ SULLIVAN ET AL., *supra* note 7, at 8.

understand, or be able to do, for example, “draft interrogatories in a civil lawsuit,” “present the state’s case in taking a guilty plea,” “draft a motion for continuance,” “describe how criminal cases proceed from arrest to conviction,” or “explain the value of a lawyer’s reputation for integrity.” Such statements of outcomes, even if they do not encompass everything a student might learn in the course, would force us to think more carefully about what we believe are the most important purposes of our courses and guide us in designing the delivery of the promised outcomes.

One of the challenges for teachers of externship courses is to demonstrate why the teaching and learning that occurs in placement settings should be learned during law school rather than in the first year of practice. While one can plausibly claim that exposure to law practice during law school is inherently valuable, exposure alone is insufficient to warrant awarding academic credit and charging high tuition for providing that exposure. Students can gain exposure to practice by clerking for a law firm or volunteering to work with an agency or a judge. Thus, it is critical that externships have clear educational objectives that are accomplished through a combination of assigned readings (about professionalism and other topics to be studied), classroom discussions, supervisors who will take time to explain and answer questions, and structured systems that require students to reflect on their experiences.

We also need to improve our methods for determining whether we are achieving our goals. The authors do not know if there is a typical way of evaluating what students learn in externships. Some externships are pass/fail courses, and the results appear to be based primarily on whether students put in the requisite number of hours at the placement site. They involve no evaluation of learning. Other externships require journals and papers, but we are unsure if these ensure a connection between what students are learning and the educational objectives of the course. We do not know of any externship courses that give exams. Perhaps this should be reconsidered. If an externship course has educational objectives, some effort should be made to determine if it is achieving them.

b. Involve faculty enough to ensure achievement of educational objectives.

Principle: Members of the law faculty control and participate in externship courses to the extent necessary to ensure the achievement of educational objectives.

Comments:

A member of the law faculty who is familiar with experiential education and law practice should have control over each externship course to ensure that the educational objectives are recognized, emphasized, and achieved.

To the extent that it is appropriate to the educational goals set by the school, the faculty member in charge of the externship should:

- communicate expectations and goals to field supervisors,
- periodically review the progress of students with supervisors, offering assistance as necessary,
- periodically review field supervisors’ accomplishment of educational and supervision requirements and provide guidance toward improvement, and
- share new ideas and developments about clinical teaching, or collaborate

with supervisors in ongoing conduct of and improvements to the externship course or program.

Externship faculty must establish and maintain appropriate relationships with externship supervisors in order to communicate standards, monitor compliance with program requirements, monitor student progress, and help placements improve their educational practices.

The faculty should engage with the relevant legal community to create and advocate for appropriate opportunities for student practice experience.

c. Establish criteria for approval of sites and supervisors.

Principle: The school has criteria for approval of field placement sites and supervisors.

Comments:

Criteria for approval of field placement sites should include suitability of work provided for students and adequacy of supervision provided by mentors at the placement. Law schools should have agreements with field placement sites that clearly describe the roles and responsibilities of the school, placement site, faculty, supervisors, and students.

The range and nature of placements offered in a given externship program should relate to articulated educational goals for that program. Placement sites should be committed to providing students opportunities to observe or engage in activities that are consistent with the educational goals of the program.

Supervisors at field placement sites should have a demonstrated commitment to mentoring law students, consistent with the school's goals for the students. Faculty should consider additional standards for supervision at sites with multiple lawyers to assure the best supervision. For example, senior leadership at the proposed site should be committed to mentoring law students, so that those directly supervising students understand that their work with students is regarded as valuable by their superiors. Where several students are placed at a site, it may be helpful if a coordinator at the site monitors students and their relationships with their mentors and maintains contact with the school.

d. Establish standards to assure that work assigned to students will help achieve educational objectives.

Principle: The school has standards assuring that work assigned to students is likely to help achieve educational objectives.

Comments:

Work assigned to students at their externship sites should meet as many of the following criteria as are consistent with the educational goals of the externship. The work:

- is substantial legal work, appropriate for students, including more advanced work for students as they become more capable,
- consists of the authentic work of the placement and does not include work assignments created solely to occupy the student without reference to the

work demands of the office,

- is appropriate to the student and law school educational objectives,
- places students in lawyering roles to the extent possible. This may include:
 - a primary counsel role, subject to relevant student practice rules,
 - a supporting role, in which the student engages in collaborative work with the supervising attorney, and
 - a role in which the student is given opportunities to observe experienced lawyers or judges performing complex tasks and tasks that are beyond the scope of the student's current capabilities and to discuss those observations with mentors,
- provides the student with an understanding of all aspects of the work of the placement, and
- exposes students to decision-making on active cases or problems, whether through staff meetings, conversations with mentors and other attorneys, or other collaborative work processes.

e. Establish standards to assure that field supervision will help achieve educational objectives.

Principle: The school has standards which assure that the supervision provided by field supervision attorneys, clerks, and judges is consistent with the educational objectives.

Comments:

Standards for supervision should communicate to supervisors that they are expected to:

- understand the educational objectives of the externship course or program,
- provide an orientation to the resources and mission of the placement site,
- assist students in developing appropriate individualized educational objectives that are appropriate to the work of the field placement and that take advantage of all of the experiences the placement has to offer to students,
- assign work consistent with the principles stated in this document,
- encourage students to evaluate their field experience critically and regularly engage the student in constructive critical evaluation of the student's field experience,
- observe or review student performances at regular intervals, and provide constructive feedback on student performance designed to improve student skills and understanding,
- provide constructive evaluation to students about their general professional development,
- regularly communicate with the externship faculty about student progress, and
- model the reflective and conscientious practitioner and welcome questioning of aspects and techniques of practice.

f. Consider students' needs and preferences when placing students.

Principle: The school considers students' needs and preferences when matching students with field placement sites and supervisors.

Comments:

The faculty should try to place students in situations that will match their needs and preferences consistent with the educational objectives of the course. The faculty should seek out placements that will challenge the student while fitting the student's goals and abilities. While total flexibility to respond to students' needs is not possible where the externship is tied to a particular type of law practice, students' needs and preferences should be considered to the extent possible.

Approaches to assigning students may include meaningful prerequisites, careful review of applications by externship faculty, individual consultations between students and faculty, interviews between students and prospective placement supervisors, and articulating approval standards to students who seek or propose placements independently.

The student matching process should be responsive to specific issues for various students, such as those who possess advanced knowledge or experience in a specialized area, are pursuing a dual degree or blend of careers, are returning students, commuters, or students with other identifiable skill development concerns or special interests, as may be necessary to assist such students to meet their personal educational objectives.

g. Provide malpractice insurance.

Principle: Adequate malpractice insurance is provided for students, supervisors, and faculty.

Comments:

If students are performing functions that could result in malpractice claims against the students or faculty, the school should ensure that either the school or the offices in which students are working provide adequate malpractice insurance for students and faculty – and ideally for field supervisors. Students and their clients should not be put at risk of financial loss if malpractice is committed by a student, supervisor, or faculty member that results in harm to a client, opposing party, or someone else. Affordable malpractice insurance may be available to externship programs through the National Legal Aid and Defender Corporation. Also, some state bar associations provide malpractice coverage for attorneys when they handle pro bono cases. Students, supervisors, and faculty may be eligible for this coverage.

- h. Approve student work in advance and observe or record student performances.**

Principle: All student lawyer activities that are client- or outcome-significant are approved in advance by field supervisors and either directly observed by field supervisors or recorded for subsequent review. Other activities of students are similarly reviewed if learning to perform those activities and demonstrating skill in performing them are educational objectives of the course.

Comments:

Field supervisors have obligations to their clients and their students. In order to protect clients' interests, field supervisors should approve in advance and monitor student activities that could affect the client's interests or, in the absence of an individual client, the outcome of the representation. At a minimum, field supervisors should review all correspondence and legal documents prepared by students, observe meetings with clients or opposing parties or counsel, monitor students' adherence to office and practice management protocols, and attend all court appearances by students.

Field supervisors can discharge their responsibilities as teachers only when they observe or review student activities that are related to the educational objectives of the course. At the same time, observation or review of mundane, routine activities is not necessary if it is unrelated to educational objectives or clients' interests. Students may also be given more autonomy as they demonstrate proficiency in specific activities.

- i. Ensure that students are prepared to meet obligations.**

Principle: Students are adequately prepared to meet their obligations.

Comments:

The question of preparation is not as critical if the students are only observing law practice, but a school should place only students who are competent to perform the tasks that will be assigned to them. Law schools should consider whether prerequisites should be met before students enroll in an externship. For example, Evidence would be a logical prerequisite for any litigation-focused placement, and Professional Responsibility may be an important prerequisite for any placement. In some cases, it may be necessary to provide relevant instruction immediately before students begin working at their placement sites.

Co-requisite courses or instruction that takes place during the externship may enhance the educational value of the externship and make the co-requisite courses or instruction more vivid and meaningful to the students, but they do not prepare students to accomplish any tasks they will be assigned at the beginning of the course.

j. Give students opportunities to interact with externship faculty and other students.

Principle: The externship provides sufficient opportunities for students to interact with externship faculty and other students in the course.

Comments:

The appropriate degree and type of interaction between and among students and faculty will depend on the model of the externship and its educational goals. These contacts should be frequent and substantive enough to achieve the educational purposes of the externship and could include seminars, speakers, presentations, tutorials, individual meetings, and journals involving reflection and dialogue.

In many externship courses, a regularly scheduled on-campus classroom meeting is the best way to provide opportunities for interaction. A classroom component may involve various forms of contact between student and faculty. In some externships, students are placed at sites that are too remote for students to meet regularly throughout the term of the course. In such cases, classroom sessions can be held immediately before and after the students' stints at the placement sites or intermittently during the term. Distance learning technology allows classroom sessions to continue throughout the course no matter how far from the law school students are placed.

Communication among all students or a subset of students in similar placements can help students learn from experiences in other placements and minimize the potential disconnection between the externship faculty member and the realities of a given office (or a given set of offices). These group meetings may include traditional seminar or classroom teachings, staff meetings, Listserv discussions, and video-conferencing.

Regular individual contact between faculty and students helps assure the quality of students' experiences. The faculty should seek out opportunities to engage in discussions with each externship student, whether through informal contact, site visits, written journals with faculty feedback, or formally scheduled interviews.

k. Ensure that adequate facilities, equipment, and staffing exist.

Principle: The school has sufficient facilities, equipment, and staffing to achieve the educational goals of its externship courses.

Comments:

Most externship courses have modest needs in terms of facilities, equipment, and administrative staff support. The school should ensure that the placement sites provide acceptable space, word processing equipment, and supplies to enable students to accomplish their assignments.

In large externship programs, administrative support should be provided to assist the faculty in recruiting, monitoring, and communicating with field supervisors, keeping track of whether students are meeting their obligations, and providing other support as needed.

