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The Downside of Requiring Additional Experiential Courses in Law School

By Douglas A. Kahn

In recent years, the bar has expressed dissatisfaction with what is considered by some to be inadequate preparation of law students to begin practicing law immediately after graduation. There are several reasons why this has become a matter of concern for the legal profession. The profession itself has undergone significant changes. Although there are a few exceptions, most law firms no longer wish to spend time training their young associates or allowing them much time to develop the skills they need. First, clients are unwilling to pay for the time a young lawyer spends in acquiring needed skills. Second, the senior

members of the firm are less willing to train or mentor young associates because of demands on their time. Salaries for young associates are quite high, and so the expectation that they arrive ready and able to handle legal work and produce income is greater than it was some years ago. Those changes in law practice necessitate that law schools make changes to better serve the profession. Although law schools have made moves to that end, the bar has not been satisfied that they are sufficient.

The ABA intends to change the educational experience of law students by requiring law students to take a course in professional responsibility and to take a specified number of credit hours in certain types of courses. In addition, the ABA requires law schools to make available to their students a range of

clinical courses and field placements. Specifically, Section 303 of the ABA's Standards and Rules of Procedure for Approval of Law Schools, 2016–2017, requires law schools to require their students to take

1. at least two credit hours of professional responsibility,
2. one writing experience in the first year and another in a subsequent year, both of which are faculty-supervised, and
3. at least six credit hours of experiential courses, which can be a simulation course, a clinic, or a field placement. The courses must be primarily experiential in nature and must comply with four listed goals. Although clinical courses clearly fit within the term "experiential," the scope of that term is unclear.

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Section 303(b) of the Standards also requires law schools to provide students with substantial opportunities for clinics, field placements, and participation in pro bono legal services. Law schools are encouraged to provide opportunities for students to have at least 50 hours of pro bono service.

In addition to the ABA's requirements, state bars are considering adopting additional requisites for students to qualify for admission to their bars. New York has added a pro bono requirement, and both California and New York are considering requiring substantially more experiential courses. If adopted, it seems likely that other states will follow their lead.

The contention of this article is that the imposition of additional, required experiential courses will have a negative effect on the adequacy of a

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student's preparation to practice law because it contributes to a reduction in the student's exposure to a range of doctrinal courses (especially core courses) and to the skills that those courses develop. Indeed, I contend that the current proliferation of clinical and other experiential courses, together with the increase in the number of other course offerings, has resulted in a sizeable percentage

of graduating students being ill-prepared to practice law as soon after graduation as law firms would like. In considering whether to adopt course requirements for admission to a state's bar, those consequences should be taken into account.

The specific doctrinal courses that an employer will want a new associate to have had will vary according to the area of law in which the firm is engaged. For example, a firm engaged in a real estate practice will want an associate to have had courses in real property, in trusts and estates, and possibly in future interests. In addition, the firm will want an associate to have some knowledge of federal taxation. The associate likely will need to work with issues concerning depreciation, like-kind exchanges of realty, capital gain and IRC § 1231 gain, at-risk rules, and

passive activity loss limitations. The associate will need to understand some basic tax concepts such as basis. Perhaps more importantly, the associate often will have to deal with partnership tax issues and will need knowledge of that area. None of those courses is required at the University of Michigan, however, and enrollments in such courses are down. As noted below, only one-third of the students who recently graduated from the Michigan Law School took at least one tax class, and less than 10% of them took either partnership or corporate taxation.

The proliferation of experiential courses is not the only source of a reduction in enrollments in core doctrinal courses. Another significant, but lesser, influence is the increase in the number of courses offered by law schools. I joined the Michigan faculty in 1964. The number of tenured and tenure-track faculty was smaller than it is today. There were only a couple of adjuncts teaching at the school, and only a few visiting professors. There were no clinical courses at that time. The number of courses available to students was considerably smaller than the current number of offerings.

By comparison, there are 74 adjunct professors teaching at Michigan this academic year of 2016–2017. Some of the courses taught by adjuncts are experiential, but many are doctrinal, albeit typically with a narrow focus. Although the expansion of the number of doctrinal courses with a narrow focus can affect the number enrolled in core courses, they do not affect the overall number of students who take doctrinal courses. Thus, the effect of those specialized courses on enrollment in core courses is much less than the effect of experiential courses because of the large number of credit hours that the clinical courses entail and because there are so many more experiential courses. In addition, the law school offers a few courses that have little or nothing to do with preparing students for the profession. The siphoning-off of students to experiential courses and courses unrelated

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to preparation for practice necessarily means that fewer students will be enrolled in the core doctrinal courses. Although the expansion of offerings raises problems that the law schools should examine, this article is addressed to the bar and to the proposals that will require students to take a number of experiential courses to qualify for admission to a state bar. Although an expansion of experiential course requirements is not the only problem, it would be a major one.

This article examines the effect that the current proliferation of clinics and other experiential courses has had on students' selection of some core doctrinal courses. My reference to doctrinal courses includes courses in procedure; I use the term to distinguish between doctrinal and procedural courses on the one hand and clinical, simulation, and field courses and externships on the other hand. I describe data from the University of Michigan Law School indicating that the availability of numerous clinical courses together with the practice of encouraging students to take them has contributed significantly to the reduced number of students taking doctrinal courses in areas that they likely will encounter in practice. Adding additional experiential requirements will exacerbate that problem.

I chose to use Michigan because I am especially familiar with that school. I also will focus much of the discussion on the effect on the election of tax courses because that is the subject I teach, although the reduction in core course elections also has taken place in other areas of the law as well. From discussions I have had with faculty from other law schools, the situation at Michigan is not unique, but there are variations in the elections chosen at other schools.

The Decline in Elections of Doctrinal Courses at the Michigan Law School

The Michigan Law School requires a student to pass 83 credit hours to graduate. A student currently entering the law school will have 24 credit hours of required courses in the student's first year, and real property is not required. In addition, the student must select a three- or four-credit course from a list of permissible electives. So, the student will have to take another 55 or 56 credit hours in the remaining two years of law school. I will assume the student took a four-hour elective, and so has 55 credit hours remaining. Of those 55 hours, the ABA requires that a student take a two-hour course in professional responsibility. Although the ABA requires that a student take six credit hours of experiential courses, at Michigan four of those credit hours are satisfied by one of the courses that is required in the first year curriculum; and so a student will be required to take two more credit hours of experiential courses in the last two years. That leaves the student with 51 credit hours for the remaining two years of study. Most students will include a four-hour real property course in their selection (at least I hope so), and that will leave them with 47 credit hours.

The law school provides 18 clinical courses, most of which have a seminar component. The credit hours for clinics vary, but most provide either five or seven credit hours, including the seminar component. One clinic (the Michigan Innocence Clinic) runs for two semesters, each of which

has seven credit hours; so the total amount of credit for taking the course is 14 credit hours. That one clinical course will constitute one-sixth of the entire number of credits that the student will take in law school. The school also provides a dozen externship opportunities, some of which are ongoing programs and others that are arranged by the student with the approval of the school. A full externship provides 12 or 13 credit hours, of which one hour is for a seminar component. A student enrolled in a full externship has the option of writing a paper or doing a project for which the student receives an additional one to three hours of credit. The maximum credit hours a student can receive for an externship is 15, but that can be increased if permission is obtained. The school provides for part-time externships of three to five credit hours (one hour of which is a seminar component). A third form of experiential learning is through simulation courses.

In addition to these experiential courses, a student is allowed to take up to 12 credit hours of courses outside the law school and receive credit toward graduation. It is desirable for some students to take courses outside the law school that will be useful to them in practice if they hadn't included those courses in their undergraduate studies. For example, I would urge a student who has not had a course in accounting to take that course outside the law school if it is not offered in the law school. Similarly, a course in economics would be useful, especially because so many doctrinal law school courses today incorporate economic theory into the class discussion.

If, in addition to the required courses and taking real property, for example, a student were to take two clinical courses (let us assume a total of 14 credit hours), that would leave 35 credit hours available because the clinical courses will satisfy the ABA's experiential requirement. Thirty-five credit hours will allow the student to take about ten doctrinal courses, but there will be even less room for taking doctrinal courses if the student

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takes one or more simulation courses and courses outside the law school. As noted below, it is highly desirable for a student to take at least one transactionally focused course. The number of available elective doctrinal courses would be reduced even further if a state bar were to increase the number of required experiential courses.

There are a number of reasons why clinical courses are popular. A major reason is that students enjoy them and believe that they will better prepare them for practice. Another factor is that grades in clinical courses generally are higher than in doctrinal courses. Another factor is that some of the clinical courses count toward satisfying the pro bono requirement that the New York bar imposes. One of the positive features of the clinical courses is that students have a large number of contact hours with the instructor. The standard student-faculty ratio for clinical courses is 8 to 1 for a seven-credit course and 10 to 1 for a five-credit course.

However much skills training a student has obtained, the student will need to have a certain amount of knowledge of legal doctrine in order to have something to which to apply that skill. Moreover, skills in legal reasoning, analysis, and statutory

construction are best learned in doctrinal courses. The clinics, and even the simulation courses, generally do not provide that type of training as well as doctrinal courses. Although most of the clinics have a seminar component that potentially could provide training of the sort obtained in doctrinal courses, those sessions likely are more focused on the delivery of legal services than on the analysis of legal issues and policies.

If a student takes a full externship and does not take a clinical course, the effect on doctrinal course selection will be about the same as for a student who takes two clinical courses. But if that student also takes one clinical course, that will allow the student to take about eight doctrinal courses, unless she also takes a simulation course or a course outside the law school.

The percentage of students who take some basic core courses has declined precipitously in recent years. Consider the decline in the percentage of students who take a course in federal income taxation. Michigan currently has two separate basic income tax courses. One course is titled "Taxation of Individual Income." The other is titled "Introduction to Income Tax of Business," which consists of a combination of basic income tax and corporate tax. A student who fails to take either of those two courses likely did not take any tax course because having one of them is a prerequisite for taking advanced tax courses. In each of the two academic years of Fall 2014 to Winter 2015 and Fall 2015 to Winter 2016, approximately two-thirds of the graduating class did not take a single tax course. Thus, only about one-third of Michigan's graduating class will have taken a tax course.

In contrast, for the academic year of Fall 1969 to Winter 1970, only 15% of the graduating class had failed to take a tax course. For the academic year of Fall 1970 to Winter 1971, only 6% of the graduating class failed to take a tax course (the basic tax course was titled "Taxation I" at that time). There were only two small clinical programs at the law school in those

two academic years, so the clinical program had minimal effect on course selection.

It is true that some schools have had better enrollments in taxation. For example, at Temple University Law School, only 29% of last year's graduating students failed to take any tax course. But even there, almost one-third of that graduating class had no exposure to tax law.

The explosion of the number of clinical and experiential courses is not the only cause of the dramatic increase in the number of students who graduate from the law school without taking a single tax course, but it is a significant factor. The same drop in the percentage of students taking doctrinal core courses (albeit not always as dramatic) is found in other areas of the law as well.

Consider the subject of commercial transactions. In the academic years Fall 1969 to Winter 1970 and Fall 1970 to Winter 1971, virtually every graduating student had taken commercial transactions. In the academic year Fall 2014 to Winter 2015, only 30 students took commercial transactions, about 10% of the average graduating class size of 300 at Michigan. In the academic year Fall 2015 to Winter 2016, 40 students took commercial transactions. For purposes of those figures, I have included students who took the course "Secured Transactions" as having taken commercial transactions.

The precipitous decline in enrollments for taxation and commercial transaction courses is not due entirely to the enrollments in clinical and experiential courses or to the large number of course offerings. Even with the reduction in the number of credit hours that a student can fill with doctrinal courses, they could choose taxation or commercial transactions over other doctrinal courses; but many chose otherwise. The reduction of the number of doctrinal courses that is available to them means, however, that they will be taking far fewer such courses overall, and so a number of subjects will be omitted from their law school experience. For example, the enrollments

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in labor law at Michigan are vastly lower than they were in pre-clinical years. The sizeable number of hours that students can devote to clinical courses is a significant element in causing the reduction of enrollments in doctrinal courses.

Adequacy of Preparation for Practice

Of course, a student can practice law without having had a course either in taxation or in commercial transactions, and many do. But those subjects, especially taxation, are pervasive and arise in numerous areas of the law. Taxation is an important element of corporate law and of commercial law. I cannot conceive of practicing real estate law without a solid background in taxation. Even in the areas of divorce and tort law, taxation can play a significant role. Estate planning and estates and trust law practice deal with tax issues. Many young lawyers will be handicapped for not having any exposure to taxation as well as to other substantive areas they omitted.

There are benefits to exposing students to a wide variety of areas of the law, even to subjects that a student will not encounter in her professional life. In searching for solutions to difficult transactional issues, a lawyer

may draw on concepts that were learned when studying an unrelated subject and adapt those concepts to the problem at hand. This can lead to innovative and creative solutions. Moreover, a student may not spend her entire career in the field of law that she intends to enter. Opportunities can arise in a different field of specialty from the one initially chosen. The more diverse a lawyer's educational background, the better able that lawyer is to capitalize on those opportunities.

Failure to take a tax course has another significant consequence. In studying tax, a student learns the techniques of good statutory interpretation. The student learns to read a statute carefully, paying attention to every detail including the punctuation. Words used in the statute must be construed in the context of the surrounding text and of the general tax law principles. The student learns how to use the regulations, case law, rulings, and legislative history in construing a provision and how to apply it to a variety of factual situations. In construing a tax provision, the statute is read in light of the overarching principles of tax law and the specific role that the instant provision plays in the tax system. A tax course is especially well suited to teach those skills. It has a complex code that contains numerous integrated statutory provisions. Tax courses provide the student with skills in dealing with statutes that will be of value in whatever field of law the student should enter. It is unfortunate that two-thirds of Michigan's students will not have that training.

The value of law school education is to provide its students with the intellectual tools to become first-rate lawyers. Some of the training in law school can be obtained while working in the profession, but much of what is done in the academy is uniquely suited to that environment and is not duplicated in practice. The clinical and other experiential courses are helpful in introducing a student to the actual operation of the law, but the student should not take so many of those courses that it will prevent

her obtaining the specialized training that substantive courses provide.

Additional Costs

In addition to its effect on the variety of subjects to which a student will be exposed, the proliferation of clinical and similar courses also affects the enrollment in advanced courses in specific areas. It is valuable for a student, after taking a basic course, to take advanced courses in the same subject. The more deeply a student probes into a subject, the more complex will be the issues encountered. The training in working with more complex material and obtaining a deeper knowledge of the principles and operation of a field makes the student far better equipped to enter law practice. The problem is that by taking advanced courses, the student will have to forego taking some of the other courses she might like to have. Choices have to be made. A student who has taken several clinical courses will be even more restricted in the courses available to her and so will find it more difficult to take advanced courses. At Michigan, this circumstance has greatly reduced enrollments in advanced courses. For example, only a handful of students take the advanced courses in corporate taxation and in partnership taxation. By contrast, in earlier years, over one-half of the class took corporate taxation.

Another cost of the greater emphasis on clinical courses is that in order to encourage more students to take a tax course and to be exposed to advanced tax subjects, many schools have combined several tax courses into a single course. It is common for a school to combine corporate and partnership taxation into a single course. At Michigan, the introduction to income tax of business course combines basic income taxation and corporate taxation into a single course with a little partnership taxation thrown in as well. Although I understand the motivation for having such combined courses, they provide a much less valuable experience than is obtained from a full separate course. It is not simply that

the combined courses necessarily will cover less material. Much more significant is that they cannot cover the material in anything like the depth that is achieved in a separate course. They are more like a survey course. The value of the advanced course in providing in-depth analysis of complex issues is largely lost. The enrollment in clinical programs has played a major role in creating the circumstances that have led schools to combine courses into a single offering.

An additional cost attributable to clinical courses, although of less importance, is nevertheless worth mentioning. Clinical courses absorb a large amount of a student's time. Much of that time can be spent in ways that have little or no educational value (such as sitting in court waiting for a case to be called). That is one of the reasons that I prefer simulation courses. Another reason is that the instructor in a simulation course can control the issues that will arise rather than to depend on what issues a client brings. The instructor also can control the timing of meetings. The student in a clinical course, especially one involving litigation, is subject to the time schedule set by a court or an agency, or a client.

Benefits of Transactional Courses

A transactionally oriented course has great benefits. It is a very different experience to have to determine a client's goals, obtain the necessary facts for arriving at a solution, and then create a solution that achieves the client's goals with the least cost. Every student should have at least one course that provides that experience. It is doubtful that a student needs to take more than one such course. Some clinical courses provide that experience and so do some simulation courses and seminars. An experiential course is a valuable part of a student's legal education. But, there is a question as to the value of taking multiple courses of that nature. There is a diminishing return in engaging in the same or similar experiences repeatedly. Although it is reasonable to require an experiential

course, the required number should be restricted.

Law schools, including Michigan, have been creative in designing transactionally oriented courses that capture the students' interest and provide valuable training in problem solving. In addition to developing needed skills, those courses illustrate to students that the practice of law can require creativity in solving problems. I believe that they can stimulate enthusiasm for entering the legal profession. Another advantage is that the students in those courses will have to incorporate nonlegal factors (such as business considerations) into their solutions. I am very much in favor of the school's offering such courses. The question raised in this article is whether a student's taking multiple experiential courses is sufficiently valuable to warrant a narrowing of the student's exposure to substantive subject matter. However one ultimately resolves that question, in deciding whether to increase the required number of experiential courses, consideration should be given to the effect that will have on enrollment in core doctrinal courses.

Conclusion

In my view, the proposals to require law students to take more experiential courses are ill-advised. They will not improve students' preparation for law practice. There are diminishing returns in taking more experiential courses. Reducing the number of doctrinal courses will result in students that are less prepared for practice than they otherwise would be. Indeed, the current proliferation of clinical and other experiential courses has already adversely affected the level of students' preparedness for law practice. A student would be better served to take a wider range of doctrinal courses than to take more than a few experiential courses. ■