

# Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering

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## I. Introduction

Legal educators have long viewed experiential courses involving real lawyering as a world divided neatly in two: externship placements and in-house clinics.<sup>1</sup> This article suggests that despite the decades-old vintage of this categorization scheme, it is inadequate for the curriculum reform era that lies ahead.<sup>2</sup> Increasingly, the content of these categories has expanded, the always-permeable boundary between them has blurred, and hybrids and varieties that defy easy categorization have sprouted. Thus, labels conceal both similarities and differences.<sup>3</sup> Current language has not captured the

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<sup>1</sup> See, e.g., Elliott S. Milstein, *Clinical Legal Education in the United States: In-house Clinics, Externships and Simulations*, 51 J. LEGAL EDUC. 375 (2001); Hans P. Sinha, *Prosecutorial Externship Programs: Past, Present and Future*, 74 MISS. L.J. 1297 (2005); Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. REV. 287, 298 (1989).

<sup>2</sup> See Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123 (2000) (noting that the common typology that divides clinical courses has become more misleading than helpful).

<sup>3</sup> The term “hybrid clinic” is often used for programs that combine the more intensive supervision and classroom work typical of many “in-house” clinics with externship-like placements outside the law school. See Mary A. Lynch, *Designing a Hybrid Domestic Violence Prosecution Clinic: Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices*, 74 MISS. L.J. 1178, 1187, 1211–21 (2005). It is also used to refer to a “hybrid” of a traditional classroom course and clinical experience. See Homer C. La Rue, *Developing an Identity of Responsible Lawyering Through Experiential Learning*, 43 HASTINGS L. J. 1147 (1992) (describing Maryland’s Legal Theory and Practice program). Note also that the dividing line between simulation-based courses and courses involving real experiences has also blurred over time. Simulation exercises for teaching particular skills are often used as preparation for real lawyering experiences, and simulation of an upcoming event—the “moot”—is typically used to prepare for it. Some courses rely on intensive simulation to teach a particular skill, surface an ethical dilemma, challenge standard assumptions, raise cross-cultural dialogue, highlight systemic issues, etc. The simulation is then followed by an opportunity to use the skill to respond to the problem, or observe the issue at work in a real setting, both to provide motivation and to increase the

nuance and variety of the forms that have evolved over time for experiential learning through real lawyering experiences, limiting our thinking about the variety of options available to law schools for the design of experiential learning opportunities.<sup>4</sup>

In this article, we focus exclusively on the portion of the curriculum that involves pedagogies for engaging students in legal work in real life situations. By defining clearly where the boundary of our analysis lies, we can be systematic rather than selective in locating what lies within those boundaries. Our overarching purpose is to identify and frame the wide array of options for structuring an educational experience in which law students are performing as professionals serving people involved in legal matters.

We suggest that legal educators expand their thinking about curricular options for experiential learning and develop a conceptual framework for articulating these options. In this article, we offer such a framework, representing our effort to highlight more comprehensively the options that law schools can consider in designing or redesigning the experiential programs in their curricula. We hope this article will serve as a decision-making guide for the law school faculty and administrators who will be shaping the future of experiential legal education, and legal education in general. We are aware that developing a conceptual framework for articulating options may provoke controversy because of its potential to be misunderstood as suggesting that all experiences have equal

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likelihood that learning from the simulation will transfer. *See, e.g.*, David Binder, Albert J. Moore, & Paul B. Bergman, *A Depositions Course: Tackling the Challenge of Teaching for Professional Skills Transfer*, 13 CLINICAL L. REV. 871, 871–98 (2007); Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417 (2002).

<sup>4</sup> Our effort to delineate a broader set of options presents many challenges, including choices of terminology. Often we opt for the terms “experiential” or “real lawyering experiences” rather than “clinical” to avoid preconceived notions that readers might bring to the term “clinical” and to avoid implications that we are considering only clinical programs and not the broader curriculum. We fear that overreliance on the familiar labels “in-house clinic” and “externship” obscures more than it reveals about the plethora of possibilities before us. For similar reasons, we often use the words “program” or “experience” in lieu of “course” or “clinic.” We care less about the terms and more about broadening our thinking by moving away from familiar labels that can limit our analysis.

value.<sup>5</sup> Such an interpretation would permit law schools to ignore the consequences of the choices that they explicitly and implicitly make, as long as they provide *some* kind of experiential opportunity. We believe, however, that providing a descriptive framework of available options and initially bracketing their normative potential not only helps broaden thinking about program choice and design, but also forces legal educators to make explicit the values embedded in the choices that they ultimately make.

Part II of this article briefly addresses the primary currents that have led experiential education to this juncture where a wide array of structural choices is available to legal educators. Part III identifies these specific structural choices and fits the structural features within a conceptual framework. In essence, Part III is a catalogue of design options for experiential programs that provide students with opportunities to engage in real legal work as part of their professional education. This catalogue is presented in multiple forms—narrative, checklist, and chart<sup>6</sup>—in recognition of the various ways that readers may prefer to absorb information.

Choosing among the catalogued options is another matter. In every law school, legal educators face the dilemmas of choice. These are localized decisions, dependent on missions, locales, resources, and other constraints and circumstances. In Part IV, we

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<sup>5</sup> Proposed revisions to ABA accreditation standards have the potential to conflate simulations with clinics and remove security of position for clinical faculty. See A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOL 19–31(2009–10) [hereinafter A.B.A. STANDARDS], *available at* <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>; Mary Lynch, *ABA Standards Review Continues to Spark Robust Discussion and Strong Comments*, BEST PRACTICES FOR LEGAL EDUC. BLOG (July 19, 2010), <http://bestpracticeslegaled.albanylawblogs.org>; Clinical Legal Education Association, *Clinical Legal Association's (CLEA) Comments on the Outcome Measures to the ABA's Standards Review Committee*, (July 1, 2010), [http://www.albanylaw.edu/media/user/celt/outcomes\\_page/clea\\_outcomes\\_comment\\_july\\_2010.pdf](http://www.albanylaw.edu/media/user/celt/outcomes_page/clea_outcomes_comment_july_2010.pdf). We oppose these proposals and view this writing as challenging rather than supporting these troubling initiatives. We hope that this article is viewed in accord with our intentions and that it is not misused to support ideas that we reject. See Scott Jaschick, *Law School Tenure in Danger?* INSIDE HIGHER ED, July 26, 2010, <http://www.insidehighered.com/news/2010/07/26/law>.

<sup>6</sup> *Infra* Appendices 1– 2.

identify the major contextual features that would facilitate choosing from the clinic design options displayed in our catalogue and organize these features in a series of graphics.<sup>7</sup> In Part V, we discuss how to apply the framework and provide examples that illustrate how different contextual realities may result in distinctly different choices.

As experiential legal educators, we teach our students that making sound professional judgments requires a careful, deliberative process in which we identify alternatives, evaluate each of them, choose among them, and after the results of acting are available, reflect on the results.<sup>8</sup> Consequently, clinicians understand well that their structural decisions regarding experiential programs should derive from conscious deliberative choices among available options. We hope that the framework we provide here for identifying those options is useful to legal educators who are contemplating various programmatic structures and to those who are involved in curriculum reform efforts designed to incorporate a contextual approach to the study of law, lawyering, and the legal profession. In other words, although our particular contribution—creating a typology of forms for experiential programs—is modest, we see it as part of the groundwork for envisioning the curricular innovations that are vital to the future of legal education.

## **II. Evolution of Clinical Education: How We Got Here and Where We Can Go<sup>9</sup>**

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<sup>7</sup> *Infra* Appendix 3.

<sup>8</sup> *See, e.g.*, Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as a Methodology*, in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL EDUCATION FOR THE LAW STUDENT 374 (1973); Justine A. Dunlap & Peter A. Joy, *Reflection in Action: Designing New Clinician Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49 (2004); Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000).

<sup>9</sup> Others have written more comprehensive histories of clinical education. *See, e.g.*, Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education For This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5–13 (2000). Yet others have traced the earlier roots of clinical education. *See, e.g.*, Douglas A. Blaze, *Deja Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939

From the perspective of the burgeoning social justice movements of the 1960s and 1970s, law was a vehicle for progressive social change. In that era, the field of public interest law, which had already sprouted in various forms, was growing and blossoming. As courts expanded individual legal rights and the right to counsel, law students were seen as one source of representation for those who could not afford legal assistance.<sup>10</sup> Student practice rules began to appear in jurisdiction after jurisdiction authorizing law students, when supervised by lawyers, to appear in court on behalf of indigent people.<sup>11</sup>

Inspired by these developments, a new generation of law students sought to become lawyers for underserved people. Law schools began hiring clinical faculty and creating clinical programs to help these law students achieve their goals. This institutional response was made possible by the availability of outside funding for the establishment of law school clinical programs.<sup>12</sup> Some of this outside funding also

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(1997); John S. Bradway, *Legal Aid Clinic as Law School Course*, 3 S. CAL. L. REV. 320 (1930); Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099 (1997). An excellent way to access literature on the history of clinical legal education is the Clinical Legal Education Bibliography developed by Sandy Ogilvy and Karen Czapanskiy, found in print form as J. P. Ogilvy & Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography*, 2 CLINICAL L. REV. (SPECIAL ISSUE) 1 (3rd ed. 2005), available at <http://faculty.cua.edu/ogilvy/Index1.htm>. The topic headings include “Clinical Legal Education: History.”

<sup>10</sup> See *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Brennan, J. concurring):

. . . Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. The Council on Legal Education for Professional Responsibility (CLEPR) informs us that more than 125 of the country's 147 accredited law schools have established clinical programs in which faculty supervised students aid clients in a variety of civil and criminal matters. These programs supplement practice rules enacted in 38 States authorizing students to practice law under prescribed conditions. Like the American Bar Association's Model Student Practice Rule (1969), most of these regulations permit students to make supervised court appearances as defense counsel in criminal cases. Given the huge increase in law school enrollments over the past few years, I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision. *Id.* (internal citations omitted).

<sup>11</sup> See, e.g., Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 821 n.31 (2004).

<sup>12</sup> The important role of the Ford Foundation and the Council on Legal Education for Professional Responsibility is noted in many articles, including Barry, Dubin & Joy, *supra* note 9, at 5–13; see also Ogilvy & Czapanskiy, *supra* note 9, at the Clinical Legal Education section.

served to extend the animating principles of clinical education. Through the Council on Legal Education for Professional Responsibility, the Ford Foundation provided seed money to many law school clinics for the purpose of enhancing law students' training in professional values and responsibilities.<sup>13</sup> Within a decade, clinical programs and the clinical faculty who taught in them had established a strong foothold in the curriculum at many law schools.

As this thumbnail history reveals, the first programmatic models for clinical education were grounded in the imagery of litigation and courtroom representation on behalf of subordinated populations. Over time, clinical faculty refined their pedagogies and deepened the academic connections between their work and the work of the university.<sup>14</sup> This movement of clinical education—from the margins of the academy to a more prominent place within it—allowed clinical faculty to focus more deliberately on the pedagogical aspects of their work.

As their academic mission developed, clinical educators began developing theories of their practice, which involved both the practice of law and the practice of teaching, and began thinking more broadly and more deeply about the legal profession and the needs of its future practitioners.<sup>15</sup> Not all lawyers were litigators, and much lawyering occurred outside of courthouses. Clinical educators began to develop

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<sup>13</sup> See Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976); J. P. "Sandy" Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1 (2009).

<sup>14</sup> For descriptions of the developmental stages of clinical legal education, see Barry, Dubin, & Joy, *supra* note 9, at n. 12; Marc Feldman, *On the Margins of Legal Education*, 13 N.Y.U. REV. L. & SOC. CHANGE 607 (1985) (describing a four-stage development: first, skills training and service to the poor; second, the shift to teaching learning; third, the integration of the first two, limited client representation combined with high levels of supervision and intense student reflection; and fourth, the clinicians critique and integration into the core curriculum).

<sup>15</sup> Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin'*, 75 NEB. L. REV. 648 (1996) (describing the calls for reform pre-CLEPR through CLEPR and MacCrate and beyond).

programs and pedagogies that encompassed the spectrum of lawyering skills<sup>16</sup> and roles, including counseling, mediation, transactional, and legislative work.<sup>17</sup> Over the years, the number and types of clinics multiplied, and clinical education gained recognition as a vital part of the overall mission of legal education.<sup>18</sup>

In this evolutionary process, a variety of tensions developed.<sup>19</sup> One tension concerned those who wished clinical education to remain true to its social justice roots<sup>20</sup> and saw in its academic development the risk that clinical education would be valued primarily as skills training<sup>21</sup> or on the basis of whatever scholarship might be inspired by

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<sup>16</sup> Like so much surrounding clinical education, the phrase “lawyering skills” has too often been denigrated by those who view “skills” as referring to non-intellectual, practical, easily communicated matters, such as techniques for impeaching a witness. Ronald J. Allen, *NITA and the University*, 66 NOTRE DAME L. REV. 705, 714 (1991) (“Now generalize this one step further. Does the entire course of technical skills training seem like a sham? Perhaps so. It purports to be premised on serving the needs of the adversary system’s search for truth, but it appears to be premised on the needs of serving the client. Winning, not truthful outcomes, is the apparent goal, and the sense of hypocrisy and of immorality grows, a problem I would predict is exacerbated to the extent that NITA programs are integrated with legal clinics.”). We take a broader, and more appreciative, view of the skills required by attorneys, recognizing that they require integrating complex cognitive, planning, ethical, and performative dimensions. See Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 578–79 (1987) (noting “[t]his short history illustrates that each of these “traditional” approaches to legal education can be characterized either as theoretical or as practical. The final Section of the first Part argues that clinical education also can be viewed as either theory or practice . . . . Therefore, even if clinical education is labeled as practical, this label can mean something other than skills training.”).

<sup>17</sup> See Ogilvy & Czapanisky, *supra* note 9, at V. Lawyering Skills, E. Mediation, F. Negotiation, G Problem Solving, and H. Collaboration Among Professionals.

<sup>18</sup> See John C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1462–74 (1998); Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1100–26 (1997).

<sup>19</sup> Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31 (1993) (reviewing four issues affecting and affected by clinical legal education: 1) whether the mission of clinical legal education is to address poverty or transmit lawyering skills; 2) the economics of relying on grants and soft money as opposed to hard money; 3) tension between in-house and externship programs; and 4) marginalization of clinics, their faculty and their students).

<sup>20</sup> See, e.g., Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287 (2001); Jane Aiken & Stephen Wizner, *Law As Social Work*, 11 WASH. U. J. L. & POL’Y 63 (2003); Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187 (1992) (expressing concern over the trend in clinical education toward greater resemblance to the rest of the law school academy).

<sup>21</sup> Cf. Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327 (2001) and David Barnhizer, *The University Ideal And Clinical Legal Education*, 35 N.Y.L. Sch. L. Rev. 87 (1990) (criticizing clinical faculty for a growing focus on teaching technical legal skills and arguing that the primary intellectual contributions of clinical faculty should be about the justice and injustice of real legal processes among other humanistic themes) with David Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191 (2003). For an argument focused on resolving this tension, see Antoinette

the clinics' legal work, ignoring its connection to public service and education about systemic injustice.<sup>22</sup> Another tension concerned those who incorporated externship models into their clinical programs and those who worried about the quality of learning that would take place with what they saw as a return to the apprenticeship model.<sup>23</sup> Among those who believed that lawyering outplacements could be pedagogically valuable, some clinicians were concerned about externship pedagogies that focused on students' career interests rather than clients' needs and that were inherently more variable and limited than in-house clinics. Despite these issues, an externship program's lower cost to the law school budget created the risk that over time, externship models might displace in-house clinics. The clinical education movement has been living with these currents for some time, creating today's varied landscape in which competing interests and realities have generated an array of different clinical models and forms.

Entering this backdrop of clinical variety are recent assessments of legal education that have garnered substantial attention. *Best Practices for Legal Education*, a collaborative endeavor of the Clinical Legal Education Association, the ABA, the AALS, and others, was published in 2006. *Educating Lawyers: Preparation for the Profession of Law*, one of a series of reports devoted to education for the various professions, was published in 2007 by the Carnegie Foundation for the Advancement of Teaching. The Carnegie study and the Best Practices project differ in some respects, but their

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Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. (2001).

<sup>22</sup> Cf. Douglas L. Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. LEGAL EDUC. 540 (2002) and Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469 (1992) with Paul Bergman, *Reflections on US Clinical Education*, 10 INT'L J. LEGAL PROF. 109 (2003).

<sup>23</sup> Cf. Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1 (1999) and Kenney Hegland, *Condlin's Critique of Clinics: The Case of the Missing Case*, 36 J. LEGAL EDUC. 427 (1986); J. P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZ. L. REV. 155 (2002–03).

conclusions and proposals overlap considerably. Although each moves beyond earlier critiques of legal education, echoes of those critiques—most notably the MacCrate Report—reverberate through them both.<sup>24</sup>

Both the Carnegie Report and Best Practices voice considerable concern with the chasm perceived to lie between legal education and the legal profession. Each considers the current state of legal education and makes generalized recommendations about how to bridge the chasm. Currently, these reports observe, the bridge is too underdeveloped to safely carry across the tens of thousands of law graduates who enter the profession each year.<sup>25</sup> But each offers hope that curricular innovation can strengthen and widen the passageway.

Recognizing that the professional world which law graduates enter is fraught with pressures and pitfalls, both the Carnegie Report and Best Practices ask law schools to take seriously their formative role as the gateway to the legal profession. Incorporating additional teaching of more lawyering skills is part of what they urge us to do. But as they take pains to demonstrate, our curricular responsibilities simultaneously reach into skills training and beyond skills training. Perhaps most fundamentally, we are asked to cultivate in our students, in Tony Amsterdam's words, "ways of thinking within and about the role of lawyers."<sup>26</sup>

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<sup>24</sup> *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. PROF'L DEV. [hereinafter The MacCrate Report]. The MacCrate Report itself echoes earlier critiques of legal education.

<sup>25</sup> ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* (2007); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (commonly known as "The Carnegie Report").

<sup>26</sup> Anthony G. Amsterdam, *Clinical Legal Education—A 21<sup>st</sup> Century Perspective*, 34 J. LEGAL EDUC. 612, 612 (1984).

This literature suggests a pedagogy in which students assume the role of the lawyer, and while in role, face problems of the sort that lawyers encounter in practice.<sup>27</sup> The students' performance in these roles becomes the subject of study, and consequently, students are asked to make their thinking, planning, and choosing systematic and explicit, in oral and written form, at every step along the way. Students are asked to consider the significant events occurring in their casework, to process them internally, to seek to understand their meaning, and to evaluate them in light of their own performance. Simply stated, we believe this is the reflective context-based education that best realizes the aims of Carnegie and Best Practices and most responds to the public service needs of the times.

Some law schools have already invested substantial institutional resources in responding to the call of Carnegie and Best Practices.<sup>28</sup> With decades of experience in systematically applied reflective pedagogies of lawyering-in-action, clinical educators are crucial participants in these conversations about curricular innovation.<sup>29</sup> The authors believe that as members of the legal academy consider curriculum innovations that represent context-based pedagogies of the sort that Carnegie and Best Practices

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<sup>27</sup> See, e.g., Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989) (describing role assumption as the fundamental methodology of clinical education and challenging its use in some situations).

<sup>28</sup> Mandatory real case experiential education has been a feature of legal education at a few schools for many years, such as City University of New York (CUNY) School of Law, University of the District (UDC) of Columbia David A. Clarke School of Law, University of Montana School of Law, and University of New Mexico School of Law. In recent years, a number of law schools, new and established, elite and otherwise, have adopted or are considering proposals for a mandatory real case experiential requirement. See, e.g., Stanford Law School, *A "3D" JD: Stanford Law School Announces New Model for Legal Education*, (Nov. 28, 2006), <http://www.law.stanford.edu/news/pr/47/>; Rachel M. Zahorsky, *Irvine by Erwin*, A.B.A. J., Aug. 1, 2009, at 46; Washington and Lee University School of Law, *Law Students Return to Revamped Third Year*, (Aug. 20, 200), <http://law.wlu.edu/news/storydetail.asp?id=614> (describing the school's all-experiential third year); Stephen Ellmann, *The Clinical Year*, 53 N.Y.L. SCH. L. REV. 877 (2008) (discussing New York Law School's "clinical year").

<sup>29</sup> See e.g., Elliot M. Burg, *Clinic in the Classroom: A Step Toward Cooperation*, 37 J. LEGAL EDUC. 232 (1987).

recommend, we will benefit at the outset from an understanding of the range of alternatives available to us before evaluating and choosing among them. At minimum, we must survey the existing landscape and note the broad range of choices that have already been made as a prelude to a process of identifying the choices that each law school may yet make on the road ahead.

### **III. Considerations for Designing Courses Involving Real Lawyering Experiences<sup>30</sup>**

As experiential education has evolved, so too have the structural options for programs involving experiential learning. The structural forms of the experiential programs that a law school offers may have been intentionally designed, organically developed, or pedagogically rooted.<sup>31</sup> They may represent adaptations to fortuitous circumstances or fixed realities that have changed over time. Nonetheless, once we challenged ourselves to think systematically about the range of structural alternatives available to clinical educators, we saw the inadequacy of limiting ourselves to two categorical options—externships or in-house clinics—when imagining the many and varied possibilities for creating educational programs in which students provide legal assistance.

Consequently, we generated and categorized what we hope is a thoroughgoing list of the structural components for real-life lawyering experiences. In generating this list, we attempted to think as broadly as possible. To bring as much simplicity as possible to the multiplicity that we found, we sought to capture our groupings of structural features in overarching categories. The typology of structural features for clinic design that

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<sup>30</sup> Our definition of “real lawyering experiences” incorporates a wide range of roles lawyers play, including some, such as mediation and legislative work, which can also be performed by non-lawyers.

<sup>31</sup> See, e.g., Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L. J. 277 (1982).

emerged was surprisingly extensive. By displaying a broad menu of structural options, the typology holds potential, we believe, to expand our vision, helping us make explicit the choices currently available to legal educators for creating or revamping programs that engage students in real legal work.

In the following section we present a narrative description of the structural options for experiential programs. Appendices 1, 2A and 2B present this information in three alternative formats: a checklist setting out the structural options, a chart in outline form, and a more detailed version of the chart. All three versions offer an organizing framework for the creation of experiential learning opportunities involving legal service to others. We hope that this framework can assist legal educators who are involved in a deliberative process of curricular design to consciously explore the full array of structural options for experiential pedagogy. Achieving that objective means that educators—immersed in the contexts, constraints, and circumstances facing a particular law school at a particular time—will be enabled to make more informed judgments about how to configure effective and targeted contextual learning opportunities for their students. At the very least, we hope that the framework will stimulate additional conversation about the burgeoning curricular opportunities that lie ahead for experiential education and the process for moving forward in an intentional and thoughtful way.<sup>32</sup>

We categorize the design choices for experiential education within a “why, what, who, how, where, and when” framework.<sup>33</sup> Collectively, we hope we have done a

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<sup>32</sup> The clinical literature emphasizes the importance of intentionality in developing good lawyers. *See, e.g.*, Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1 (2002); Linda F. Smith, *Designing an Extern Clinical Program: Or as You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527 (1999); Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996).

<sup>33</sup> We intentionally deviate from the traditional sequence of who, what, when, where, why, how to foreground goals (the “why”) and content (“what” is being offered.).

reasonably complete job of describing the varied landscape of pedagogical forms that involve students in the provision of legal services.

### ***A. Why: The Goals***

The starting point for identifying potential structures for experiential education is, of course, to identify the desired goals for those experiences.<sup>34</sup> As suggested in our prior discussion of the evolution of, and tensions within, experiential education, the goals of experiential education have included engaging students, understanding unequal social structures, advancing social justice, developing lawyering skills, cultivating professional identity, fostering professional ethics, providing culturally competent client representation to a diverse array of clients, developing sound judgment and problem-solving abilities, gaining insight into law and the legal system, promoting lifelong learning, and learning to work collaboratively.<sup>35</sup>

We thought it most useful to consider goals from multiple viewpoints. These viewpoints would include those of the people most immediately affected—the students and the teachers/attorneys charged with designing or implementing the experience. They would also include those of other stakeholders interested in the evolution of legal education, such as alumni, the legal community, and the regulators of the profession and the academy. The goals of each group would likely overlap, but might differ in emphasis.<sup>36</sup> In addition, we recognized that the goals for the experiential component of a

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<sup>34</sup> See Hoffman, *supra* note 31.

<sup>35</sup> For a general discussion of goal-setting in legal education, see STUCKEY ET AL., *supra* note 25, at 39–91. For a discussion of goals of experiential education, see Robert Dinerstein, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508 (1992); Maranville, *supra* note 2; Bryan L. Adamson et al., *Report and Recommendations on the Status of Clinical Faculty in the Legal Academy* (Wash. Univ. in St. Louis Legal Studies Research, Working Paper No. 10-06-07, 2010), available at <http://ssrn.com/abstract=1628117>.

<sup>36</sup> See *infra* Visual 1, Why: Stakeholders for Developing the Goals.

program might differ to some extent from the goals for the group learning component, such as that which takes place in a classroom.<sup>37</sup> Ideally, however, the goals for the experiential component and the goals for the group learning component would be complementary and mutually reinforcing.

### ***B. What: The Supervised Experiences and the Group Learning Component***

The composite parts of experiential instruction fall into two main categories: the supervised experiential component and the group learning component.<sup>38</sup>

#### *1. Supervised Experiential Content*

The supervised experiential component is shaped by the source of the work, the role played by the student, and the nature of the work. Choices include which tasks or responsibilities the students will perform in conducting the legal work and what role the students will play.<sup>39</sup> These choices define the content of what can be learned and explored in the context of the course.

In undertaking experiential education, the student takes on particular tasks or responsibilities. These may include judging, mediating, counseling, representing individuals or groups in adversarial proceedings, representing individuals or groups in non-adversarial contexts, representing individuals or groups in various kinds of transactions, or educating groups about law and the legal process. In representing individuals or groups, the student may be either a primary or a subsidiary attorney. The

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<sup>37</sup> See, e.g., Stacy Caplow, *From Courtroom to Classroom; Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic*, 75 NEB. L. REV. 872 (1996).

<sup>38</sup> Recognizing that group learning takes place in the traditional classroom, in smaller groups, and online, we intentionally substitute for “classroom component” the term “group learning component.”

<sup>39</sup> See David F. Chavkin, *Am I My Client’s Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998); Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Case Representation*, 8 CLINICAL L. REV. 405 (2002).

student may also serve in the role of a mediator, a judicial clerk, a teacher, a trainer, or an observer.

## 2. *Group Learning Content*<sup>40</sup>

As the pages of the *Clinical Law Review* attest, experiential teachers use the group learning component in numerous ways.<sup>41</sup> Some teachers may use classroom time for skill building, some may engage in simulations, some may develop interdisciplinary perspectives, some may expose students to critical perspectives, and some may endeavor to develop their students' cultural competence. Some teachers focus on the foundational substantive and/or procedural law needed for the experiential component, while others conduct case rounds.<sup>42</sup>

The group instructional component can be a pre- or co-requisite to the experiential component. It may be brief or extensive, bridge the gap between doctrine and practice by discussing applications of doctrine in relevant contexts, be a tutorial on specific issues implicated in the cases or problems of the experiential component, and may or may not be limited to those who are engaged in the experiential component. Alternatively, one may choose not to have a group learning component.<sup>43</sup>

### C. *Who: The Teachers and Learners*

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<sup>40</sup> For a discussion of the need for a group learning component and whether it should be a class, see Erica M. Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 CLINICAL L. REV. 659 (2004).

<sup>41</sup> See Oglivy & Czapanskiy, *supra* note 9, at 35–36.

<sup>42</sup> For thoughtful elaboration on the pedagogical possibilities of case rounds, see Susan Bryant & Elliott S. Milstein, *Rounds: A “Signature Pedagogy” For Clinical Education?*, 14 CLINICAL L. REV. 195 (2007); see also Steven Hartwell, *Classes and Collections: How Clinicians Feel Differently*, 9 CLINICAL L. REV. 463 (2002).

<sup>43</sup> Of course, choices may be limited by existing ABA Standards for Approval of Law Schools. A.B.A. STANDARDS (2009–10), available at <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>. Some of these standards require a classroom or reflective learning component for experiential courses. *Id.* at §305(e)(7).

Another series of choices for program designers involves the individuals who are labeled “teachers,” “mentors,” or “supervisors,” as well as those who are labeled “learners” or “students.” In most experiential courses, there are designated and non-designated teachers. In a well-structured experiential program, virtually every person with whom the student has contact may serve as a teacher. Clients, opposing counsel, judges, witnesses, clinic staff, fellow students, and community members may all provide information and feedback to the students. In addition, the oft-quoted adage reminds us that the teacher often becomes the student, and, conversely, the student often becomes the teacher. For this framework, however, we focus on those who are assigned responsibility for organizing and delivering instruction, providing direction and feedback, and evaluating and assessing student progress and performance.<sup>44</sup> These individuals may have a range of titles, may be full or part-time faculty members, and may have course loads that are primarily experiential or non-experiential.

### *1. The Teachers*

The principal choices to be made about faculty in the “who” category include deciding who will have responsibility for teaching the classroom/group instructional portion of the course and who will have responsibility for supervising the experiential component. Likewise, choices must be made about the relationship between the classroom and the experiential components, including which students will participate in each.

The instructor of the experiential component may be a full time experiential faculty member at the law school, a full time non-experiential faculty member at the law

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<sup>44</sup> Liz Ryan Cole, *Training the Mentor: Improving the Ability of Legal Experts to Teach Students and New Lawyers*, 19 N. M. L. REV. 163 (1989).

school, a part time faculty member,<sup>45</sup> a faculty member from another department or discipline of the university, or a non-faculty member, such as a practicing attorney or another professional. Regardless of title, instructors may see student supervision as their primary focus, or only a subsidiary one among many other duties. The instructor may or may not be integrated into the law school by being granted a vote and a voice. Teachers of the experiential component may or may not be the same people as those who teach the classroom component.

The same is true for the group learning component. These teachers can be drawn from any of the categories above, or from more than one of these categories. Teachers of the experiential components may or may not be the same people as those who teach the group learning components. Collaboratively taught programs may entail team teaching by any grouping of those listed above.

## 2. *The Learners*

Program designers must make choices about not only who will have the responsibility to teach, but also who will have the opportunity to learn. Which students will participate in the experiential component and which students will participate in the classroom component? As with the decision about faculty, the student participants in the classroom component may or may not be co-extensive with the student participants in the experiential component. Those involved in the experiential component may be the entire class, or perhaps a subset of the class—a team of students working on a particular case or project, or even an individual student. They may all be law students or they may be an

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<sup>45</sup> The practice of hiring non-faculty “fellows” and “staff attorneys” has become increasingly common. Programs vary in the qualifications and duties required and the status and compensation provided. We note but do not address the role of such non-faculty attorneys in experiential programs. See Dunlap & Joy, *supra* note 8, at 60.

interdisciplinary group that includes law students and students from other disciplines. They may be chosen by lottery, by application, or by some other method.

***E. Where: On Campus, Off Campus, or Far Away***

Supervised experiential learning can occur in many locations. The most common locations are on-site legal clinics, judicial and executive chambers, prosecutor and defender offices, governmental agencies, legislatures, non-profit legal services, and other legal advocacy offices. Some law schools offer experiential opportunities in private law firms, while others offer them in cities and countries far distant from the law school. The group instructional component can be offered at the law school, at an off-campus location, or even in cyberspace through computerized distance learning technologies.

***F. When: Timing of Experiential Learning***

Law school students and faculty are accustomed to the structure of courses taught during the same time periods each week for a specified term of weeks. Learning in these non-experiential courses is typically structured around these pre-determined time periods. Students and teachers engaged in experiential learning, on the other hand, often structure time around the experience rather than structuring the experience around a pre-set time block. Experiential learning, difficult to structure into predictable days and times, is not likely to occur in fifty minute time blocks. In keeping with the unpredictability of the experiential component, even a group learning component may be offered on an alternative schedule, such as an intensive “boot camp,” a mandatory orientation, or a series of periodic workshops. In addition, student experiences may be allowed to extend beyond the temporal beginning or end of the academic term. Indeed, since contextual

learning so often comes from reflection on experience, these reflections can continue and deepen long after the term has concluded.

The timing of experiential education may vary on additional dimensions, including when it occurs during the course of the student's education, timing within the academic calendar, the length and intensity of either the experience or the group learning component, and the timing of any group learning component in relationship to the experiential component. Throughout U.S. law schools, real experiential education has most often been available to upper-level J.D. students, but that is not invariably the case. At some schools, 1L's or LL.M. students are afforded the opportunity to participate in educational programs involving actual legal work. Experiential education may take place during the regular academic year or during the summer, for a single term, an entire academic year, or even longer. An "immersion" experience may be the only course in which the student is enrolled; alternatively, the experience may be only one of several courses the student is taking. Any group learning component may be offered before, after, or at the same time as the experiential component.

***D. How: Source of Content and Institutional Recognition of Experiential Learning***

The "how" of experiential learning includes how to generate the experiential learning content, how to provide recognition for student learning, how to provide feedback to students, and how to assess the students' learning. The source of experiential content may influence the overall educational content. For cases handled within the law school, options include self-referral of clients, appointment by the court, and referrals from agencies. For external placements, possibilities are placement lists, student initiative, or requests for student workers from site supervisors. The option chosen

creates its own administrative and resource consequences regarding intake, staffing, litigation fees and costs, and other expenditures.

Institutions award various forms of acknowledgment to recognize experiential learning. Most law schools award academic credit to students for participation in experiential programs,<sup>46</sup> and a handful of law schools make such programs mandatory.<sup>47</sup> Most law schools provide grades to students in clinics, while others award students ungraded credits.<sup>48</sup> An important “how” concerns assessment of both individual students and the experience itself.<sup>49</sup>

#### **IV. Contexts and Constraints: The Backdrop for Choosing Among the Options**

We now turn to an important practical question: what are the contextual factors and constraints that will influence a school’s structural choices for its students’ real lawyering opportunities? Our list, familiar to readers involved in experiential programs, includes the specific goals, institutional mission, resources (monetary and non-monetary),

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<sup>46</sup> Some programs are extra-curricular rather than curricular, where students receive neither grades nor credits, although there may be some other form of institutional recognition—such as a certificate of commendation—for the services rendered. In the alternative, some students receive stipends or pay for their performance as student lawyers. While our focus in this paper is on for-credit experiences, we believe that law schools should pay more attention to the educational content of the not-for-credit experiences that students undertake, especially in light of the considerable number of hours that so many students devote to them.

<sup>47</sup> See, e.g., *Academics, Scholarship & Curriculum*, UNIV. OF WASH. SCH. OF LAW, <http://www.law.washington.edu/Admissions/Why/Curriculum.aspx> (last visited Sept. 13, 2010); *About the Clinical Program*, UNIV. OF N.M. SCH. OF LAW, <http://lawschool.unm.edu/clinic/index.php> (last visited Sept. 13, 2010); *Clinics*, UNIV. OF MONT. SCH. OF LAW, <http://www.umt.edu/LAW/clinics/default.htm> (last visited Sept. 13, 2010); *Clinics and Externships*, Wash. And Lee Univ. Sch. of Law, <http://law.wlu.edu/clinics/> (last visited Sept. 13, 2010); *Clinics and Programs*, CUNY SCH. OF LAW, <http://www.law.cuny.edu/clinics.html> (last visited Sept. 12, 2010); *Introduction to the Clinical Program*, UNIV. OF D.C. DAVID A. CLARKE SCH. OF LAW, <http://www.law.udc.edu/?page=ClinicIntro> (last visited Sept. 13, 2010).

<sup>48</sup> Ctr. for the Study of Applied Legal Educ., *Report on the 2007–2008 Survey* (2008) [hereinafter CSALE Study], available at <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>.

<sup>49</sup> In recent years “assessment” has become something of a buzzword in legal education as external accreditors consider alternative approaches to assessing student learning outcomes, and accrediting law schools according to “outcome-based” measures. See, e.g., A.B.A. STANDARDS (2009–10), available at <http://www.abanet.org/legaled/committees/comstandards.html>. Although we believe that thoughtful assessment of both students and programs is crucial for improving legal education, we express no opinion here on the nature, extent, and frequency of that assessment. We suggest, however, that such requirements should not be applied differentially to experiential programs.

professionalism concerns, and interests of the various players (such as students, faculty, law school and university administration, the surrounding legal community, and the potential client base). We discuss these contexts and constraints in summary form not only because they are familiar to many readers, but also because they receive thoughtful treatment elsewhere in the literature.<sup>50</sup> In Appendix 3 below, we provide visuals to illustrate some of these contexts and constraints. While the previous section expands the realm of programmatic possibilities, contextual factors and constraints in a particular law school setting will, as a practical matter, reduce the options.

#### **A. Goals**

The articulated goals for an overall program of experiential learning will be a crucial factor in determining the details of each experience. Often a school will articulate multiple goals—such as professional ethics instruction, lawyering skills development, and the provision of public service—and the relative priority of the goals will affect the program’s design. For example, the tradeoff between skills development and public service is evident in choices about the case volume handled by the students, the intensity of supervision, and the content of classroom work linked to the experience.<sup>51</sup>

Decisions about goals might also derive from a school’s articulated mission. For example, one school’s mission might focus on social justice and another’s mission on a particular area of substantive expertise or lawyering skills. The “reality-based” opportunities made available to students will vary depending on whether each school is

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<sup>50</sup> An excellent place to start is the Clinical Legal Education Bibliography, developed by Sandy Oglivy and Karen Czapanskiy. Oglivy & Czapanskiy, *supra* note 9. The topic headings include Clinical Legal Education, Clinical Teaching (including Clinic Design and Clinic Administration), Lawyering Skills, and Professional Responsibility.

<sup>51</sup> Rachel F. Moran, *Transformation and Training in the Law: Serving Clinical Legal Education’s Two Masters*, ASS’N OF AM. LAW SCHOOLS 1 (Apr. 2009), available at [http://www.aals.org/services\\_newsletter\\_presMay09.php](http://www.aals.org/services_newsletter_presMay09.php).

attempting to further its mission or fill educational gaps generated by the mission's intensive focus.

The goals of the constituent groups will also affect programmatic choices. Some students who attend law are school already devoted to serving a particular population or to mastering a substantive area of practice. These students may be eager participants, or even organizers, of real lawyering projects. Others may seek to enhance their prospects on the job market or to break the routine of conventional classroom education by engaging in the intensive and interactive process of experiential learning.

Faculty who are not identified with experiential education can be key players as well. Some faculty members whose interests lie primarily outside the realm of experiential education may support projects in their substantive areas of expertise. Others may find themselves drawn to experiential learning when they interact with students who are afire with the enthusiasm so often generated by performing work in real life situations. A law school dean may be enthusiastic about the prospects for curricular innovation, hostile to such efforts, or walk a middle ground. The local bar and community groups may be seeking help in high volume courts, attempting to address a gap in access to justice, or be eager to develop a sophisticated curriculum for training the next generation of public interest lawyers.

### ***B. Resources***<sup>52</sup>

While we hope that a law school's mission and curricular goals will play a primary role in programmatic design, the lesson of experience is that monetary concerns will loom large. Experiential programs can be funded through the sources generally available for legal education: tuition, state funds, private gifts, or sources available only

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<sup>52</sup> See *infra* Appendix 3; Visuals 2–7.

for special purposes, such as grants, or attorney’s fees. The cost of an experiential learning program will vary with design and circumstances, but significant lawyering projects are resource-intensive.<sup>53</sup> Experiential learning involves not just the faculty resources devoted to a real lawyering curriculum, but also financial concerns relating to administrative and support staff, office space, office equipment and supplies, computers and their maintenance, and malpractice insurance premiums.<sup>54</sup> Additional costs may be incurred in the effort to secure outside grants and comply with reporting requirements. Since no law school has unlimited resources, a decision to fund one project is often a decision to close the door on another.

Non-monetary resources, such as the size and location of the law school and the availability of expertise, are also critical factors in choosing among possible structures for real lawyering projects. Considerations of size include the number of faculty and students, the existing menu of real lawyering experiences already available to students, and the scale and uses of the physical plant. A law school located in a large urban center will face a very different range of opportunities and community needs than a law school located in a largely rural area. The location of the law school will affect the diversity, backgrounds, and interests of the student body, the needs of the community, and even student and faculty travel time. Finally, location and size are intimately intertwined with the types and levels of expertise that will be available for the support and staffing of a project. If the structure of the program requires a permanent faculty member to directly

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<sup>53</sup> Many of the articles in the Annotated Bibliography on Clinic Design and Clinic Administration may relate to experiential programs that do not fit the usual definition of “in-house clinic.” See Oglivy & Czapanskiy, *supra* note 9, at 28–35. A helpful checklist of program details appears in the appendix of Philip G. Schrag’s article, *Constructing a Clinic*. Schrag, *supra* note 32, at 245–47.

<sup>54</sup> See *infra* Visual 2, Choosing Among the Design Options: Resources—Money.

supervise the students, an important concern will be whether any current faculty members at the law school, inside or outside the experiential program, have the expertise to do so.

Enthusiasm and support from key players may be considered another non-monetary consideration that is crucial to the success of a new experiential learning project.<sup>55</sup> A single enthusiastic student or student group can energize the project, a motivated faculty member can develop it, and dedicated members of the bar or local community groups can play a critical role in sustaining it. Intensity of interest can also take a negative form. For example, political interference from outside interests opposed to the substantive work of the project can create constraints that will affect the planning and design of an experiential educational opportunity.<sup>56</sup>

Pedagogical concerns also affect the nature of the experiential projects that a law school chooses. A law school may want to provide a variety of lawyering opportunities and ensure so that all students have courses tailored to their various learning styles, or the law school may choose to create structured sequences of lawyering experiences for students to undertake on the view that appropriate sequencing will enhance students' learning.<sup>57</sup>

### ***C. Professionalism and Ethics Concerns***

Although a detailed exploration of the professional and ethical concerns implicated by real lawyering experiences is beyond the scope of this article, those concerns provide important contexts and constraints for designing experiential learning

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<sup>55</sup> See *infra* Visual 3, Choosing Among Design Options: Resources—Non-Monetary.

<sup>56</sup> For articles on political interference, see Ogilvy & Karen Czapanskiy, *supra* note 9, at 24–25.

<sup>57</sup> This is consistent with the “spiral curriculum” concept widely accepted in educational theory. See JEROME BRUNER, THE PROCESS OF EDUCATION 52–54, 197 (1960).

opportunities.<sup>58</sup> Students may need to comply with the requirements of the jurisdiction's student practice rule.<sup>59</sup> In addition, under the rules of professional responsibility, attorneys must comply with the Three C's (competence, confidentiality and avoidance of conflicts of interest.)<sup>60</sup> The structure of a lawyering opportunity may determine who is bound by these requirements—just the attorney of record (likely the attorney supervising the students) or the students, as well.<sup>61</sup> Where programs involve collaboration with those outside the law school community, clarifying whether the lawyer-client relationship includes the law school actors will have implications for the ethical analysis of the issues that are faced<sup>62</sup> and will affect the coverage of the school's malpractice insurance.

Competence, confidentiality and conflicts of interest issues also implicate structural concerns of a different nature. Typically, confidences may be shared among members of a "firm," and conflicts of interest are determined in part by reference to other members of that firm. Students must learn the parameters of confidentiality and understand the definition of the "law firm" in which confidences must be kept. That will require clarity on the part of the faculty members themselves, who will need to be careful both in their interactions with students and in their use of students' lawyering experiences

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<sup>58</sup> The clinical literature contains many cautionary reminders and useful explorations of professional and ethical concerns arising in experiential settings. *See, e.g.*, Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187 (1999); Adrienne Thomas McCoy, *Law Student Advocates and Conflicts of Interest*, 73 *WASH. L. REV.* 731 (1998). Professor Peter A. Joy's work is especially helpful in addressing these concerns. *See, e.g.*, Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 *S. TEX. L. REV.* 815 (2004); Peter A. Joy, *The Law School Clinic as a Model Ethical Office*, 30 *WM. MITCHELL L. REV.* 35 (2003); Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 *CLINICAL L. REV.* 493 (2002).

<sup>59</sup> For an interpretation and catalogue of student practice rules, see Chavkin, *supra* note 39.

<sup>60</sup> *See infra* Visual 4, Choosing Among Design Options: Overview Ethical Considerations. For an excellent analysis of the three C's in externship settings, see Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 *CLINICAL L. REV.* 473 (2004).

<sup>61</sup> Joy & Kuehn, *supra* note 58.

<sup>62</sup> Lisa G. Lerman, *Professionalism and Ethics Issues in Legal Externships: Fostering Commitment to Public Service*, 67 *FORDHAM L. REV.* 2295 (1999).

as grist for classroom instruction.<sup>63</sup> The ethical issues are compounded where the lawyering involves collaboration with lay advocates, such as social workers, or where it entails the provision of legal assistance that is not intended to supply full representation.<sup>64</sup>

Clarity will also require institutional decisions about whether to treat all of those involved in experiential projects as belonging to one firm, or whether those involved in each project will constitute separate firms. Moreover, it will be important to make explicit the relationship with the “law firm” maintained by the law school and the university administration.

Beyond the formal rules, the law school will want its students, faculty, and community partners to provide competent service, and some tension may exist between the standards of practice in the community and the aspirational standards for the experience.<sup>65</sup> Students should have appropriate foundational knowledge and professional skills to perform the necessary lawyering work with a realistic level of effort. They also need guidance to avoid conflicts of interest between the legal work that they conduct under the law school’s auspices and the legal work that they undertake through part-time or summer employment.<sup>66</sup> Faculty and supervising attorneys may experience a conflict between the duty to provide competent representation to the client and their obligation and desire to provide a meaningful educational experience to the student.<sup>67</sup> Finally, real

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<sup>63</sup> See *infra* Visual 5, Choosing Among Design Options: Ethical Considerations: Confidentiality.

<sup>64</sup> For an exploration of the challenges in collaborating with social workers, see Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2001). For discussions of challenges involved in using students in the delivery of “unbundled” legal services, see Kruse, *supra* note 39; Mary Helen McNeal, *Unbundling and Law School Clinics: Where’s the Pedagogy*, 7 CLINICAL L. REV. 341 (2001) (for a discussion of ethical issues, see *id.* at 398).

<sup>65</sup> See *infra* Visual 6, Choosing Among Design Options: Ethical Considerations: Competence.

<sup>66</sup> *Infra* Visual 7, Choosing Among Design Options: Ethical Considerations: Conflicts of Interest.

<sup>67</sup> *Id.*; see also George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher’s Duty to Intervene*, 26 GONZ. L. REV. 415 (1990–91).

lawyering activities by students may affect adversely the interests of funders (including private donors and members of the legislature), trustees, or alumni of the law school or university and that may create external pressures affecting the 3C's.<sup>68</sup>

## **V. Making Choices: Process and Examples**

We turn now to three illustrations of how a law school might use our framework of structural options to aid its decision making about how to initiate, reconfigure, or expand its experiential education curriculum. Our examples include two that illustrate the potential for hybrid structures that do not fit neatly into the two traditional designations of in-house clinic or externship. That decision does not reflect a view that we should be abandoning existing structures and replacing them with new ones of a hybrid form. To the contrary, we take as a given that more traditionally structured in-house clinics and externship opportunities will play a central role not only in a law school's program for experiential learning, but in a school's overall program for legal education. We believe that in-house clinics and externships play fundamental roles in achieving essential goals of legal education, including instilling students with a sense of professional identity, preparing them for the practice of law, developing their professional judgment, helping them develop high standards for ethics and professionalism, diversifying educational options to meet various students' goals and needs, and nurturing a commitment to social justice initiatives and meaningful access to justice. While those goals should permeate the overall law school curriculum, programs of experiential learning will often provide the best vehicle for furthering these goals.

### ***A. A Recommended Process for Using the Design Typology***

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<sup>68</sup> See Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971 (2003); *infra* Visual 5, Choosing Among Design Options: Ethical Considerations: Confidentiality.

Rather than adopting a rigidly linear approach that works through the options depicted in Part III and the contexts and constraints discussed in Part IV, we recommend a deliberate multi-stage process.<sup>69</sup> The first stage is an “inventory,” involving an assessment of an institution’s structure, goals, resources, and characteristics. Picture your own institution as it is currently constituted. Identify the contexts and constraints discussed in Part IV and illustrated in the Visuals in Appendix 3 that represent your institution’s most obvious strengths, critical concerns, or difficult challenges. List and set priorities among those unlikely to change, but think flexibly. Some seemingly immutable characteristics might be overcome by creative plans and strategies, even though these strategies may take considerable time to coalesce.

With a handle on the contexts and constraints that will shape the decision-making, turn to the exploration of options described in Part III and in Appendices 1 and 2. Since goals for any program will be a paramount consideration, consider the options that respond to the “why” question. Viewed in light of both the goals that you have framed and the list of contextual factors and constraints that you can name, what options make the most sense or seem to “fit” best in the litany of what, who, where, when and how? Try to be as comprehensive as possible about the numerous configurations realistically available to you. What are the pros and cons of the various options you have developed? As you consult various constituencies about these options, the decision-making process may highlight which structures are emerging as the best choices for your institutional environment.

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<sup>69</sup> See *infra* Visual 1, Designing an Experiential Opportunity with Real Legal Work: The Process: Matching Goals, Design Options and Constraints.

Third, return to the considerations listed under contexts and constraints, giving thought to considerations beyond the ones you initially identified as the critical ones. Add to the assessment any contexts and constraints that may emerge from circumstances outside your institution, such as political and organizational currents influencing legal education. How will the institutional choices that you are considering interact with these currents? Do these interactions create additional constraints? Assess the relevance of these considerations to your situation now or in the future. Where you have identified critical considerations as barriers to attractive programmatic options, make certain before abandoning these possibilities that they are truly obstacles that cannot or should not be overcome.

Having consciously undertaken a careful and comprehensive decision-making process, you are ready to act. While that step may be self-evident, without deadlines akin to those that exist in litigation, there is a danger that the process will remain open-ended. There is always the potential that better options might be developed or the sense that the future might be a better time to act. If, however, the impetus is a desire to improve the school's experiential learning curriculum, the status quo may be less desirable than an "imperfect" choice. The clinical literature is replete with examples of innovative programs, launched with enthusiasm, which encountered anticipated and unanticipated problems.<sup>70</sup> The rich analysis that flows from reflection is often the most salient part of

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<sup>70</sup> See, e.g., Kruse, *supra* note 39 (describing efforts to teach problem-solving in the context of a pro se prison clinic); Michael Millemann et al., *Rethinking the Full-Service Representation Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178 (1997) (describing "an experimental project in which law students provide legal information and advice to other-wise unrepresented parties in family law cases").

the story. Therefore, reflecting on the actions taken, with a willingness to remake those actions in light of these reflections, is a critical final step in the process.<sup>71</sup>

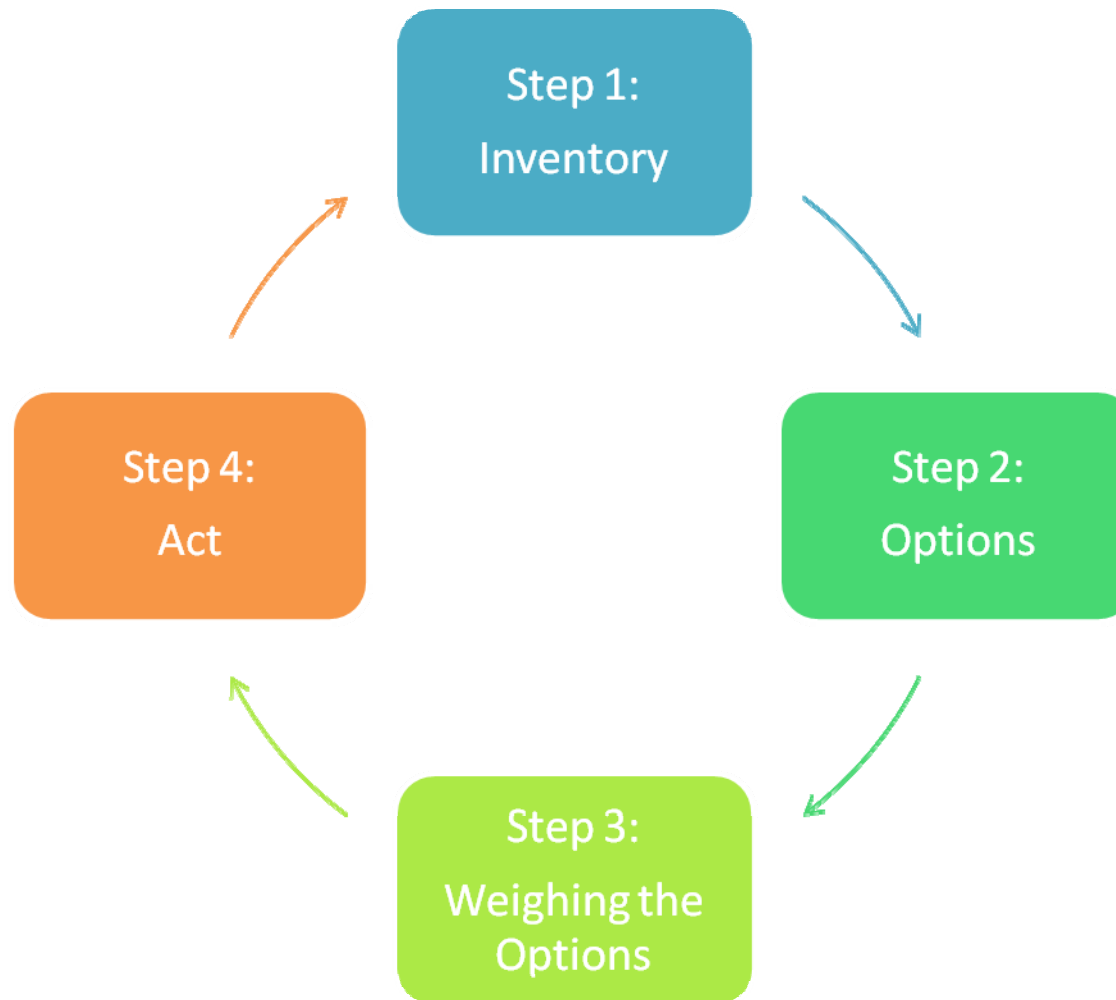
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<sup>71</sup> See W. Warren H. Binford, *Reconstructing a Clinic*, 15 CLINICAL L. REV. 283, 290–323 (2009).

## Visual #1: Designing an Experiential Opportunity with Real Legal Work

### The Process: Matching Goals, Design Options and Constraints

Part V-A, pp. 24-26



## ***B. Three Examples***

### *1. Example #1: Learning to Mediate*<sup>72</sup>

Step 1: The Inventory (The institution's structure, goals, resources, and characteristics as delineated in Part IV)

A law school is located in a major metropolitan area. It enrolls a total of approximately six hundred students and has approximately forty-five full-time faculty members. This law school has six longstanding and well-established in-house clinics and a variety of externship opportunities available to its students. Each of the clinics is taught by a full-time faculty member, and all operate as one law firm for purposes of confidentiality and conflicts of interest. Externship placements are available in the community with judges, prosecutors, public defenders, not-for-profit organizations, and agencies at the state, federal and local levels. The externships are supervised by a faculty member who requires that all site supervisors be attorneys willing to take on the educational responsibility of supervising externs. Under the current structure, approximately fifty students per semester can be accommodated in the in-house clinics<sup>73</sup> and approximately twelve students per semester can be accommodated in the externship program. This past semester, over one hundred students applied for the fifty slots in the in-house clinics.

The faculty is generally supportive of experiential education. Faculty members who teach in the clinics also have other significant institutional responsibilities, such as

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<sup>72</sup> This example is based on a real-life situation that arose at a law school where one of the co-authors teaches. The conceptual framework developed in this article helped the faculty member identify various possibilities for designing an experiential opportunity involving mediation.

<sup>73</sup> The clinics are typically offered for three credits per semester with an option to enroll the following semester for an additional two credits.

administrative assignments and teaching more traditional doctrinal courses or simulation-based skills courses.

Step 2: The Options (The Why, What, Who, When, Where, and How of-Part III)

Several people who work with a neighborhood mediation center in the community approached the clinic director about the possibility of establishing an Alternative Dispute Resolution (ADR) clinic. The center's director is a licensed mediator, but not an attorney. Such a project would not fit within the current program. The project would not be acceptable as an externship placement, as the supervisor would not be a lawyer and the in-house clinic is not geared to accommodate an outside organization.

The inapplicability of both the externship and the in-house clinic models might lead to the ready conclusion that the mediation program should not be created here. But rather than rejecting the proposal, the clinic director might use the foregoing framework to consider in a deliberate way the proposal's viability. The first question should be "why." What goals are to be served by creating an experiential opportunity in dispute resolution?

Providing an experiential component to ADR would fit nicely with the law school's program on dispute resolution. Because the mediation center is highly regarded for the quality of its work, there is reason to expect that students would receive significant educational benefits from their participation in a high-quality, community-based mediation practice. In addition, as a non-litigation approach to conflict, a mediation clinic would serve as a valuable complement to the clinic's other offerings, which are largely focused on litigation. It would also respond to student desires for expanded opportunities in experiential education, evidenced by over-enrollment in the

clinics, and expanded opportunities for contributing in a positive and welcome manner to the diverse local community. Teaching students to conduct mediations and supervising their efforts would expand the capacities of the neighborhood mediation center to provide effective, timely, and culturally sensitive dispute resolution services to the community, and train a larger cadre of mediators who might provide valuable dispute resolution services in the future.

What contextual factors will need to be considered in making a fine-tuned judgment? One important contextual factor is the expertise available in the community. This expertise resides not only with the director of the local mediation center, but also with the members of its board who are certified mediators and attorneys. A second contextual factor is the program's desire to view itself as a single law firm. Could the students in the mediation program be made part of that single firm?

What constraints exist? The law school does not have the resources to hire a full-time or even a half-time faculty member to teach the course as one of its live-client clinics. In addition, none of the current experiential faculty members is a certified mediator, and thus none is capable of supervising a mediation clinic. Any new course must be approved by the entire faculty, and this approval would depend on effectively addressing resource-based concerns.

This resource picture leaves open the possibility of hiring qualified adjunct faculty to direct a mediation clinic. For reasons of stability, continuity, and quality control, engaging full-time clinical faculty is generally a preferable option. The decision whether to consider an adjunct faculty option in this context may be affected not only by internal structural and pedagogical considerations but by other cross-currents within legal

education, as well. Are there larger cost-driven trends at other institutions to replace full-time clinical faculty with adjuncts? Will the decision made at this law school have any influence on patterns of decisions across institutions? Is this choice likely to have broader, negative repercussions or present slippery slope concerns for experiential education beyond the particular school?

Using the thought process that we have described and consulting the chart or checklist in Appendices 1 and 2, one can identify multiple options for creating such a mediation program. One model might entail allowing the students to engage in mediation under the direction of the mediation center's director, while simultaneously instructing them through simulation and classroom work with a full time faculty member. Another model might involve engaging an adjunct faculty member to teach the classroom component. Alternatively, the experience of conducting mediations might be incorporated into a mediation class that is already being offered. Students could engage in simulated mediations in class and then participate in real mediations at the community mediation center. The teacher of the classroom course might then undertake with the students the reflective analysis of their mediations that would help them to derive lessons from their experiences and to understand their meaning. Another possibility is that one of the current experiential courses might allow students the opportunity to engage in mediations related to the subject matter of the clinic. For example, a domestic relations clinic could provide students the opportunity to assist in mediating family disputes. These mediations could be supervised by the director of the mediation center in consultation with the teacher of the domestic relations clinic.

### Step 3: Weighing the Options

Applying the framework that we have devised in the context of a particular institution can yield viable conclusions. Using the recommended process, the faculty director determined that the goals for the experiential learning program, when viewed in the context of the particular law school, suggested that an appropriate and feasible model seemed to be a “hybrid” form, one which allowed the students to participate in mediation at the center, while at the same time engaging them in a classroom course. In light of resource limitations, the best choice appeared to be engaging an adjunct faculty member to teach the course and to provide oversight of the experiential component. The clinical director, in turn, would support and mentor the adjunct professor in the practice of clinical teaching.

In reaching this conclusion, it was important to the analysis that the clinics at the law school were well-established and well-regarded, that full-time clinical faculty had security in their positions, and that there was limited risk in this context of fueling a move to replace resource-intensive clinics with cheaper versions taught by adjuncts. The fact that the decision to create an adjunct-taught clinical project was tied to the project’s connection to a secure and thriving in-house clinical program was deemed to reduce the risks that the existence of this model would have an undermining effect on less secure clinical projects at other institutions. Moreover, the model was pedagogically sound, affording students the opportunity to learn through their participation in effective community-based mediations while ensuring them attorney supervision guided by the academic objectives of the clinical program. Given the experiential program’s small

caseload, it seemed likely that the mediation program could operate as a part of that law firm without generating many actual conflicts of interest.

These suggested alternatives are only a few of the many creative ways in which the law school might respond to the proposed student-mediation opportunity. The opportunities and constraints presented in each law school's context will frame the available choices for any specific institution. The answer for one will not necessarily be the answer for another.

#### Step 4: Act

In the actual situation that gave rise to this example, the institution was enabled by our framework to respond to an experiential learning proposal by undertaking a deliberate process and making a carefully tailored choice. The choice—the mixed model described above—was implemented expeditiously. Students were able to enroll in the mediation project for the subsequent academic year. Assessing the project after one year's experience, it was deemed to have made a useful contribution to the overall clinical program, one which the students appreciated and found benefit in, and will therefore be continued for the next academic year.

#### *2. Example #2: Innocence Project*

Step 1: The Inventory (The institution's structure, goals, resources, and characteristics as delineated in Part IV)

A law school is situated in a metropolitan area with a number of other law schools. The program's in-house clinic and externship options are organized under a single umbrella of "clinical courses." Under this model, all students seeking course credit for legal work must enroll in one of the twelve to fourteen clinical courses, organized by subject matter, offered each semester. Clinical courses that involve areas of

law not covered by the school's in-house clinic, a poverty law office, operate on a purely field placement, or externship model. Where the work done at the in-house clinic fits the subject area of a particular clinical course, a placement at the school's in-house clinic is one of the placement options available to students. Although the Clinic Director, a tenured-faculty member, is involved in administrative aspects of each of the clinics, nonclinical faculty members—both full-time and adjunct—are involved, as well. All students must take a minimum of two designated skills courses to graduate, with the clinical courses among the list of approved skills courses. The school's Mission Statement includes the commitment "to preparing students to be successful lawyers and leaders in the public and private sectors through integrated practical, theoretical and ethical education of the highest caliber."<sup>74</sup>

A non-clinical, full-time faculty member is involved in extensive pro bono work in the criminal defense area. One of his projects is a collaboration with a private firm that has led to the establishment of an Innocence Project for the region. Through the collaboration, pro bono lawyers, with law student assistance, investigate cases of persons who claim to have been wrongfully convicted and are seeking exoneration. They also research, draft, and file amicus briefs in furtherance of reliable expert testimony, improved identification procedures, and better forensic science. Until recently, all students involved have worked purely on a volunteer basis. The faculty member has now approached the Clinic Director, the chairperson of the Curriculum Committee, and the Associate Dean, trying to structure a program where Innocence Project students obtain credit for their work. Short of credit, he requests that they obtain at least some type of formal recognition for their efforts.

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<sup>74</sup> This example is based on a real-life situation that arose where one of the co-authors teaches.

## Step 2: The Options (The Why, What, Who, When, Where, and How of-Part III)

The reality that the faculty member is seeking to convert a volunteer program into a credit-bearing program carries with it preliminary answers to some of the questions about structural options. The primary goal is to create a combined classroom and experiential component through which students will explore wrongful convictions in the criminal justice system. In the proposed experiential component, student casework would include reviewing transcripts, discovery and other legal materials, identifying issues for further investigation, preparing research memoranda for presentation to a committee of practitioners, and drafting relevant briefs. In terms of the “where” question, the faculty affiliated with the school’s three Academic Centers—each of which supports faculty and student pro bono work—all have their offices in a building separate from the main law school building; since their suites include student space, the students would work in that location. In terms of the “when” question, the proposed work would occur during the academic semester, in conjunction with a substantive seminar on the topic. The “how” question relating to the source of the work is answered by the reality that cases would be referred from the attorneys involved in the Innocence Project in the local area.

Since the faculty member proposes to teach the course and oversee the work, that portion of the “who” question is answered as well. With regard to students, the “who” question is more complicated, because the faculty member wants to handpick the students doing the casework. He expects a broader group of students would enroll in the classroom portion itself, and envisions the students performing the casework as a small subset of that larger group. In terms of options, separate experiences could be structured

for those students doing actual casework and those studying the topic solely through the classroom. Alternatively, the classroom component could be the same, with the students who perform casework receiving additional credit in some fashion.

The “how” questions involving recognition by the institution present difficult questions. Extra-curricular public service legal work is recognized under the school’s Public Service Transcript Notation program. It is unlikely, however, that this form of recognition would be a sufficient response, since many of the students working on Innocence Project cases already earn that notation, and the faculty member has made clear his preference for a credit-bearing experience. These circumstances suggest an experiential structure involving credits as part of the classroom component or in addition to them, with the need to analyze whether the experiential work should “count” as a clinical experience and as satisfying one of the law school’s “skills” course requirements for its students. The “how” of both student and program assessment will depend to some extent on the option chosen.

### Step 3: Weighing the Options

The initial inquiry from the faculty member involved a request that the experiential component be a “clinical” component, which carries specific meaning at the institution. The school’s clinical courses typically involve either direct representation under the student practice rule at the in-house clinic, or legal work off-site in well-structured externship settings. Research for full-time faculty members would not normally fit the definition, although the case-related nature of the tasks proposed here might suggest revisiting that line. A related complication involves the fact that clinical courses automatically count as one of a student’s two required “skills” courses for

graduation from the law school. Yet the skills courses typically engage a broader range of skills than are likely to be developed through the work of the Innocence Project.

Finally, a very real possibility exists that the first offering of the course will raise questions or problems that might make changes advisable if the course is offered a second time. That suggests the desirability of offering the course initially as a “Perspectives” course, a specific vessel at the school that allows a course to be offered on an experimental basis without initial approval from the Curriculum Committee or the faculty. The chairperson of the Curriculum Committee has indicated, however, that she opposes using this structure for clinical and skills courses.

The structural complexities—including the constraints and realities at the institution—might suggest that the proposal be rejected. It simply does not fit the recognized categories, raising the possibility that the slippery slope problem might begin to erode the otherwise well-structured program. Yet the faculty members involved share a commitment to expanding high-quality opportunities for experiential learning. That approach certainly furthers the school’s commitment to preparing students for the practice of law and integrating theory and practice in the educational experience. While in some respects this experience is less robust experiential learning than exists elsewhere at the school, the course is being offered as an addition to the curriculum, not as a replacement for other clinical opportunities. A nonclinical, full-time faculty member is seeking to add to the menu of experiential options, at no cost to the school and without any diminution of resources to the existing in-house clinic and externship opportunities. On balance, the students, the faculty member, and the school overall would be best served by getting to yes, rather than by blocking the request.

#### Step 4: Act

In the actual situation, the solution crafted established a two-credit seminar course in Wrongful Convictions. With the professor's approval, students in the course could receive either one or two additional credits for casework. Each additional credit required five hours of weekly casework, fitting the formula for most of the school's clinical courses. However, the supplemental credits are simply labeled an "additional component." The work specifically is not defined as clinical work, and the additional component is not designated a "clinical component." Thus, the work will not count toward the skills requirement, and, as requested by the professor, will be graded on a pass/fail basis, a grading option that is not open to the clinics. Finally, since the Innocence Project —deemed neither a clinical nor a skills course —was offered initially as a "Perspectives" course, it may be modified, if needed, for its second offering. Under the school's rules, should the professor want to offer the course a third time, he must submit a formal proposal for approval by the Curriculum Committee and the faculty.

#### 3. *Example #3:*

Step 1: The Inventory (The institution's structure, goals, resources, and characteristics as delineated in Part IV)

A new private law school has opened in a medium-sized city. The law school wishes to develop centers of excellence in business law and health law. The dean has been selected, and has begun organizing the school. The first class will enroll in the fall of 2010. There will be approximately 100 students in the inaugural class, although the law school is hoping to grow to a student body of 500 in the succeeding five years. The current faculty consists of seven faculty members, none of whom is experienced in or specifically designated to teach in the clinical area. The law school intends to hire five

more faculty members during the 2010-11 hiring season, and to reach an optimal full-time faculty level of thirty faculty members by 2015. Under the current plan, the faculty will hire a clinician in 2012. The clinician will oversee any experiential offerings, and co-teach any live-client clinics. The remainder of the offerings in the experiential education curriculum will be taught by adjuncts and part-time faculty members. The dean has advertised the school as having a commitment to the community, as well as promising incoming students a vibrant program of experiential education.

Step 2: The Options (The Why, What, Who, When, Where, and How of-Part III)

The dean has decided that the best way to accomplish her goals is to utilize the resources currently available in the community. There are several legal aid programs, public defender agencies, and prosecutors' offices in the surrounding communities. There are also several corporate legal headquarters and law firms in the community that have expressed an interest in having law student interns. The dean is anxious to take advantage of these opportunities and to make good on her promise of greater opportunities for experiential learning.

Why not create an externship program, with students placed in these offices? Is that the best solution, or even a viable one? What is the context in which this decision is being made?

There is a tremendous amount of talent in the surrounding legal community. But is that enough? Currently, the law school does not have the resources to hire a full-time, or even a half-time, faculty member devoted to supervising the externships. It will be at least one to two years before that faculty member is hired. The dean has suggested that one of the existing faculty members could supervise the externships as a substitute for

teaching an additional classroom course. The law school has the resources to hire an adjunct to assist this faculty member. Is it appropriate to begin this program simply because it is the only type of experiential education that can arguably be undertaken by the currently configured faculty?

Applying the process that we have proposed can lead to the realization that the school needs to undertake a more thorough analysis of its values, resources, and constraints before establishing an externship program. Clinical education should not be a Procrustean bed in which the school chops off necessary pedagogy to fit any institutional constraints. Perhaps the school should wait until it is fully staffed before beginning a program of clinical education, or the school should set a priority of hiring one or more clinicians in its early faculty expansion. Perhaps the school should create a highly focused externship based in one or two offices, and utilize supervision by a faculty member who is expert in the area of law practiced in those offices. The dean is not pleased with any of these suggestions, as it does not satisfy her desire to advertise the “robust” experiential education currently available at the institution.

### Step 3: Weighing the Options

Analyzing this proposal according to the framework that we have established leads to the likely conclusion that the dean’s proposal is neither feasible nor appropriate. An externship overseen by a non-clinical faculty member, without the benefit of an established clinical program, is left with an underdeveloped pedagogy. Only once that pedagogy is deliberately developed, and an externship model designed to fit that pedagogy, will the experiential learning program constitute a sound educational model.

The law school has not looked at its priorities and strengths to determine its appropriate niche in clinical education. If the school intends an institutional commitment to business and health law, should not its clinical components also reflect this strength? Given the school's commitment to hire a clinician in the near future, shouldn't that faculty member be involved in establishing the program of clinical education and ensuring the consistency and educational strength of all its components? An externship program may indeed be an appropriate pedagogical vehicle for this law school, but the parameters of that program should be established with goals, thoughtfulness, and academic rigor.

This appears to be a situation in which the dean is allowing the constraints (lack of faculty and lack of resources) to drive the decision. Simply because it is the only model that fits within the limitations of the institution does not mean that the model is of sufficiently high quality to undertake. This is not to say that the answer would be the same for every new law school wishing to establish a clinical component in its curriculum. A new law school may have assessed its strengths and constraints, and may creatively develop a vision of clinical education that is both pedagogically sound and specifically tailored to its needs, goals, and resources.

#### Step 4: Act

In this situation, the appropriate faculty action is to say no to the dean's request to establish an externship program for this academic year. It is clearly possible that this law school can become a center for experiential education and can live up to its advertised goals. But it is not ready to do so now. It would be a better use of the law school's

resources to begin laying the groundwork and establishing the conditions for developing high-quality experiential opportunities.

While this example illustrates a new law school at the beginning stages of developing a curriculum, the same analysis might also apply to an established law school wishing to expand its experiential offerings. Not every clinical experience or hybrid model of experiential education, even at a well-established law school, will necessarily add value to the pedagogy of the institution. The analytic process that we propose here mandates an intense focus on the strengths and weaknesses of institutions, and their resources, goals, and constraints, regardless of whether a law school is creating a new program or adding to an existing one.

***C. Reflect: Values Implicated in Your Choices and Their Effects on Legal Education at Your School and Beyond***

This article has focused on description, setting out a framework of considerations relevant to structuring real experiential learning opportunities for a law school and providing three examples of how the framework would operate in context. Although we have expressly avoided making global, normative recommendations about which choices to follow in structuring experiential opportunities, we recognize that these choices can have far-reaching implications. Despite its primary focus on an individual law school's mission and goals, our framework also recognizes that design choices for experiential education at individual schools have important implications for legal education on both the national and international levels, and that developments on the national and international scenes reverberate within individual institutions. In keeping with the experiential methodology that underlies our approach in this article, we devote this

section to a fuller description of a reflective process that includes, as above, the benefits accrued in individual institutions, but goes beyond that as well.

### *1. Thinking Globally: National and International Trends*

Law schools are under increasing pressure from the profession, including the major accrediting bodies, to engage students in a conscious process of professional formation, as well as to teach a wide range of lawyering skills beyond the legal analysis of appellate cases and statutes.<sup>75</sup> They are struggling to find approaches that can be scaled up to serve an entire student body at a cost that is not prohibitive.

Some argue that the easy way out of this conundrum is to make a wholesale move towards experiential opportunities located off-site with most of the supervision done by employees of the organization hosting the placement, and minimal resources invested by the law school.<sup>76</sup> This would return legal education to the externship model that predated ABA Standard 305(b).<sup>77</sup> We do not view the approach set out in this article as supporting the argument for such a model.

Each of the authors believes that even lightly supervised experiences can be valuable for targeted purposes, such as engaging students, providing context for their learning, and exposing them to different practice areas and approaches to lawyering. Yet to the extent that the goals for experiential education move beyond the acquisition of discrete skills (such as interviewing and counseling, negotiations, drafting, and trial advocacy) to help students develop global skills and values such as problem-solving,

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<sup>75</sup> See, e.g., SULLIVAN ET AL., *supra* note 25; Catherine L. Carpenter et al., *Report of the Outcome Measures Committee*, 2008 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B., available at <http://www.abanet.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>.

<sup>76</sup> See, e.g., James H. Backman, *Where Do Externships Fit? A New Paradigm Is Needed: Marshaling Law School Resources to Provide an Externship for Every Student*, 56 J. LEG. ED. 615, 640 (2006).

<sup>77</sup> A.B.A. STANDARDS, *supra* note 43, at §302(b) (requiring law schools to invest resources in higher credit externships or large externship programs).

professional judgment, cultural competence, awareness of power dynamics, and the capacity for lifelong learning, a more systematic and intentional approach is required. Classroom learning about the theory underlying the skill or value, simulation methodologies for learning basic techniques and highlighting dilemmas and assumptions,<sup>78</sup> and more intensive opportunities to practice and reflect on application of skills, values, and systemic issues in a real case setting—to ensure transfer of skills and knowledge to other settings—are all important components of such an approach.<sup>79</sup> Field placements alone, especially minimally supervised ones, are insufficient.

Curriculum developments are, of course, inevitably and tightly intertwined with personnel decisions. Thus, hotly debated law school accreditation questions about status, job security, and voting rights for clinicians form a highly politicized, national context for the decisions on curriculum design that are made at individual institutions<sup>80</sup> At the same time, decisions made at the local level on status, job security, and voting rights in turn affect who will be in a position to participate in the national discussions on both personnel issues and curriculum.

## *2. Acting Locally: Concrete Opportunities, Law School Programs*

In our experience, individual law schools benefit from having full-time experiential faculty with a commitment to the school and a voice in faculty deliberations,

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<sup>78</sup> Note that such intensive simulation-based activities can be integrated with real experiences. An interesting example is the Depositions course at UCLA Law School that is heavily simulation-based, but culminates in students taking real depositions for cooperating attorneys. Most “in-house” and “hybrid” clinics also incorporate significant simulation methodology.

<sup>79</sup> We have all encountered students who have taken simulation-only skills courses but are unable to transfer knowledge learned in that environment to the fast-moving, fluid reality that often characterizes law practice.

<sup>80</sup> See, e.g., BRYAN L. ADAMSON ET AL., ASS’N AM. LAW SCH., REPORT AND RECOMMENDATIONS ON THE STATUS OF CLINICAL FACULTY IN THE LEGAL ACADEMY 26-27 (2010); Letter from Robert A. Gorman, Univ. of Pa., to Am. Bar Ass’n Standards Review Comm. (July 5, 2010), available at <http://www.abanet.org/legaled/committees/comstandards.html> (scroll down to “Comments on the Comprehensive Review”; click on Gorman: Security of Position under “Terms and Conditions” subheading).

including faculty who focus to a significant extent on teaching through real legal work. Those benefits include bringing different perspectives to teaching, engaging students, and promoting greater access to justice,<sup>81</sup> developing students' capacities to work effectively with clients from a wide variety of backgrounds, exposing students to systemic issues, generating familiarity with different teaching methodologies,<sup>82</sup> producing doctrinal scholarship grounded in legal practice,<sup>83</sup> and ensuring that scholarship and service to the community are informed by awareness of on-the-ground developments.<sup>84</sup> Though we favor dispensing with orthodoxies and taking a broad view of the options for clinic design, we do so in the context of the extensive, deliberately developed programs taught by secure staff at each of our schools. We believe that thoughtfully designed "hybrid" opportunities are more likely to emerge at law schools with full-time, secure status, real case experiential faculty.

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<sup>81</sup> See, e.g., Phyllis Goldfarb, *A Theory-Practice Spiral: the Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Deborah Maranville, *Infusing Passion and Context Into the Traditional Law School Curriculum Through Experiential Learning*, 51 J. LEGAL ED. 51 (2001); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010).

<sup>82</sup> See, e.g., *Center for Excellence in Law Teaching*, ALBANY LAW SCHOOL, [http://www.albanylaw.edu/sub.php?navigation\\_id=1709](http://www.albanylaw.edu/sub.php?navigation_id=1709) (last visited Sept. 12, 2010) (describing Albany Law School's Center for Excellence in Law Teaching, founded by one of the co-authors as an outgrowth of her work on CLEA's publication of Best Practices in Legal Education).

<sup>83</sup> See, e.g., Deborah Maranville, *Workplace Mythologies and Unemployment Insurance: Exit, Voice, and Exhausting All Reasonable Alternatives to Quitting*, 31 HOFSTRA L. REV. 459 (2003); Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will Batson Cover Disability-Based Strikes*, 57 ALB. L. REV. 289 (1993); Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607 (1990).

<sup>84</sup> For examples of scholarship, see SUSAN L. KAY & DONALD HALL, REPORT OF THE TENNESSEE BAR ASSOCIATION STUDY COMMITTEE ON EFFECTIVE ASSISTANCE OF COUNSEL IN DEATH PENALTY CASES; Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996). The potential inherent in law school clinical faculty's service efforts is exemplified by the National Innocence Network bringing together numerous clinicians and law reformers to focus on addressing the problem of wrongful convictions, especially through use of DNA testing, which was inspired the initial Innocence Project at Cardozo Law School.

## **VI. Conclusion**

In this article we have attempted to assist in the process of experiential curriculum design by providing a broad conceptual framework and a structured process for thinking deliberately about available options. We see ourselves as following the time-honored methodology of experiential education: making explicit the full range of considerations that thoughtful decision makers should take into account and deliberately assessing all available alternatives.

By suggesting that there are myriad choices for law schools, we do not intend to suggest that each choice is equally worthy. Nor do we intend that this analysis invite schools to attempt experiential education on the cheap. Both live client clinics and externships have been developed as pedagogically sound, properly supervised models for educating law students. Both require extensive involvement by law school faculty. Both require intensive supervision and provide the opportunity for reflective learning. Any program developed under our suggested model must do no less.

Our analysis is intended to develop structural alternatives that program designers must assess thereafter for their pedagogic integrity. Just as brainstorming processes produce fewer ideas if evaluative judgments are made too quickly, our approach to exploring design alternatives benefits from elaboration before turning to evaluation. We are not evaluating these alternatives at the outset, but we recognize that legal educators will invariably bring their normative judgments to bear on their choices from among these alternatives. Our goal is not to prejudge these choices but to provide a mode of analysis for schools that seek to engage in creative curricular design, while remaining true to the values and goals underlying experiential education. We hope that by bringing

structured guidance to this process, we can help legal educators to see more clearly and to think more creatively about developing the next generation of experiential education.

# **Appendix 1**

## **Experiential Opportunities in Law School Checklist for Identifying Structural Options**

### ***I. Why: The Goals (Articulate and Prioritize)***

- A. Consider Goals for the Learning Experience (e.g.):
  - 1. Developing lawyering skills
  - 2. Advancing social justice
  - 3. Cultivating professional identity
  - 4. Fostering professional ethics
  - 5. Providing competent client representation
  - 6. Gaining insight into law and the legal system
  - 7. Promoting lifelong learning
  - 8. Learning to work collaboratively
  
- B. Consider Goals from Different Perspectives
  - 1. Students
  - 2. Supervising Attorney
  - 3. Other Teacher, if any
  - 4. Institution
  - 5. Clients/Community
  
- C. Consider Goals for:
  - 1. Experiential component
  - 2. Group learning component (e.g. classroom)

### ***II. What: The Supervised Experiences and the Group Learning Component***

- A. Experiential Content
  - 1. Role played by the student (e.g. primary or a subsidiary attorney, mediator, judicial clerk, teacher, trainer, observer).
  - 2. Nature of the work— (e.g. judging, mediating, counseling, representing individuals or groups in adversarial proceedings, representing individuals or groups in non-adversarial contexts, representing individuals or groups in various kinds of transactions, or educating groups about the law and legal process)
  - 3. Tasks or Responsibilities Tied to the Nature of the Work (e.g., for representation: Interviewing/Counseling, Fact Investigation, Legal Research, Case/Project Planning, Negotiating, Drafting, Mediating, Contested case advocacy, Trial, Court or Administrative Agency)
  - 4. Source of the work (Cases for in-house clinic; placements for offsite work)

## B. Group Learning Content and Structure

1. Substantive choices (may include a mix of items below)
  - a. Skill Building (e.g. with methodologies such as simulations)
  - b. Develop interdisciplinary perspectives
  - c. Expose students to critical perspectives
  - d. Develop their students' cultural competence.
  - e. Focus on the foundational substantive and/or procedural law
  - f. Conduct case rounds.
  
2. Structural Questions
  - a. Pre- or co-requisite to the experiential component?
  - b. Length: brief or extensive?
  - c. Designed to bridge the gap between doctrine and practice?
  - d. Tutorial on specific issues implicated in the cases or problems of the experiential component?
  - e. Limited to those engaged in the experiential component?
  - f. No group learning component at all?

## III. Who: The Teachers and Learners

### A. Teachers

1. Who Has Responsibility for the Experiential Component? (e.g. full time experiential faculty member at the law school, full time non-experiential faculty member at the law school, part time faculty member, faculty member from another department or discipline of the university, non-faculty member, such as a practicing attorney or another professional)
2. Who Has Responsibility for Group Learning Component? (similar list as #1, and may be the same person or involve team teaching)
3. Who Coordinates the Experiential and Group Learning Components?
4. What, if any, design questions involving other potential teachers (e.g. Clients, opposing counsel, judges, witnesses, clinic staff, fellow students, community members)

### B. Learners (e.g.:

1. which students participate in the experiential component and which participate in the group learning component?
2. are the groups of students co-extensive? Is one group a subset?
3. all law students or also from other disciplines?

## IV. Where:

### A. Experiential Component

1. On Campus (e.g. on-site legal clinics)
2. Off Campus (e.g. judicial and executive chambers, prosecutor and defender offices, governmental agencies, legislatures, non-profit legal services, other legal advocacy offices, private law firms)
3. Far Away (e.g. cities and countries far distant from the law school)

B. Group Learning Component

1. at the law school
2. at an off campus location
3. in cyberspace, through computerized distance learning technologies

***V. When: Timing of Experiential Learning***

A. Experiential Component

1. during the academic year while the student is enrolled in other classes
2. during a term where the experiential component is the only course in which the student is enrolled
3. during the summer

B. Group Learning Component

1. In relation to Experiential Component: before, after, or at the same time
2. Frequency and Intensity: weekly or periodic classes or meetings, intensive “boot camp,” mandatory orientation, periodic workshops
3. Regularity: pre-set time block or with varied structure based on the experiences arising in the experiential component

***VI. How: Source of Content and Institutional Recognition of Experiential Learning***

A. How to generate the experiential learning content

1. For cases handled within the law school—finding cases: (e.g., self-referral of clients, appointment by the court, and referrals from agencies)
2. For external placements—matching students with placements: (e.g. placement lists, student initiative, requests for student workers from site supervisors)

B. How to provide recognition for student learning.

1. Academic credit or Extra-Curricular?
  - a. For Academic—graded or ungraded?
  - b. For Extra-Curricular—any form of recognition?
2. Voluntary or Mandatory?
  - a. The experience itself—clinic or pro bono
  - b. In satisfaction of broader requirement (e.g. skills)
3. Law School Role in Paid work
  - a. stipends, grants, awards

b. related group learning component?

**Appendix 2: Chart 2A: Overview - Why, What, Who, Where and How<sup>85</sup>**

**Designing Experiential Opportunities in Law School: Explicit or Implicit Design Decisions for the Law School**

Decisions Specific to Experiential Component	General Design Decisions	Decisions Specific to Group Learning Component <sup>86</sup>
May differ from group learning component	<p align="center"><b>Why?</b>  <i>Focus of Teaching/Learning Goals</i>  <i>Other Law School Goals</i>  <i>Other Student Goals</i></p>	May differ from experiential component
	<p align="center"><b>What?</b>  <i>&lt;--Type of work--&gt;</i>  <i>&lt;Substantive Law Focus--&gt;</i>  <i>&lt; Student Roles --&gt;</i>  <i>&lt; Student Task --&gt;</i>  <i>&lt;Teaching Methods--&gt;</i>  <i>&lt;Relationship to Law School Curriculum--&gt;</i></p>	<b>Extent of Component</b>
	<p align="center"><b>Who?</b>  <i>&lt;Teachers/Supervisors--&gt;</i>  <i>&lt;Students--&gt;</i></p>	
	<p align="center"><b>Where?</b>  <i>&lt;At law school or off-site--&gt;</i></p>	
	<p align="center"><b>When?</b>  <i>Timing re: . . . school year</i>  <i>. . .stage in students' learning</i></p>	<b>Timing re: experiential activity</b>
<b>Source of experiential content</b>	<p align="center"><b>How?</b>  <i>Immersion, Extended</i></p>	<b>In person v. remote learning</b>

<sup>85</sup> The left and right-hand columns provide an opportunity to expand on the many “why, what, who, how, where, and when” decisions that will play out differently for the experiential, and any “group learning,” components.

<sup>86</sup> We struggled with what to call this component. “Academic” seemed to suggest, wrongly, that the experiential component cannot also be academic. “Classroom” is under-inclusive because some of this work may take place in settings outside the conventional classroom. We settled on “group learning component,” but we do not mean to exclude from it methodologies like individual journals. We accept the term because typically individual methodologies, such as journals, are assigned to a group of learners.

**Appendix 2 (cont.)**  
**Chart 2B - Detail: Why, What, Who, Where and How**  
**Designing Experiential Opportunities in Law School**  
**Explicit and Implicit Design Decisions for the Law School**

<b>Decisions Specific to Experiential Component</b>	<b>General Design Decisions</b>	<b>Decisions Specific to Group Learning Component<sup>87</sup></b>
<p>May differ from group learning component</p>	<p style="text-align: center;"><b>Why?</b></p> <p><b>Focus of Learning Goals</b>            Substantive Law            Interdisciplinary knowledge            Professional formation            Reflection            Skills (including cultural competence and collaboration)            Social justice            Service to clients            Law reform</p> <p><b>Other Law School Goals</b>            Attract students            Compete in rankings</p> <p><b>Other Student Goals</b>            Variety            Networking/ job contacts</p>	<p>May differ from experiential component</p>
<p><b>Experiential Substantive Law Focus</b>            General Practice            Mix (&gt;1, but not wide open)            Specialized                e.g. Criminal                    Environmental,                    Tax</p> <p><b>Experiential Roles</b>            Client representation                Primary attorney                Secondary attorney                Educator/trainer                Mediator                Observer</p>	<p style="text-align: center;"><b>What?</b></p> <p style="text-align: center;"><b>Type of work</b>            Dispute resolution            Transactions            Legislation            Education</p> <p style="text-align: center;"><b>←Substantive Law Focus→</b></p> <p style="text-align: center;"><b>← Student Roles →</b></p>	<p><b>Extent of Group Learning Component, If Any</b>            Extensive to none</p> <p><b>Group Learning Component Substantive Law Focus, if any</b>            Note: may but need not correspond to experiential component</p> <p><b>Roles in Group Learning Component</b>            (co-extensive w/ teaching methods?)            Listener            Observer            Role-player            Critique-er</p>

<sup>87</sup> *Id.*

<p><b>Experiential Tasks</b>  Interviewing/Counseling  Fact Investigation  Legal Research  Case/Project Planning  Negotiating  Drafting  Mediating  Contested case advocacy  Trial  Court or admin hearing  Appellate  Legislative advocacy  Public education</p> <p><b>Experiential Teaching Methods – Note: this seems like “non-group” rather than “experiential”</b>  Roleplays/Moots  Student self-reflection (written or oral)  Feedback on performances  Discussion  Student performances  Systemic issues  Social Justice  Efficiency</p> <p><b>Relationship of Experiential Opportunity to Law School Curriculum</b>  Regularly offered for-credit “course”  Regularly offered for-credit component of doctrinal or skills course</p> <p>Assist with law prof pro bono activity on ad hoc basis  For credit</p> <p>As volunteer  Student organization activity</p>	<p style="text-align: center;"><b>← Student Task →</b></p> <p style="text-align: center;"><b>← Teaching Methods →</b></p> <p style="text-align: center;"><b>← Relationship to Law School Curriculum →</b></p>	<p>Discussant  Reflect-or</p> <p><b>Group Learning Tasks</b>  Read  Listen  Analyze  Practice a skill  Provide feedback  Perform a task, e.g. draw</p> <p><b>Group Learning Teaching Methods</b>  Simulation/Roleplays  Demonstrations  Readings  Discussion  Journals</p> <p><b>Relationship of Group Learning Component to Law School Curriculum</b>  Regularly offered experiential opp. course credits  Regularly offered for credits separately awarded/graded from experiential opportunity  Doctrinal or “skills” course with add’l enrollment beyond experiential students</p> <p>None  Seminar</p> <p>None  Prerequisite Workshop/CLE</p>
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For- credit Not for credit		Rounds
	<p><b>Who?</b>  <b>Teachers</b>  #  Individual v. multiple teachers  <i>Status</i>  Full-time, tenure-track  Full-time non-tenured  Part-Time  No official status  <i>Integration w/in Law School</i>  Full voting rts.  Partial voting rts.  No voting rts.  <b>Students</b></p>	
<p>At law school  “in-house clinic”  Student volunteer org  With law professor</p> <p>External law office/agency</p>	<p><b>Where?</b>  ←Law school→</p> <p>Offsite law office/agency</p>	
	<p><b>When?</b>  <i>Timing re: . . .</i>  <i>school year</i>  Academic year v. Summer</p> <p><i>stage in students' learning</i>  I, 2 or 3L's, LL.M's</p> <p>←<i>Timing of group instruction</i>  <i>component vis a vis experiential</i>→</p>	<p>Before  Concurrent</p>
<p>Source of experiential content  Self-referral by clients  Appointment by court  Referral from agencies  Placement lists  (external  placements)  Student initiative  Site supervisor requests</p>	<p><b>How?</b></p>	<p>In person v. remote learning  Optional v. mandatory</p>

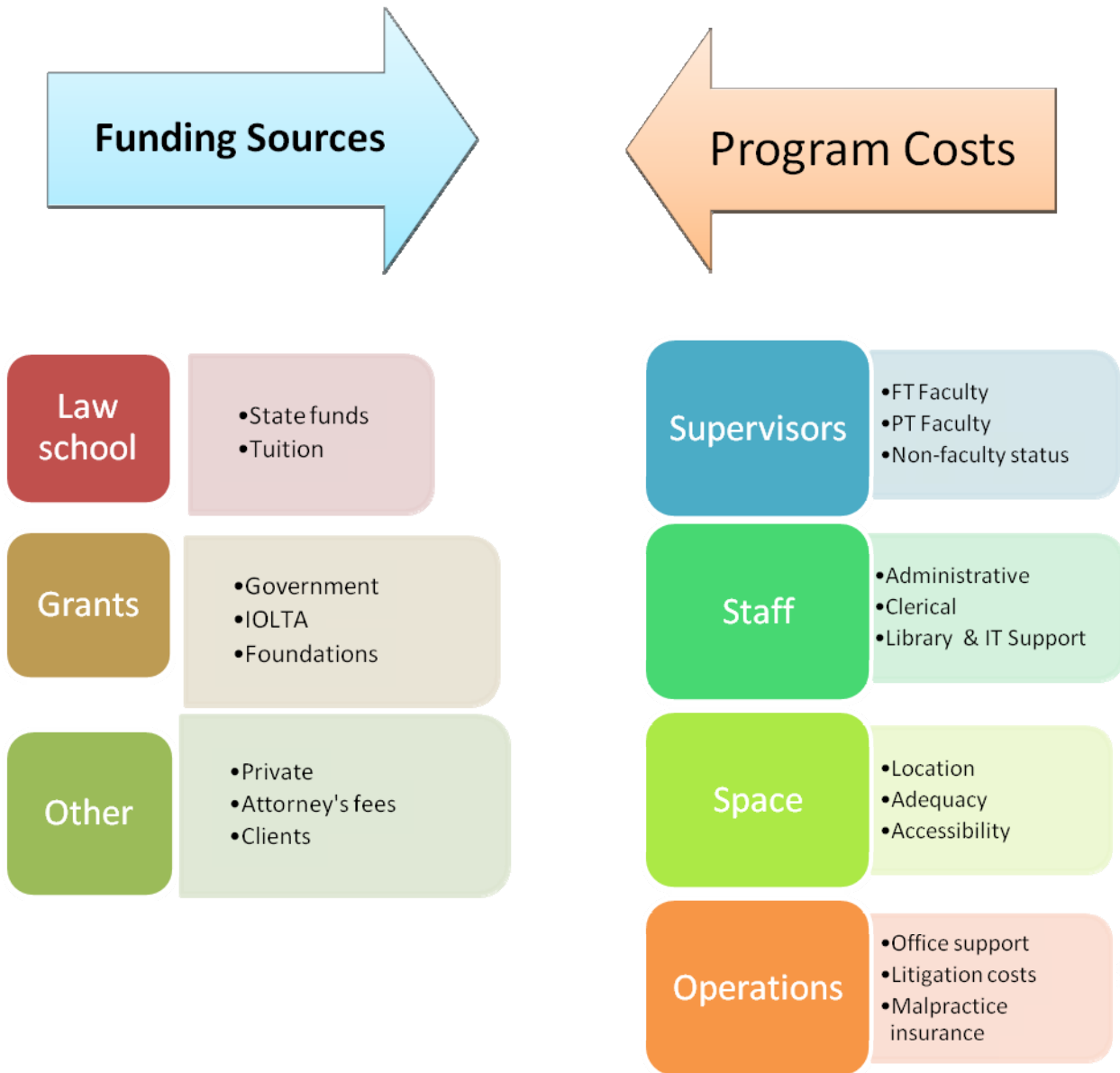
### Appendix 3

## Visual #2: Choosing Among Design Options

Resources

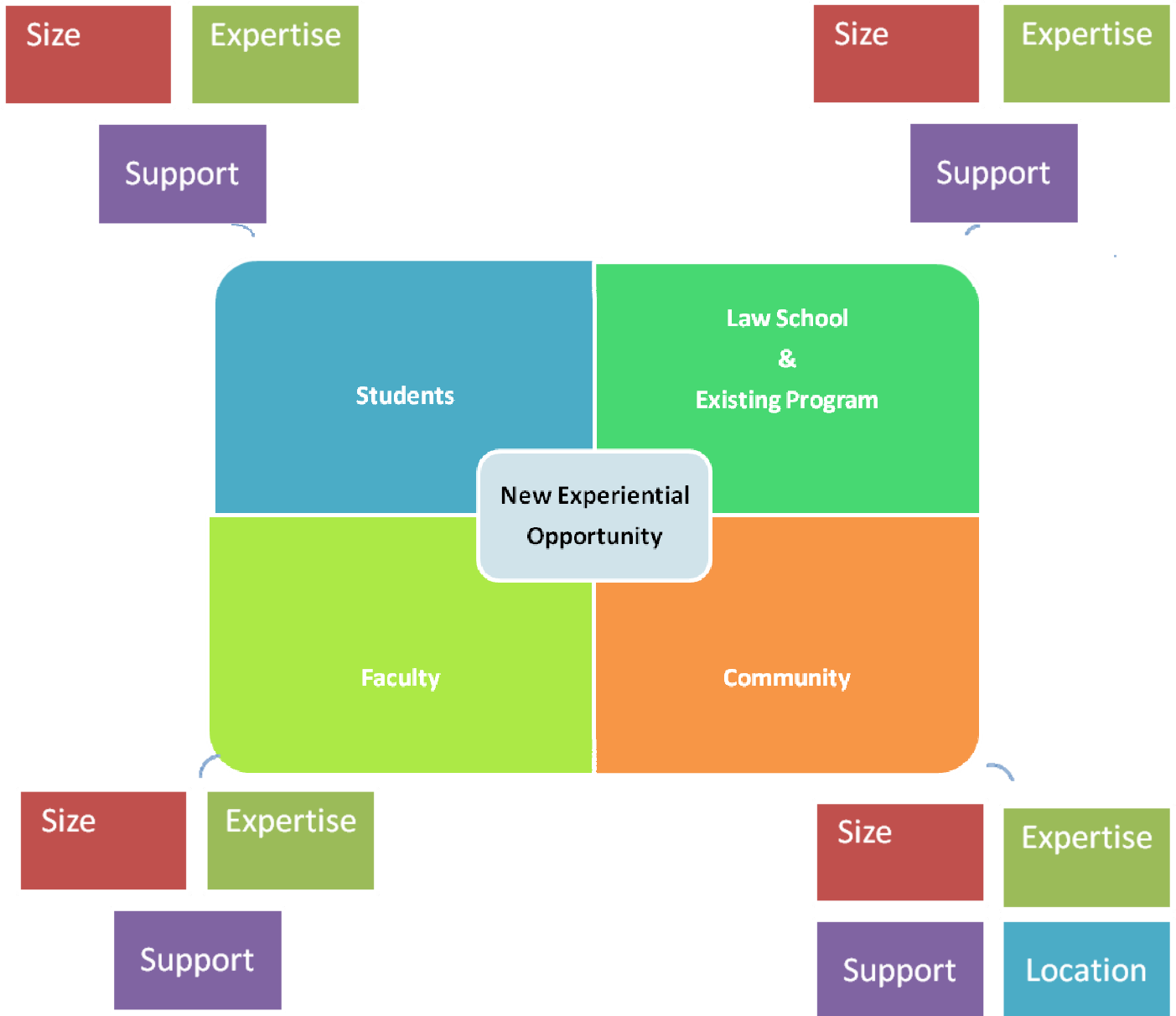
\$\$ Money \$\$

Part IV-B, pp. 20-21



### Visual #3: Choosing Among Design Options

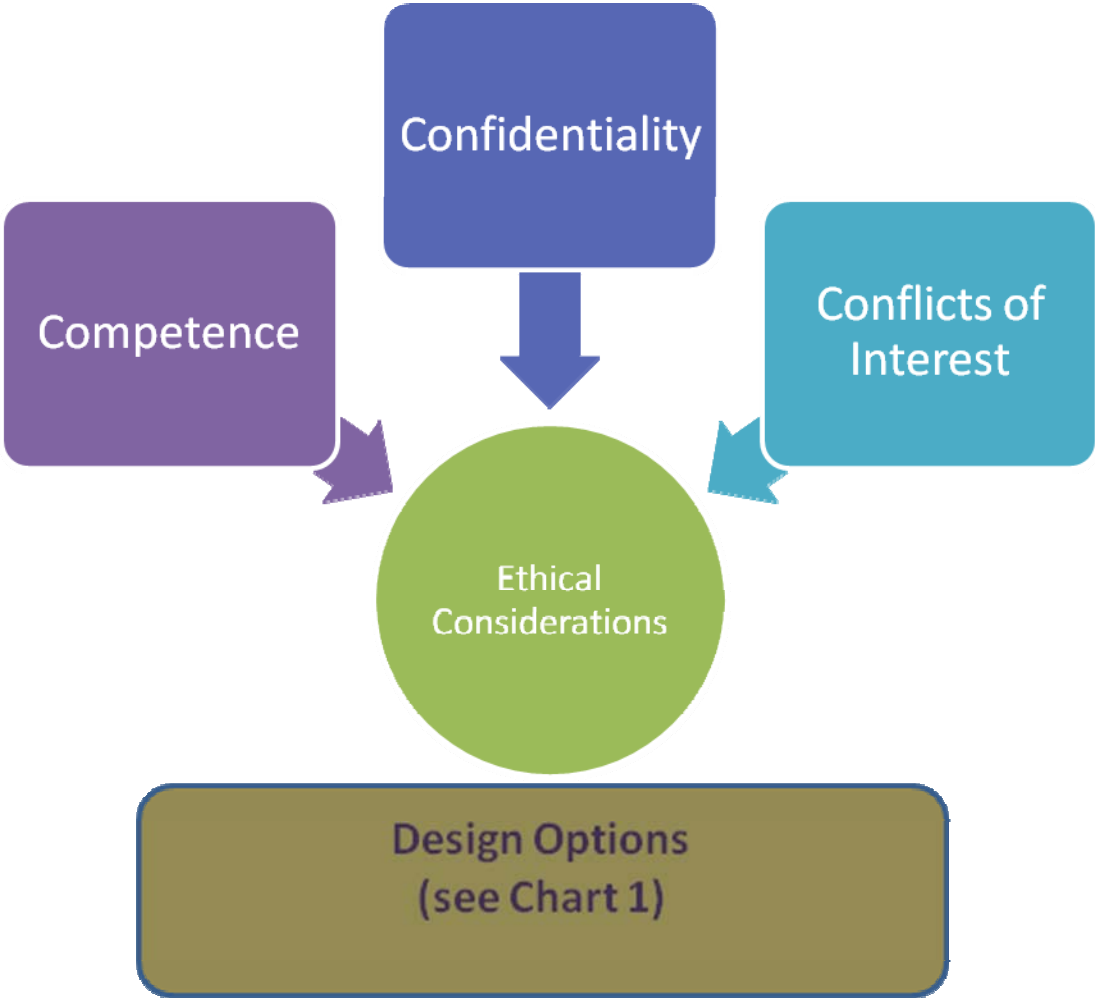
Resources  
Non-Monetary  
pp. 20-21



# Visual #4: Choosing Among Design Options

## Ethical Considerations

Part IV-C, pp. 23-25

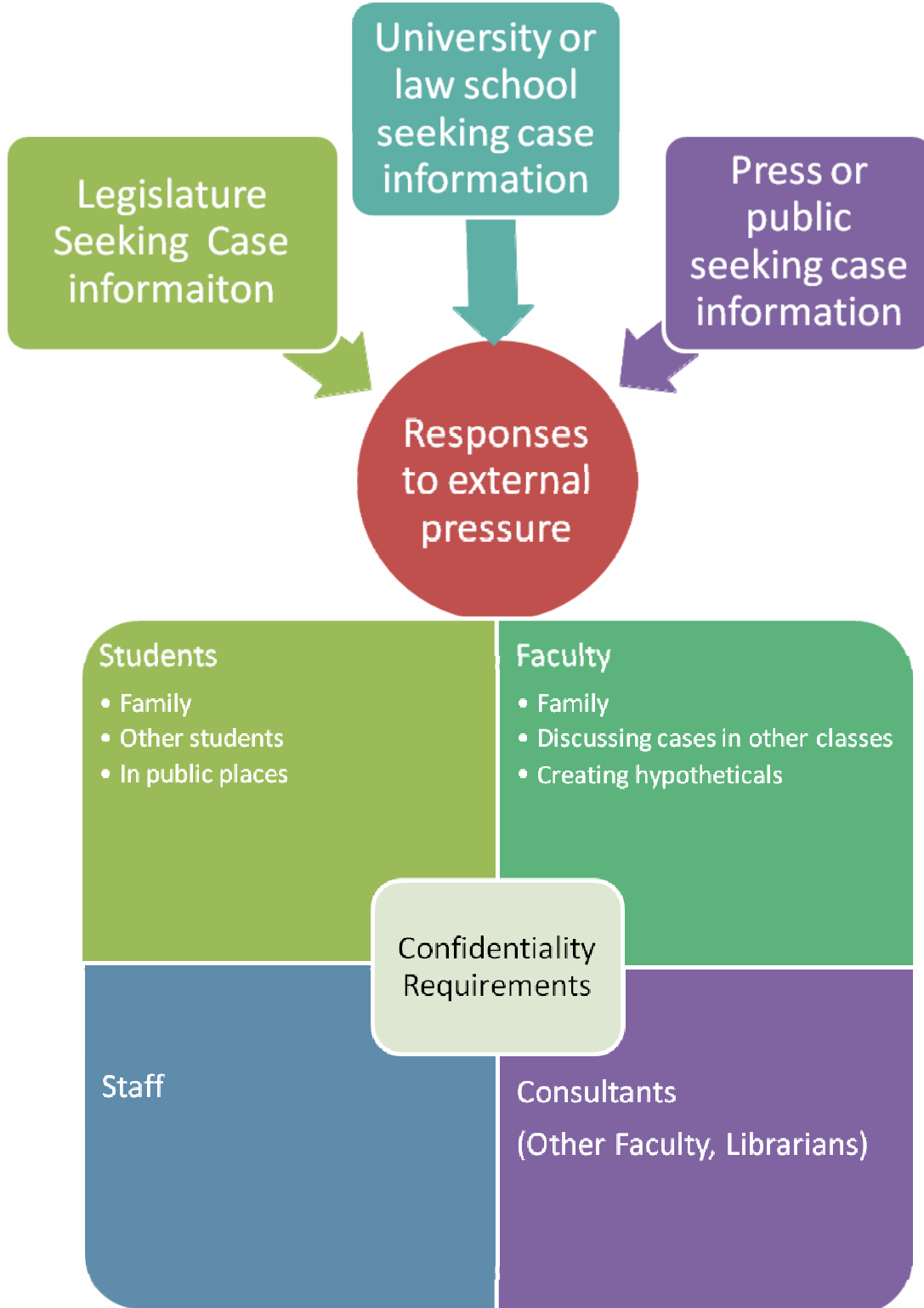


# Visual #5: Choosing Among Design Options

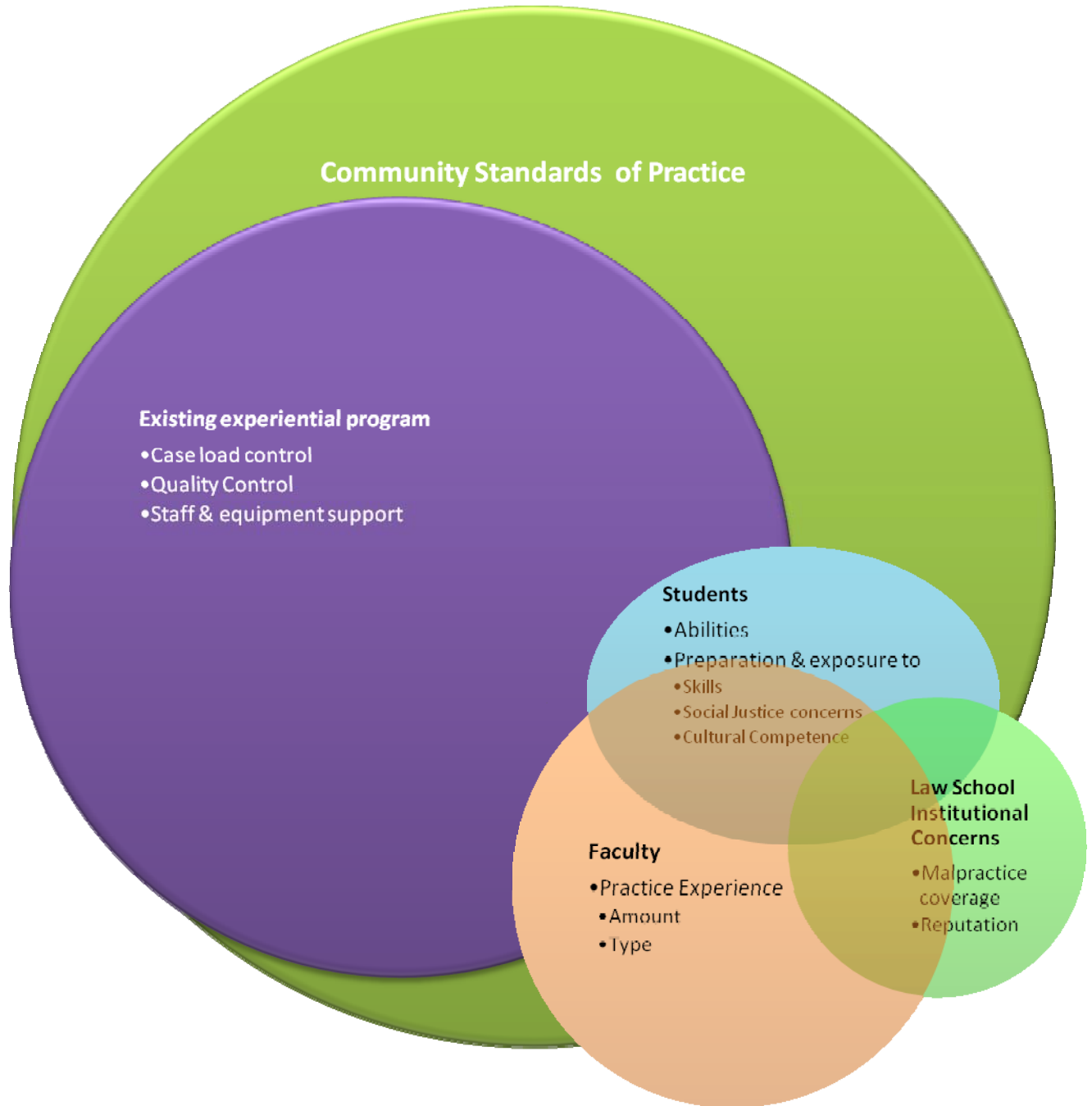
## Ethical Considerations

### Confidentiality

Part. IV-C - p. 23



**Visual #5: Choosing Among Design Options**  
**Ethical Considerations**  
**Competence**  
p. IV-C, pp. 22-23



## Visual #7: Choosing Among Design Options

### Ethical Considerations

### Conflicts of Interest

Part IV-C pp. 24-25

