The Need for Experiential Legal Research Education*

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With most legal research courses having experiential components, designating legal research courses as experiential would allow schools to increase offerings in legal research and to meet the ABA’s newly expanded experiential course requirement. When structured appropriately, legal research courses clearly meet the requirements laid out in the simulation category of experiential courses.

Introduction511

The Need for Research Courses Across the Curriculum.....513

 The Role of Research in an Attorney’s Work.....513

 The Standards.....515

 The Role of Research Courses in Legal Education518

Primary Characteristics of Experiential Education.....520

The ABA’s Experiential Course Requirements.....522

 The History.....522

 The Current Standards.....524

Research Courses Under the ABA’s Experiential Course Requirements527

 The Traditional Legal Research Course529

 The Flipped Classroom Legal Research Course.....530

 The Online Legal Research Course.....531

 The Specialized Legal Research Course532

Conclusion.....533

Introduction

¶1 The American Bar Association’s (ABA) experiential learning requirement is a direct response to the argument that, in the past few decades, new attorneys are beginning their professional lives without being “practice-ready.”¹ In 2007, the

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1. Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at SR10 (“[Law schools’] missions have become muddled, with a widening gap between their lofty claims about the profession’s civic responsibility and their failure to train lawyers for public service or provide them with sufficient preparation for practical work.”); Ashby Jones & Joseph Palazzolo, *What’s a First-Year Lawyer Worth?*, WALL ST. J., Oct. 17, 2011, at B1 (“[T]here is still a gulf between a newly minted lawyer and one who can provide value to a client.”); David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1 (“The fundamental issue is that law

Carnegie Report and Roy Stuckey's *Best Practices for Legal Education* became the most recent in a long list of publications arguing that a sound legal education requires more emphasis on the actual skills that students will perform as lawyers.² This skills deficit was compounded when law firms became less willing to undertake the cost of training lawyers in light of the 2008 recession.³ As such, the task of ensuring that graduates were ready to "act" like lawyers was delegated to law schools, which had traditionally focused on teaching students to "think" like lawyers.

¶2 One key skill that new attorneys must possess is how to conduct efficient research. Studies show that, on average, attorneys in their first two years of practice spend thirty-five percent of their time conducting legal research.⁴ Although the response to the call for more practice-ready attorneys has been heard and at least partially responded to with the development of the ABA's more robust experiential course requirement, legal research is rarely mentioned as one of the practice-ready skills that new associates must improve.⁵ This is despite the fact that law firms regularly cite their new attorneys' research skills as lacking.⁶

¶3 The development of the ABA's experiential learning requirement has many law schools working to determine which courses they currently have that fit the ABA's requirements for experiential courses, which preexisting courses they can modify to fit the requirements, and what new experiential courses can be developed to guarantee that there are enough seats in courses designated as experiential for every student to earn their six experiential course credits.⁷ Most, if not all, law schools already have courses classified as clinics and field placements (commonly referred to as externships) with clearly defined characteristics, but there is more room for interpretation in the third category: simulations.

schools are producing people who are not capable of being counselors."); see also Sarah Valentine, *Integrating Legal Research into the Law School Curriculum: Putting the Boulder Statements into Practice*, in *THE BOULDER STATEMENTS ON LEGAL RESEARCH EDUCATION* 1, 2 (Susan Nevelow Mart ed., 2014) ("In short, law schools teach students to think like lawyers but provide little education in what lawyers should be able to do and how they should think.").

2. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (Carnegie Report); ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

3. See Erwin Chemerinsky, Essay, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1, 1–13 (2011) (noting that law schools used to "adopt[] the mantra that they teach students to think like lawyers and leave practical training for after graduation"); see also Myra E. Berman, *Portals to Practice: A Multidimensional Approach to Integrating Experiential Education into the Traditional Law School Curriculum*, 1 J. EXPERIENTIAL LEARNING 157, 158 (2015) (mentioning "the reluctance and often the incapability of law firms to bear the cost of training new attorneys in basic lawyering skills"); Tierney Plumb, *A Law School-Run Law Firm*, NAT'L JURIST, Feb. 2012, at 22, 23 ("Many law firms are no longer willing to finance the training of entry-level attorneys . . .").

4. STEVEN A. LASTRES, *REBOOTING LEGAL RESEARCH IN A DIGITAL AGE* 3 (2013), https://www.lexisnexis.com/documents/pdf/20130806061418_large.pdf [<https://perma.cc/SH5Q-Z2D3>].

5. See Richard A. Leiter, *The Missing Lawyering Skill*, AALL SPECTRUM, July 2008, at 22.

6. ALL-SIS TASK FORCE ON IDENTIFYING SKILLS AND KNOWLEDGE FOR LEGAL PRACTICE, *A STUDY OF ATTORNEYS' LEGAL RESEARCH PRACTICES AND OPINIONS OF NEW ASSOCIATES' RESEARCH SKILLS* 76–94 (2013), <http://www.aallnet.org/gm-node/44887.aspx> [<https://perma.cc/3NWE-TZQF>] (sharing the study's findings of how good hiring attorneys considered new hires' research skills to be).

7. AM. BAR ASS'N, *ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS* 2015–2016, at 16 (2015) (Standard 303(a)(3)) [hereinafter ABA STANDARDS].

¶4 Stand-alone research courses,⁸ when designed with the experiential requirements in mind, seem a natural fit for simulation experiential courses.⁹ After all, experiential courses aim to have students practice the skills they will actually perform as lawyers. Given that new attorneys spend such a large portion of their time researching,¹⁰ it would make sense for law schools to develop experiential courses aimed at this critical task. Despite this, previous literature on possible experiential courses rarely mentions research courses at all; when an article does mention research in the context of experiential education, it is almost always in the context of combined legal research and writing courses, with the focus on how writing components can fit the experiential requirements.¹¹

¶5 This article presupposes that legal research courses have the opportunity to fill necessary experiential learning gaps in legal education. Paragraphs 6–20 question the current state of legal research within the curriculum, given the importance of legal research in the practice of law and the ABA’s prescribed standards for law schools to prepare students for practice. Paragraphs 21–27 describe the pedagogical benefits of experiential education, as tied to the law school curriculum. Paragraphs 28–42 provide a brief history of the legal community’s ongoing plea for greater emphasis on lawyering skills in legal education and outlines the current ABA standards regarding experiential learning. Paragraphs 43–65 analyze various legal research course structures and consider which course formats best fit the experiential course requirements set out by the ABA.

The Need for Research Courses Across the Curriculum

The Role of Research in an Attorney’s Work

¶6 Legal research instruction in the law school curriculum is vital because researching takes up a significant portion of an attorney’s workweek. Studies show that attorneys spend nearly one-third of their time conducting legal research, nearly fifteen hours each week on average.¹² This increases to around thirty-five percent

8. By “stand-alone research courses,” I mean those courses that focus solely on legal research. This excludes most first-year legal research and writing courses, in which many students do research projects based on hypotheticals with the intention of using the research to write a memo or brief or conduct an oral argument.

9. In fact, many legal research instructors have long taught with active learning techniques in mind, flipping their classrooms and focusing on teaching skills by requiring students to research problems similar to those they might conduct in practice.

10. LASTRES, *supra* note 4, at 3.

11. See, e.g., David I.C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 401, 424 (2015) (listing “a typical legal writing and research course” as a potential experiential learning course, but not including stand-alone research courses); see also Cynthia Batt, *A Practice Continuum: Integrating Experiential Education into the Curriculum*, 7 ELON L. REV. 119, 125 (2015). Batt’s article does explicitly state that it is problematic that Stuckey’s definition of experiential learning ignores legal writing and research courses. *Id.* (“More troubling . . . is the exclusion of legal writing and research courses from the experiential course mix, as students are generally writing and researching as simulated lawyers.”). In the discussion of experiential learning across the curriculum, however, Batt disregards research as the part of the course that makes it experiential. See *id.* at 128, 138.

12. LASTRES, *supra* note 4, at 1.

for those attorneys in their first two years of practice.¹³ The 2014 ABA Technology Report states that one-fifth of an attorney's billable hours are accounting for time she is engaged in legal research.¹⁴ Eighty-five percent of associates surveyed believe that their employers expect them to have strong legal research skills, but only twenty-nine percent of that number receive any formal training on how to do legal research,¹⁵ leaving it to law schools to prepare their recently hired associates.

¶7 Unfortunately, most law schools do not emphasize the need for strong legal research skills in their curriculums. In fact, nearly one-half of associates believe that legal research should be a larger portion of the law school curriculum.¹⁶ Moreover, around eighty percent of associates believe that more time should be devoted to at least one area of legal research.¹⁷ Categories like statutory research, administrative research, and public records are those that attorneys most frequently believe should have more time in the curriculum.¹⁸ According to practitioners, another area in which new associates struggle is conducting cost-effective research, particularly using online research databases other than Lexis Advance and Westlaw.¹⁹ Finally, the study notes that new associates also struggle with legislative history research and knowing when to stop researching.²⁰

¶8 Of particular note is the fact that "law students . . . assess their own readiness to practice law more positively than do attorneys who work with recent law school graduates."²¹ Seventy-one percent of third-year law students believe they have the research skills necessary to practice effectively, but only twenty-three percent of attorneys practicing at firms that hire recent graduates agree.²² Eighteen percent of attorneys named research as *the* most important skill a new lawyer should possess.²³

13. *Id.* at 3.

14. Joshua Poje, *Legal Research*, ABA TECHREPORT 2014, <http://www.americanbar.org/publications/techreport/2014/legal-research.html> [<https://perma.cc/CVR2-8FX7>].

15. LASTRES, *supra* note 4, at 2; *see also* Jacob Gershman, *The Ideal Law School Graduate? A "People Person" Who Can Do Research*, WALL ST. J. L. BLOG (Nov. 25, 2013, 1:19 PM), <http://blogs.wsj.com/law/2013/11/25/the-ideal-law-school-graduate-a-people-person-who-can-do-research> ("Employers, particularly those with more years in practice, rely on new attorneys to be research experts. The employers in our focus groups have high expectations when it comes to new hires' research skills . . .").

16. LASTRES, *supra* note 4, at 6.

17. *Id.*

18. *Id.*; *see also* ALL-SIS TASK FORCE ON IDENTIFYING SKILLS AND KNOWLEDGE FOR LEGAL PRACTICE, A REPORT OF THE QUALITATIVE RESPONSES FROM THE SURVEY OF PRACTITIONERS ON THE LEGAL RESEARCH PRACTICES AND OPINIONS OF NEW ASSOCIATES' RESEARCH SKILLS 8 (2015), <http://www.aallnet.org/gm-node/50594.aspx> [<https://perma.cc/ZXM2-WHRM>].

19. ALL-SIS TASK FORCE ON IDENTIFYING SKILLS AND KNOWLEDGE FOR LEGAL PRACTICE, *supra* note 6, at 88, 91.

20. *Id.* at 85, 93.

21. BARBRI, STATE OF THE LEGAL FIELD SURVEY: INSIGHTS FROM BARBRI'S FIRST ANNUAL SURVEY OF LAW STUDENTS, LAW SCHOOL FACULTY AND ATTORNEYS 4 (2015), http://www.thebarbrigroup.com/files/white-papers/220173_bar_research-summary_1502_v09.pdf [<https://perma.cc/5DPG-VC7Y>].

22. *Id.* at 6.

23. *Id.* at 5.

The Standards

¶9 According to ABA Standard 301(a), the objective of a legal education program is to “prepare[] its students, upon graduation . . . for effective, ethical, and responsible participation as members of the legal profession.”²⁴ It is difficult to imagine that an attorney could be an effective member of the legal profession without competent research skills.²⁵ Indeed, Standard 302 requires law schools to establish learning outcomes that include competency in at least four areas, which are discussed next. Each of these competencies should require students to gain strong research skills.²⁶

¶10 The first required competency is “[k]nowledge and understanding of substantive and procedural law.”²⁷ To understand substantive and procedural law, a lawyer must first be able to locate it.²⁸ The ever-changing nature of the law guarantees that no lawyer is ever going to memorize “the law” in its entirety, even in his specialty area; the law is too vast and changes too rapidly. A concrete understanding of the sources of law—how they are published, what each contains, and how they relate to one another (hierarchy of authority)—is a prerequisite to begin locating and understanding the value of substantive and procedural law. As such, one crucial step in ensuring that graduates will have “[k]nowledge and understanding” of the law is that they have the research skills to help them locate the substantive and procedural law that relates to the legal issues on which they are working.

¶11 Standard 302’s second competency is “[l]egal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context.”²⁹ Analysis and reasoning of an issue, as well as problem solving, begin before an attorney even starts searching for legal authority; research planning forces the lawyer to analyze the issue in terms of jurisdiction, the best resource in which to start researching, what steps to take in the research process, and more.³⁰ The

24. ABA STANDARDS, *supra* note 7, at 15.

25. Brooke J. Bowman, *Researching Across the Curriculum: The Road Must Continue Beyond the First Year*, 61 OKLA. L. REV. 503, 543 (2009) (“[I]f students fail to take legal research . . . , they face enormous consequences should they decide to use their law degree.”).

26. ABA STANDARDS, *supra* note 7, at 15; *see also* David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 78 (1979) (“[Legal research] supports and is integrally linked with many of the other skills and goals of legal education.”); Matthew C. Cordon, *Beyond Mere Competency: Advanced Legal Research in a Practice-Oriented Curriculum*, 55 BAYLOR L. REV. 1, 15 (2003) (“The necessity of conducting research pervades a number of other skills areas in the *MacCrate Report*, not merely the problem-solving component.”).

27. ABA STANDARDS, *supra* note 7, at 15 (Standard 302(a)).

28. *See* Kurt M. Saunders, *Thinking About Research; Researching About Thinking*, in EXPERT VIEWS ON IMPROVING THE QUALITY OF LEGAL RESEARCH EDUCATION IN THE UNITED STATES 85, 88 (1992) (“[Legal] research must draw upon an accumulated knowledge base of legal terminology, principles, relationships, and modes of analysis and then use this knowledge to access authority and answers”); Valentine, *supra* note 1, at 6 (“[L]egal research is what connects the legal professional to the required knowledge and the way research is done profoundly affects how one understands the substantive law.”).

29. ABA STANDARDS, *supra* note 7, at 15 (Standard 302(b)).

30. *See* CATHY GLASER ET AL., *THE LAWYER’S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 242 (2002) (“[R]esearch and analysis are intertwined, because while it is true that you cannot analyze an issue unless you know the applicable law, it is also true that you cannot know—or, at least appreciate the significance of—the applicable law until you know the issue.”); Steven M. Barkan, *Should Legal Research Be Included on the Bar Exam? An Exploration of the Question*,

analytical problem-solving process continues as the researcher begins reading legal authority to determine whether the sources found are “on point.”³¹ Finally, without accurate research, an attorney cannot move on to either written or oral advocacy; the attorney’s arguments depend on her interpretation of the legal authorities discovered during the research process.³² As authors of a legal research textbook note, “legal writing is meaningless unless its content is accurate.”³³

¶12 The standard’s third competency is “[e]xercise of professional and ethical responsibilities to clients and the legal system.”³⁴ Legal research courses are an excellent avenue for teaching students their ethical responsibilities as lawyers.³⁵ The failure of an attorney to research not only harms his reputation but violates his profession’s ethical standards.³⁶ Rules 1.1 and 3.1 of the Model Rules of Professional Conduct are both grounded in the idea that an attorney must provide satisfactory legal research.³⁷ After all, “competent representation” of a client cannot be acquired without satisfactory legal research.³⁸ Likewise, Rule 3.1 requires attorneys to provide a legal and factual basis for lawsuits they bring, which again requires adequate research.³⁹ The need for quality legal research becomes even more apparent under Model Rule 3.3(a)(2), which prohibits lawyers from “knowingly . . . fail[ing] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”⁴⁰

99 LAW LIBR. J. 403, 403, 2007 LAW LIBR. J. 23, ¶ 1 (“Because law is an information profession, the ability to find both the law and accurate information about the law is crucial to legal problem solving and decision making, and to a lawyer’s ability to function competently.”); Theodore A. Potter, *A New Twist on an Old Plot: Legal Research Is a Strategy, Not a Format*, 92 LAW LIBR. J. 287, 288, 2000 LAW LIBR. J. 25, ¶ 5 (“Conducting efficient legal research requires the researcher to assess the nature of the problem and the time and resources available to conduct the research.”); Lucia Ann Silecchia, *Designing and Teaching Advanced Legal Research and Writing Courses*, 33 DUQ. L. REV. 203, 204 (1995) (“While, undoubtedly, analytical ability is also of paramount importance, knowing how to locate the correct law to analyze . . . [is a] prerequisite[] for functioning as an effective attorney.”).

31. See Bowman, *supra* note 25, at 516 (“With each research project, the attorney must develop and implement an appropriately designed, effective, coherent research plan—from determining the issues and identifying search terms, to developing an alternative plan if the first research plan proves ineffective.”).

32. *Id.* at 513 (“Legal research is so integral to . . . the communication of arguments, written and oral, that it is difficult to separate research from other skills . . .”).

33. STEVEN BARKAN ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 14 (9th ed. 2009).

34. ABA STANDARDS, *supra* note 7, at 15 (Standard 302(c)).

35. Valentine, *supra* note 1, at 15.

36. See Carol M. Bast & Susan W. Harrell, *Ethical Obligations: Performing Adequate Legal Research and Legal Writing*, 29 NOVA L. REV. 49 (2004) (summarizing all the ethical and professional rules related to legal research with which an attorney must comply).

37. See MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.3 (2013).

38. *Id.* R. 1.1; see also *Smith v. Lewis*, 530 P.2d 589 (Cal. 1975).

39. MODEL RULES OF PROF’L CONDUCT R. 3.1. In *Carlino v. Gloucester City High School*, the court found that “a flagrant failure to conduct any legal research” was a violation under Rule 11(b) of the Federal Rules of Civil Procedure, which has language nearly parallel to that found in Rule 3.1 of the Model Rules of Professional Conduct. No. 00-5262, 2002 WL 1877011 (3d Cir. Aug. 14, 2002).

40. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2); see also *Nachbaur v. Am. Transit Ins. Co.*, 752 N.Y.S.2d 605 (N.Y. App. Div. 2002).

¶13 Beyond the Model Rules' requirements, as one author notes, "[t]houghtfully prepared exercises can help prepare students for working with a diverse client population and strengthen the connection between what the students are studying and the humane purposes of a legal education."⁴¹ Legal research courses force students to think about their professional and ethical responsibilities for efficient research on behalf of their clients, so as not to waste time and rack up large bills.⁴² They must learn to balance their research between free resources in print and online and more costly commercial databases; this requires them to think client-centrally.⁴³

¶14 Finally, law schools must establish learning outcomes for competency in "[o]ther professional skills needed for competent and ethical participation as a member of the legal profession."⁴⁴ Interpretation 302-1 of the ABA standards lists the following as other professional skills that law schools may determine are needed to be "competent and ethical" participants in the legal profession: "interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation."⁴⁵ Again, many of these skills necessitate an ability to conduct efficient legal research. To counsel and negotiate effectively, an attorney must understand substantive and procedural law, which she finds through effective research. Fact development is also the result of efficient research. Trial practice and document drafting both rely heavily on competent legal research, as new lawyers may need to rely on locating model or sample forms when completing a lawyering task for the first time in practice. Organization and management of legal work are tied to legal research; one area in which many law students struggle is staying organized as they research.⁴⁶ Finally, self-evaluation is a critical part of the research process—as students practice and fail or succeed, they evaluate and internalize what to do differently or similarly next time.⁴⁷ The mantra of many legal research instructors is that "you only get better with practice!"

¶15 Legal research's strong ties to each of Standard 302's required learning outcomes make clear that students cannot become effective, ethical, or responsible members of the legal profession without access to significant research instruction throughout their legal education. Moreover, the new standards were adopted under the premise that law schools must engage in "institutional self-examination and planning [to] constantly improve the quality of education and professional preparedness of [their graduates]."⁴⁸ As such, law schools will not be able to meet the

41. Valentine, *supra* note 1, at 15.

42. See Deborah K. Hackerson, *Access to Justice Starts in the Library: The Importance of Competent Research Skills and Free/Low-Cost Research Resources*, 62 ME. L. REV. 473, 474 (2010).

43. *Id.*

44. ABA STANDARDS, *supra* note 7, at 15 (Standard 302(d)).

45. *Id.* at 16.

46. See Poje, *supra* note 14.

47. See Kristin B. Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning Through Learner-Centered Assessment*, 94 LAW LIBR. J. 59, 65, 2002 LAW LIBR. J. 4, ¶ 24 ("To complete the learning process, students must assess their learning and receive feedback about their performance.").

48. Donald J. Polden, Am. Bar Ass'n Standards Review Comm., *Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education* 2 (May 6, 2009), <http://>

learning outcomes they are required by Standard 302 to set out without substantial changes with regard to legal research's role in the existing curriculum.

The Role of Research Courses in Legal Education

¶16 Despite the well-recognized need for legal research education,⁴⁹ legal research courses remain the “stepchild in legal education.”⁵⁰ Any required legal research instruction is offered almost exclusively in the first year;⁵¹ rarely is there any mandated assessment of students' research skills between the first-year legal skills course and the students' graduating and stepping out into the world of practicing law.⁵² Legal research is rarely discussed or called on to be put into practice during other law school courses, despite being a critical skill.⁵³ This goes against what pedagogical theory tells educators about how students learn: repetition is the key to embedding skills into a learner's memory.⁵⁴

¶17 Most students can continue experiencing practice-focused legal research education only by taking elective research courses, participating in clinics, or securing externships.⁵⁵ Unfortunately, there are barriers for each of these. Because legal research courses are devalued by the administrations and doctrinal faculty at many law schools, students themselves devalue them.⁵⁶ While law librarians continue to sound the battle cry that legal research courses are of vital importance, their call falls on deaf ears, as many students believe the more necessary classes for them to take are those that will appear on the bar exam or that are related to the areas in which they hope to practice. What many students do not seem to realize is that legal research will be critical to their practice of law in whichever area they choose. While students could practice their research skills in clinics or externships, those classes are not available to everyone, as there may not be enough clinic seats at most

www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/principles_and_goals_accreditation_5_6_09.pdf [https://perma.cc/K7EV-AECA].

49. See *supra* ¶¶ 6–8 (describing the importance of strong research skills in practice).

50. Robert C. Berring, *A Sort of Response: Brutal Non-Choice*, 4 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 81, 81 (1996).

51. Some schools do have legal skills programs that extend into the third or fourth semester of law school. See, e.g., *Legal Practice Program*, WILLIAM & MARY LAW SCH., <http://law.wm.edu/academics/programs/jd/requirements/Legal%20Practice/index.php> [https://perma.cc/FDY6-K84Z].

52. Thomas A. Woxland, *Why Can't Johnny Research? Or It All Started with Christopher Columbus Langell*, 81 LAW LIBR. J. 451, 455 (1989) (“[T]he research skills—such as they are—of the vast majority of students (except those who participate in such extracurricular activities as the law review or moot court) are left to atrophy until the new lawyers begin professional practice.”).

53. See Bowman, *supra* note 25, at 505.

54. See, e.g., Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 433 (2002) (“[W]e enhance learning by requiring the learner to work with the material in more than one way. This facilitates *multiple encoding*. . . . If we help the learner place new information in many different settings, the students will develop a contextual breadth to that learning.”); Gerdy, *supra* note 47, at 64, ¶ 22 (“Using their new legal research skills to solve a hypothetical problem is the best way for students to complete the learning cycle and to solidify the new knowledge in their minds.”).

55. Students may be exposed to scholarly research in seminar courses or by participation on a journal.

56. See Potter, *supra* note 30, at 290–91, ¶ 11 (“Factor in the low esteem legal research has in relation to other law school courses and you have a pretty compelling explanation for why students are not interested in spending a great deal of time in the library.”); Valentine, *supra* note 1, at 9 (“[W]hile most of those who teach legal research recognize its importance, the legal academy has rarely done so.”).

law schools for all students to participate and not all students' schedules allow them to fit in a clinic or an externship. The work that students do in clinics and externships also depends on what is assigned to them; not all clinic and externship experiences allow for a great deal of research practice. Finally, despite being a huge portion of an attorney's job and being called for by some in the legal community, legal research is rarely tested on state bar exams.⁵⁷

¶18 In addition to the dearth of opportunities for students beyond the first year, the instruction they receive in the first year is usually insufficient. In first-year legal skills courses, students must split their focus between research, writing, oral advocacy, and other lawyering skills, while still grappling with how to analyze legal issues.⁵⁸ Unfortunately, these classes often focus squarely on legal writing and legal analysis components,⁵⁹ which often means that the research problems students do encounter are purposely kept simple.⁶⁰ Easily maneuvered research problems do not force students to interact with the challenging materials necessary to fully grasp the research process,⁶¹ and often give them the false sense that research in general is simple and is not something they need to spend more time practicing. They also will not know how to research the complex legal issues that they will encounter during their summer clerkships or out in practice.⁶²

¶19 This is not to say that all first-year skills instructors do not recognize the importance of legal research instruction; rather, it is difficult in a packed syllabus to find enough time to devote to both research and writing.⁶³ Despite the "transfer of knowledge requir[ing] the teacher to be an expert in the field," too often first-year skills instructors are current or former practitioners, who are not experts on legal research.⁶⁴ In those rare situations where there is equal time allotted to both research and writing, students themselves often devalue the research instruction, not recognizing the importance of those skills until after their first summer clerk-

57. See *Preparing for the MPT*, NAT'L CONF. OF BAR EXAMINERS, <http://www.ncbex.org/exams/mpt/preparing> [<https://perma.cc/66L4-3SKK>].

58. Caroline L. Osborne, *The State of Legal Research Education: A Survey of First-Year Legal Research Programs, or "Why Johnny and Jane Cannot Research,"* 108 LAW LIBR. J. 403, 409, 2016 LAW LIBR. J. 20, ¶ 17.

59. See, e.g., Ann Hemmens, *Advanced Legal Research Courses: A Survey of ABA-Accredited Law Schools*, 94 LAW LIBR. J. 209, 213, 2002 LAW LIBR. J. 17, ¶ 7 ("Some scholars argue that the increased focus on the writing skills portion of the required first-year legal research and writing course has resulted in a decreased focus and coverage of research skills."); Roy M. Mersky, *Legal Research Versus Legal Writing Within the Law School Curriculum*, 99 LAW LIBR. J. 395, 399, 2007 LAW LIBR. J. 22, ¶ 18 (noting that focusing on legal writing in first-year courses "come[s] at the cost of legal research instruction").

60. Valentine, *supra* note 1, at 13.

61. *Id.*

62. Gerdy, *supra* note 47, at 66, ¶ 29.

63. Robin K. Mills, *Legal Research Instruction in Law Schools, The State of the Art or, Why Law School Graduates Do Not Know How to Find the Law*, 70 LAW LIBR. J. 343, 346 (1977); Terry Jean Seligmann, *Beyond "Bingo!": Educating Legal Researchers as Problem Solvers*, 26 WM. MITCHELL L. REV. 179, 181 (2000).

64. Valentine, *supra* note 1, at 9.

[T]eaching writing and teaching research require different expertise and different approaches. If legal education is to truly create the expert-apprentice relationship that allows students to develop into a legal professional, then legal research must not just be included in that equation, it must be taught by those that are experts.

ships and often trying to rush through the research so they can start writing the legal documents on which the majority of their grade depends.⁶⁵

¶20 Unless and until law school administrators and faculty join law librarians in advocating for the importance of strong legal research skills and their vital role in meeting all the learning outcomes prescribed by the ABA, this is unlikely to change. The newly revised requirements for more experiential education, however, could very well signal that it is time to start arguing for legal research to have a more valued place in the curriculum.

Primary Characteristics of Experiential Education

¶21 Legal research education is generally experiential in nature. Experiential education allows students to “make the transition from student to lawyer,” as they think client-centrally to solve legal problems.⁶⁶ As other authors note, “experiential learning” and “experiential education” are related but different terms.⁶⁷ Experiential learning can happen anywhere and has no structure, while experiential education has specific learning objectives for the students.⁶⁸ In *Best Practices*, experiential education is defined as “integrat[ing] theory and practice by combining academic inquiry with actual experience.”⁶⁹

¶22 From this definition, the most essential attribute of experiential education is evident: experiential education centers around active learning. The primary characteristics of active learning are that (1) students’ classroom experiences involve more than simply listening to the instructor; (2) the emphases are on skill acquisition and higher-level thinking; and (3) students engage directly in activities.⁷⁰ There are many benefits to active learning, especially when tied with client simulations. First, studies in cognitive science show that students retain what they are learning better with active learning than when passively sitting and listening to a lecture.⁷¹ Completing an activity that requires the student to think actively about the material cements the learning so that students can recall it better next time they are asked to perform the task.⁷²

¶23 Second, active learning tied to a client simulation demonstrates the relevancy of what the students are learning because it involves a real-world context.⁷³ Taking on the role of lawyer in these simulations gives students buy-in for what

65. Bowman, *supra* note 25, at 552 & n.262.

66. James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423, 434 (2013).

67. See, e.g., Batt, *supra* note 11, at 128.

68. *Id.*

69. STUCKEY ET AL., *supra* note 2, at 165.

70. Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 401 (1999).

71. See *id.* at 402.

72. *Id.* (“The more frequently students work with content and ideas in new situations, the more likely they will retain their understanding and be able to apply it on exams and in real life.”).

73. Ferber, *supra* note 54, at 431; see also Valentine, *supra* note 1, at 3 (“[L]egal education must teach skills and behaviors in context, allowing students to actively engage . . .”).

they are doing.⁷⁴ They can see themselves needing to perform the task in their chosen profession, which motivates them to engage fully in their learning.⁷⁵ They can envision themselves needing to conduct that task as members of their chosen profession, and their impetus to master it increases as they take charge of their own learning.⁷⁶

¶24 Finally, active learning in law school is refreshing. Since lecture-based learning remains the norm in most classes, the change in class structure stimulates students simply because it is different.⁷⁷ It wakes students up. Millennial law students desire interactive learning experiences and hands-on learning.⁷⁸ They respond best to lessons that entertain or invigorate them.⁷⁹ Additionally, students may feel compelled to work harder because experiential education usually involves the instructor monitoring the student's progress more closely than a lecture-based class.⁸⁰ Students transition from "learning for no more reason than acquiring knowledge" to engaging in the problem-solving tasks of an attorney.⁸¹

¶25 The second essential attribute of experiential education, which stands out in comparison to most of a law student's legal education, is the opportunity that the structure provides for feedback and reflection from an instructor.⁸² Studies show the importance of formative assessment, which targets increasing students' learning, as opposed to summative assessment, which aims at evaluating students' achievement.⁸³ Formative feedback allows students to put what they have learned into practice in a guided atmosphere, where they can comfortably make mistakes and be corrected, at a point in the semester when they still have an opportunity to improve based on the feedback they receive.⁸⁴ The supervision allows for the instructor to help students tie the skills they are practicing back to the theories the students have learned, using their new experiences as the basis for reflection.⁸⁵

¶26 The goal of experiential learning is to help students gain the practice-ready skills that they will use when they become legal professionals. This overarching goal, then, encompasses many smaller goals, including

74. Thomson, *supra* note 11, at 420 ("[Experiential learning] has at its core the placement of students *in the role of attorneys*").

75. Ferber, *supra* note 54, at 430–31.

76. See Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N. UNIV. L. REV. 235 (2015).

77. Ferber, *supra* note 54, at 433 ("[W]e enhance student learning by presenting important material to the learner in a distinctive way, a unique context. This facilitates *distinctive encoding*").

78. Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. 1, 10–11 (2013).

79. *Id.*

80. For example, see the ABA's requirement that simulations and clinics must include "direct supervision of the student's performance by a faculty member." ABA STANDARDS, *supra* note 7, at 17 (Standard 304(a)(i) & (b)(i)).

81. Moliterno, *supra* note 66, at 434.

82. Batt, *supra* note 11, at 127.

83. GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 72–73 (2000); MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 136–37 (2009); Bloom, *supra* note 76, at 227, 232–33.

84. MUNRO, *supra* note 83, at 72–73.

85. Hess, *supra* note 70, at 403.

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.⁸⁶

¶27 Experiential learning allows law students to begin forming their professional identities.⁸⁷

The ABA's Experiential Course Requirements

The History

¶28 For decades, the ABA has recognized the need for students to gain more practice-ready skills. In 1979, the ABA Task Force on Lawyer Competency released its report and recommendation for more lawyering skills education, commonly referred to as the Cramton Report.⁸⁸ It recommends that law schools “provide instruction in those fundamental skills critical to lawyer competence.”⁸⁹ The report identified the ability to analyze legal problems and do legal research as one such critical skill.⁹⁰ Many of the other “certain fundamental skills” listed depend greatly on an attorney’s ability to conduct legal research.⁹¹ Interestingly, in the section entitled “A Better Job of Developing Fundamental Skills,” research ceases to be mentioned, as the report focuses on legal writing and notes that “[i]n most law schools, the fundamental skill dimensions of fact gathering, oral communication, interviewing, counseling, negotiation, and organization and management of legal work receive even less systematic attention than legal writing.”⁹² It is as though the authors assume that if greater attention is given to all the above areas, competency in legal research will follow as a matter of course.

¶29 A few years later, the ABA Task Force on Professional Competence reiterated many of the same concerns as the Cramton Report, noting that “[t]he problems and issues in American legal education involve chiefly the teaching of . . . skills.”⁹³ This report agrees with the earlier recommendations regarding skills education, but does not list researching as one of the “fundamental skills of a lawyer.”⁹⁴ Later, however, the report does include “[e]ffective legal research” as a “crucial

86. Deborah Maranville et al., *Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517, 527 (2011–2012).

87. Thomson, *supra* note 11, at 420.

88. AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

89. *Id.* at 3.

90. *Id.*

91. *Id.* at 9. Those fundamental skills that depend greatly on or are related to the ability to research effectively include analyzing legal problems, collecting and sorting facts, writing effectively, communicating orally, undertaking counseling and negotiations, and organizing and managing legal work. *Id.* at 9–10.

92. *Id.* at 15.

93. AM. BAR ASS’N, FINAL REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON PROFESSIONAL COMPETENCE 6 (1983).

94. *Id.* at 11–12.

ingredient[] of the law school curriculum.”⁹⁵ Like the Cramton Report, this report does little to put a concrete plan into place for increasing skills education in law schools.⁹⁶

¶30 The 1992 MacCrate Report, however, gives a more explicit list of which skills students need to acquire during law school.⁹⁷ Legal research is the third skill listed, and the report outlines precisely what a lawyer must know to “identify legal issues and research them thoroughly and efficiently”: (1) “Knowledge of the Nature of Legal Rules and Institutions,” (2) “Knowledge of and Ability to Use the Most Fundamental Tools of Legal Research,” and (3) “Understanding of the Process of Devising and Implementing a Coherent and Effective Research Design.”⁹⁸ The report breaks these knowledge bases down into concrete skills and values that a lawyer must know to conduct efficient research.⁹⁹ While it takes great steps in describing those specific research skills needed, the report seems to assume that legal research is being taught to students fairly effectively—at least compared to some other skills.¹⁰⁰ One must wonder whether this is because legal research is often lumped together with legal writing in first-year skills courses, where it most often takes a back seat to the writing instruction that takes place.

¶31 Most recently, the ABA Task Force on the Future of Legal Education addressed the same concerns:¹⁰¹

The core purpose common to all law schools is to prepare individuals to provide legal and related services in a professionally responsible fashion. This elementary fact is often minimized. The calls for more attention to skills training, experiential learning, and the development of practice-related competencies have been heard and many law schools have expanded practice-preparation opportunities for students. Yet, there is need to do much more. The balance between doctrinal instruction and focused preparation . . . needs to shift still further toward developing the competencies and professionalism required of people who will deliver services to clients.¹⁰²

¶32 While the report makes recommendations in many areas, it does not identify steps to make law students practice-ready or identify specific skills, such as research, that need more time in the law school curriculum; it does, however, call for bar examinations to increase the testing and competency of students’ skills as opposed to their doctrinal knowledge.¹⁰³

95. *Id.* at 12.

96. *But see* AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 237 (1992) (MacCrate Report) (“For the decade before 1983 and in the decade since then . . . law schools have steadily added, expanded or enhanced courses encompassing a broad range of other professional skills.”).

97. *Id.* at 138–41.

98. *Id.* at 138.

99. *Id.* at 157–63.

100. *See id.* at 331 (“Each law school should undertake a study to determine which of the skills and values . . . are presently being taught in its curriculum and develop a coherent agenda of skills instruction not limited to the skills of ‘legal analysis and reasoning,’ ‘legal research,’ ‘writing’ and ‘litigation.’”).

101. AM. BAR ASS’N TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS (2014).

102. *Id.* at 3.

103. *Id.* at 33.

¶33 Along with the ABA's own reports, outside groups have noted the lack of practice-ready skills and made suggestions for improvements; the most important of these are the Carnegie Report and *Best Practices for Legal Education*.¹⁰⁴ The Carnegie Report concludes that law schools are not doing an adequate job teaching students how to apply the legal theories they learn in their doctrinal classes to service their actual clients.¹⁰⁵ It specifically calls for experiential learning opportunities to be integrated into the formal knowledge that law schools traditionally focus on.¹⁰⁶ However, in its chapter on "Bridges to Practice," it devotes several pages to legal writing without paying any significant attention to research as one of the skills taught in those courses.¹⁰⁷ *Best Practices* also calls for the integration of more practical skills into the doctrinally focused legal education system.¹⁰⁸ It calls strongly for the need to put students "in the roles of lawyers."¹⁰⁹ *Best Practices* suggests that experiential learning could take place outside the traditional clinical model.¹¹⁰

¶34 One can infer that the ABA's decision to increase the amount of required experiential learning course credits resulted from the repeated reports both inside and outside its institution calling for more skills education.

The Current Standards

¶35 Standard 303(a)(3) requires law school students to complete at least six credit hours of experiential learning courses.¹¹¹ To qualify, the course "must be primarily experiential in nature."¹¹² A guidance memo from the managing director of the ABA Section of Legal Education and Admissions to the Bar clarifies that "primarily" "suggests more than simply inserting an experiential component into an existing class" and "indicate[s] the main purpose of something."¹¹³ Furthermore, "[t]he experiential nature of the course should . . . be the organizing principle of the course, and the substantive law or doctrinal material that is part of the course should be incidental to it, not the other way around."¹¹⁴

104. STUCKEY ET AL., *supra* note 2, at 5–7; SULLIVAN ET AL., *supra* note 2, at 185–202.

105. SULLIVAN ET AL., *supra* note 2, at 187.

106. *See id.* at 12, 87–125.

107. *Id.* at 104–11.

108. STUCKEY ET AL., *supra* note 2, at 146–53.

109. *Id.* at 121.

110. *Id.* at 179–86.

111. ABA STANDARDS, *supra* note 7, at 16. Before the six hours were adopted, there was a proposal that students needed to earn fifteen hours of experiential course credits. *See* CLINICAL LEGAL EDUCATION ASS'N, COMMENT ON DRAFT STANDARD 303(a)(3) & PROPOSAL FOR AMENDMENT TO EXISTING STANDARD 302(a)(4) TO REQUIRE 15 CREDITS IN EXPERIENTIAL COURSES (July 1, 2013). Some state bar associations have adopted measures that require more than the ABA-mandated six hours for those wishing to take the state bar exam. *See* STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE II FINAL REPORT 2 (Sept. 25, 2014), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000012730.pdf> [<https://perma.cc/Z3FZ-BSP8>].

112. ABA STANDARDS, *supra* note 7, at 16.

113. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, MANAGING DIRECTOR'S GUIDANCE MEMO: STANDARDS 303(a)(3), 303(b), AND 304, at 3 (Mar. 2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governance/documents/2015_standards_303_304_experiential_course_requirement_.authcheckdam.pdf [<https://perma.cc/7TML-8C9V>] [hereinafter GUIDANCE MEMO].

114. *Id.* The guidance memo notes that the course should be "easily identifiable" as an experiential course.

¶36 In addition to being “primarily experiential,” the course must meet four requirements. First, the course must “(i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302.”¹¹⁵ As discussed in paragraphs 9–14 above, the professional competencies identified in Standard 302 are

(a) [k]nowledge and understanding of substantive and procedural law; (b) [l]egal analysis and reasoning, *legal research*, problem-solving, and written and oral communication in the legal context; (c) [e]xercise of professional and ethical responsibilities to clients and the legal system; and (d) [o]ther professional skills needed for competent and ethical participation as a member of the legal profession.¹¹⁶

Experiential courses must also “(ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.”¹¹⁷

¶37 In addition, experiential courses must be one of three types: simulation, law clinic, or field placement (externship).¹¹⁸ The ABA’s guidance memo makes it clear that experiential learning courses are not limited to upper-level courses.¹¹⁹

¶38 Standard 304 gives greater clarification on simulations and law clinics. Simulation courses provide students with substantial practice engaging in tasks similar to those of a lawyer advising or representing a client, but do not actually involve real clients.¹²⁰ The tasks students engage in may be based on sets of facts created or adopted by a faculty member.¹²¹ Simulation courses must also include “(i) direct supervision of the student’s performance by the faculty member; (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and (iii) a classroom instructional component.”¹²² The guidance memo on these standards notes that the classroom instructional component must be “fairly rigorous” if the course is going to “integrate doctrine, theory, skills, and legal ethics” and “develop the concepts underlying the professional skills being taught,” as required by the experiential course requirement.¹²³ The guidance memo also recommends that the classroom component would “ideally include[] assignments, learning outcomes, and assessments as with other classroom experiences.”¹²⁴ Finally, the guidance memo states that the instructional component of an experiential course does not necessarily need to equal the number of class hours for the course because some portion of the credit hours is earned by participating in the active learning component of an experiential class.¹²⁵

115. ABA STANDARDS, *supra* note 7, at 16 (Standard 303(a)(3)).

116. *Id.* at 15 (emphasis added).

117. *Id.* at 16 (Standard 303(a)(3)).

118. *Id.*

119. GUIDANCE MEMO, *supra* note 113, at 5 (“Provided the course meets the [other] requirements [for an experiential course], a simulation course offered during the first year can count toward the requirement of experiential courses . . .”).

120. ABA STANDARDS, *supra* note 7, at 17.

121. *Id.*

122. *Id.* (Standard 304(a)(i)–(iii)).

123. GUIDANCE MEMO, *supra* note 113, at 4 (quoting Standard 303(a)(3)(i)–(ii)).

124. *Id.*

125. *Id.* at 5.

¶39 Clinics, on the other hand, involve “substantial lawyering experience” that does include advising or representing at least one actual client.¹²⁶ According to the ABA’s Section of Legal Education and Admissions to the Bar, a clinic likely provides the “substantial lawyering experience” required by 304(a) if it has already met Standard 303’s “primarily experiential” requirement. Like simulations, law clinics must include the direct supervision by a faculty member, opportunities for students to perform lawyerly tasks and receive feedback from a faculty member, opportunities for self-evaluation, and some classroom instruction.¹²⁷

¶40 Based on the ABA guidance on point, it is clear that a stand-alone legal research course does not qualify as a clinic.¹²⁸ While legal research courses can base research practice problems on real-life problems like those from pro bono or legal aid offices—and do, at some law schools—they do not qualify as clinics unless students themselves interact with clients. And because it seems unlikely that students interacting with real clients would end their clinic experience at research, such a course no longer qualifies as a stand-alone research course. Likewise, while some students do a considerable amount of research as part of their externships, research is generally not externship students’ sole task, so externships likely would not qualify as a stand-alone research course.

¶41 The ABA has explicitly noted a few course types that likely do not meet the simulation course requirements, but stand-alone research courses are not enumerated amongst those mentioned. First, it notes that “traditional writing or seminar course[s] that require a traditional scholarly paper do[] not seem to fit the definition.”¹²⁹ According to the ABA, these courses probably do not allow for self-evaluation or for “multiple opportunities for performance” as required under Standard 303(a)(3)(iii) and (iv) and Standard 304(a).¹³⁰ Furthermore, writing seminars in which students produce scholarly papers do not provide “substantial experience . . . reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks”¹³¹ since lawyers are generally not tasked with producing academic papers.¹³²

¶42 The ABA has also clearly stated that “[i]nserting skills components in[to] otherwise doctrinal courses will not satisfy Standard 303(a)(3).”¹³³ This stems largely from the fact that Standard 303(a)(3) calls for courses to be “primarily

126. ABA STANDARDS, *supra* note 7, at 17 (Standard 304(b)). Standard 304(b) also notes that a law clinic could have the student “serv[e] as a third-party neutral,” rather than actually advising or representing a client.

127. *Id.* (Standard 304(b)(i)–(iii)).

128. There could be situations where a research faculty member partners with a practicing attorney to develop research problems, but this is unlikely to be granted law clinic status because the students are not really representing a client if they go through just the research phase of the process and then hand the research off to an attorney. If the student continued beyond the research phase, it would no longer be a stand-alone research course as described *supra* note 8.

129. GUIDANCE MEMO, *supra* note 113, at 5. It notes that law schools that want to count these courses as experiential will have “the burden of showing how and why such a course should count.” *Id.*

130. *Id.*

131. *Id.* (quoting ABA Standard 304(a)).

132. The guidance memo notes that an exception to this could be a seminar focused on writing “research and advocacy papers that . . . lawyer[s] involved in lobbying or representing or working for an advocacy group” might write. *Id.* at 6.

133. *Id.* at 4.

experiential in nature” and that the experiential aspect of the course should be the organizing principle of the course.¹³⁴ However, a skills lab attached to a doctrinal course could potentially fit the standard if they have separate course designations and syllabi.¹³⁵ Because stand-alone research courses are not explicitly identified as “non-simulation” courses, it leaves open the possibility that research courses can be developed as simulation courses—if structured appropriately.

Research Courses Under the ABA’s Experiential Course Requirements

¶43 Legal research courses come in a variety of formats. In some, lectures on legal resources and demonstrations of how to use them comprise the majority of class time, leaving students to complete practice exercises primarily outside of class. Others take a “flipped classroom” approach, where students read and watch video content prior to class, leaving the majority of class time to practice under the instructor’s watchful eyes.¹³⁶ Other legal research courses are taught fully online.¹³⁷ Finally, some stand-alone research courses are tied to a specific subject, such as business law, foreign and international law, or environmental law, to name just a few.¹³⁸

¶44 As outlined above, a course must meet a number of requirements to qualify as an experiential simulation:

- “[B]e primarily experiential in nature”¹³⁹
- “[P]rovide[] substantial experience not involving an actual client, that is . . . reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks” developed by a faculty member¹⁴⁰
- “[I]ntegrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302”¹⁴¹
- “[D]evelop the concepts underlying the professional skills being taught”¹⁴²
- “[P]rovide multiple opportunities for performance”¹⁴³

134. *Id.*

135. *Id.*

136. See, e.g., Judith Lihosit & Jane Larrington, *Flipping the Legal Research Classroom*, 22 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 1 (2013); Karen Skinner & Cindy Guyer, *Seven Tips for a Successful Flip*, AALL SPECTRUM ONLINE, <http://www.aallnet.org/mm/Publications/spectrum/spectrum-online/tips-for-flip.html> [<https://perma.cc/F29K-R8N5>].

137. See, e.g., *Required Basic-Level Courses*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF LAW, <http://mckinneylaw.iu.edu/courses/required-jd.cfm> [<https://perma.cc/BUC7-ZRCB>] (describing the law school’s one-credit online legal research course as an additional course required for graduation).

138. Cassie DuBay, *Specialized Legal Research Courses: The Next Generation of Advanced Legal Research*, 33 LEGAL REFERENCE SERVS. Q. 203, 221–23 (2014) (noting that fifty-five law schools offered specialized legal research courses that academic year, and another sixteen listed specialized legal research courses without specifying when they were taught).

139. ABA STANDARDS, *supra* note 7, at 16 (Standard 303(a)(3)).

140. *Id.* at 17 (Standard 304(a)(1)).

141. *Id.* at 16 (Standard 303(a)(3)(i)).

142. *Id.* (Standard 303(a)(3)(ii)).

143. *Id.* (Standards 303(a)(3)(iii), 304(a)(2)(ii)).

- “[P]rovide opportunities for self-evaluation”¹⁴⁴
- Include “direct supervision of the student’s performance” by and “feedback from a faculty member”¹⁴⁵
- Include “a classroom instructional component”¹⁴⁶

Given the many requirements to qualify as an experiential simulation course, research courses must be carefully structured to qualify.

¶45 Many of the requirements are met regardless of how the research course is structured. First, research courses are perfect examples of courses that “integrate doctrine, theory, skills, and legal ethics.”¹⁴⁷ Before students can begin researching, they must first gain an understanding of the resources and the research methodology; these are the doctrine and theory in a research course. Students are also exposed to their professional ethical responsibilities in regard to legal research and their service of a client. Legal research is also listed in Standard 302 as one of the professional skills that students must perform to qualify as an experiential course.¹⁴⁸ Legal research requires students to engage in legal analysis and reasoning and problem solving. To express the results of their research, students must practice their written and oral communication. Experiential courses must also “develop the concepts underlying the professional skills being taught”;¹⁴⁹ as previously mentioned, to research effectively, students must first understand the underlying concepts of the research process, hierarchy and weight of authority, and the value of different types of legal authorities.

¶46 Research courses typically provide multiple opportunities for performance. Most research courses have regular assignments, giving students frequent occasions to practice their research skills. The multiple opportunities for performance lead to multiple opportunities for students to self-evaluate. Students are able to self-evaluate when their instructor goes over exercises in class; students can see how the instructor would go about addressing the research problem and compare their own methodology. Students also get opportunities to self-evaluate when working on problems with their classmates, if there are group assignments, and when they get graded assignments back. Some research courses also incorporate student conferences, which allow students to review their research assignments in a one-on-one or small-group setting.

¶47 In most cases, research courses provide regular feedback for the students. Regardless of course format, this feedback tends to be both formative and summative.¹⁵⁰ In legal research courses, formative feedback, aimed at improving students’ performance, can be given through multiple avenues: (1) students complete ungraded in-class exercises and go over the assignments in class to see how their process compared with the instructor’s; (2) students complete out-of-class assignments and receive written feedback; or (3) students meet with the instructor for research conferences where the students’ progress is discussed. Summative feed-

144. *Id.* (Standards 303(a)(3)(iv), 304(a)(2)(ii)).

145. *Id.* at 17 (Standard 304(a)(2)(i)–(ii)).

146. *Id.* (Standard 304(a)(2)(iii)).

147. *Id.* at 16 (Standard 303(a)(3)(i)).

148. *Id.* at 15.

149. *Id.* at 16 (Standard 303(a)(3)(ii)).

150. *See supra* ¶ 25.

back, aimed at evaluating students' achievement, usually takes the form of a final graded exam, project, or research log, but can take place across the semester if there is more than one graded assignment.

¶48 While four of the requirements are met in all types of research courses, successfully meeting the remaining four depends on (1) whether the course is "primarily experiential";¹⁵¹ (2) whether the course provides "substantial experience . . . reasonably similar to the experience of a lawyer";¹⁵² (3) whether the instructor has "direct supervision" of the student's performance;¹⁵³ and (4) whether the course includes a "classroom instructional component."¹⁵⁴ There are four broad categories of stand-alone legal research courses: traditional research courses, flipped classroom research courses, online research courses, and specialized research courses.

The Traditional Legal Research Course

¶49 Traditional research courses are those where the lecture takes place during class time. These classes generally combine lecture with some classroom practice of research skills. The amount of time devoted to skills varies depending on class length, topic, and the instructor's choice of instructional design.

¶50 Whether these classes qualify as "primarily experiential in nature" is arguable.¹⁵⁵ On the plus side, research skills are the main purpose and the organizing principle of these courses. The lectures give students the context needed to perform research effectively and efficiently. However, too much lecture may mean that the course does not "provide[] substantial experience . . . reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks."¹⁵⁶ While practicing research is obviously similar to the experience of a lawyer engaging in lawyering tasks—in fact, one that new lawyers spend thirty-five percent of their time performing—listening to a lecture is not. As such, for a traditional research course to meet this experiential requirement, the instructor would need to take care in designing the course so that there is still plenty of time for practice despite including lecture as part of the class time.

¶51 The instructor must also ensure that students gain practice in research tasks that reasonably mimic real-life legal practice. This would seem to exclude the "treasure hunt" exercises that sometimes are used in legal research courses. "Treasure hunt" exercises are those that have students find a single authority on a very narrow issue; they do not require students to problem-solve a client issue, but instead direct the students through the process of using a specific resource.¹⁵⁷ Instead, students need to gain practice in research problems that are complex enough to mimic what they are likely to see in practice. While treasure hunt exercises may be a good way for students to form an understanding of the different research sources and how to

151. ABA STANDARDS, *supra* note 7, at 16 (Standard 303(a)(3)).

152. *Id.* at 17 (Standard § 304(a)).

153. *Id.* (Standard 304(a)(2)(i)).

154. *Id.* (Standard 304(a)(2)(iii)).

155. *See id.* at 16 (Standard 303(a)(3)).

156. *Id.* at 17 (Standard 304(a)).

157. Seligmann, *supra* note 63, at 190–91.

use them,¹⁵⁸ they are not similar to the broad, multilayered questions students will often encounter as practicing attorneys.

¶52 With the instructor in the classroom with the students while they are learning and practicing their research skills, the traditional format likely also meets the “direct supervision” of the student’s performance. While the ABA does not provide a definition of “direct supervision,” it has been a much-discussed topic in the realm of clinical courses.¹⁵⁹ One author describes the following as ways through which an instructor provides direct supervision: “gives specific and explicit instructions, explains the rationale for each direction and begins to establish rapport through a friendly relationship to encourage the student to engage in a continuing dialogue of questions and clarification.”¹⁶⁰ One of the primary benefits of direct supervision is that students have guidance, ensuring that they do not go too far down the rabbit hole and lose confidence in their ability to perform their new skills.¹⁶¹ The only potential roadblock to the requisite supervision is if the class size is too large. If research classes are held in a stadium-seating lecture hall with seventy, or even forty, students, instructors will not be able to directly supervise their students. Finally, the traditional legal research format does include a classroom instructional component; in fact, it probably includes more formal in-class instruction than any of its counterparts.

¶53 As long as the class size is not too large, lecture does not comprise too large a portion of the course, and exercises are written to reflect real-life types of legal problems, a traditional format course seems likely to fit the experiential course requirements set out by the ABA.

The Flipped Classroom Legal Research Course

¶54 A flipped classroom is one where most or all of the lecture component of the course takes place prior to class. The information that the students would get in the lecture during a traditional research course is conveyed through some combination of their textbook, videos, and pre-class assignments. This format frees up the majority of class time for skills practice.

¶55 A flipped classroom format easily fulfills the “primarily experiential in nature” requirement of being.¹⁶² As with the traditional research course, the gaining of research skills is the organizing principle and main purpose of the course. However, by having more class time to practice, the likelihood that students will gain substantial experience in lawyering skills increases. With more class time devoted to students’ working out the complexities of a realistic legal problem, it is easier for the instructor to write problems similar to what students will see in practice.

158. See Michael J. Lynch, *An Impossible Task but Everybody Has to Do It: Teaching Legal Research in Law Schools*, 89 LAW LIBR. J. 415, 434–35 (1997).

159. See, e.g., Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L.J. 301, 303–07 (1986); James H. Stark et al., *Directiveness in Clinical Supervision*, 3 B.U. PUB. INT. L.J. 35, 40 (1993).

160. Hoffman, *supra* note 159, at 303–07.

161. Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996).

162. ABA STANDARDS, *supra* note 7, at 16 (Standard 303(a)(3)).

¶56 Like in traditional format classes, flipped research classes involve direct supervision of the students. In fact, the goal of a flipped classroom is for students to practice under the watchful eye of their instructor before going off and trying to solve a research problem on their own outside of class. Again, this goal would be undermined if the class size is too big. Ideally, having fewer than twenty students would allow for the instructor to walk around the room and check in with each student while they are working on their assignments.

¶57 The biggest question is whether the flipped classroom offers a sufficiently rigorous “classroom instructional component.” The ABA notes that the classroom component must be “fairly rigorous” if it will allow for the “integrat[ion] of doctrine, theory, skills, and legal ethics,” and for the “develop[ment] of the concepts underlying the professional skills” that are being taught.¹⁶³ There is certainly a significant classroom component in the flipped classroom. Whether it meets the “instructional” part of the requirement depends on one’s definition of instruction. It is important to remember that instruction does not just mean lecture; instruction can happen through practice. The dictionary defines instruction as “the action or process of teaching; the act of instructing someone.”¹⁶⁴ The entire premise of active learning is to teach by having the students practice. The ABA recommends that the classroom instructional component include assignments, learning outcomes, and assessment¹⁶⁵—all of which a flipped research course usually does.

¶58 The flipped classroom, assuming class sizes are kept small enough, seems to be a perfect fit for the experiential requirements. The very nature of the flipped classroom leaves adequate time to practice skills.

The Online Legal Research Course

¶59 In an online research course, all student-to-instructor and student-to-student interactions take place through a content management system such as Blackboard or TWEN; generally, the students learn through readings and videos lectures that are prerecorded by the instructor. Students may also complete quizzes or engage in online discussion groups with their classmates to facilitate learning.

¶60 Like the traditional and flipped classrooms, the course is probably experiential in nature, for the simple reason that learning the skills of legal research is the purpose and organizing principle of the course. The greater question is whether an online research course provides an experience that is similar to a lawyer’s tasks. While assignments could be written to include researching issues similar to real-life practice, without the direct physical oversight of the instructor, students may not engage fully in the exercises. As such, where the online research course struggles most in meeting the experiential course requirements is in the “direct supervision” of the students. When students and their instructor are never in the same location, there is no direct supervision. While the instructor can give plenty of feedback, he or she is not there when the students are working through their problems.

163. GUIDANCE MEMO, *supra* note 113, at 4.

164. *Instruction*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

165. GUIDANCE MEMO, *supra* note 113, at 4.

¶61 The online legal research course may also struggle in meeting the “classroom instructional component.”¹⁶⁶ This depends on whether the ABA is willing to recognize the content management system as an online classroom. There is substantial instruction happening, through readings, posted videos, and maybe even virtual office hours, but the students and instructor are not in a traditional classroom with each other. However, the online research course usually does still include the assignments, learning outcomes, and assessments called for by the ABA.¹⁶⁷ While the ABA has become more tolerant of online education in recent years, it seems unlikely to designate a course as experiential if the course is online, given the importance of direct supervision in experiential courses. Even if an online class does qualify as a classroom, there is the lingering question of whether that class is sufficiently rigorous given the lack of supervision by the instructor.

The Specialized Legal Research Course

¶62 Specialized legal research courses focus on specific legal topics, such as foreign and international legal research, business law research, environmental law research, and many more. These courses could be structured in any of the above formats. Traditional and flipped classroom approaches to these specialized research courses are the most likely to qualify as experiential, given the difficulties identified in regard to online legal research courses.

¶63 The primary strength of specialized legal research courses in qualifying as experiential is in their ability to “integrate doctrine, theory, skills, and legal ethics” in the performance of legal research. Because all of the research instruction taking place is focused on one topical area, there is greater opportunity to tie doctrine and theory into the instruction. Understanding the legal research process in that topical area reinforces students’ understanding of the doctrine, and the understanding of the doctrine makes it easier to conduct legal research because students have some background knowledge of the nomenclature and the issues in that subject area.

¶64 The ABA clearly states that skills courses tied to a doctrinal course could fulfill the experiential learning requirements if the two have separate syllabi and course numbers.¹⁶⁸ While legal research courses are generally officially tied to a doctrinal course, topical courses lend themselves to being experiential because students often have background in the topical area, allowing the instructors to write complex, practice-focused problems that allow students to use their combined knowledge of the legal research process, the key resources for research in that topical area, and their substantive knowledge. Tying research courses to a doctrinal course might also help demonstrate their value to doctrinal faculty.

¶65 The second key strength of the specialized legal research course is its ability to give students “substantial experience” engaging in lawyering tasks. Many students see themselves practicing in a particular area; since research is such a large component of attorneys’ weekly tasks,¹⁶⁹ learning how to research in the area in

166. ABA STANDARDS, *supra* note 7, at 17 (Standard 304(a)(2)(iii)).

167. See GUIDANCE MEMO, *supra* note 113, at 4.

168. *Id.*

169. LASTRES, *supra* note 4, at 3.

which they will eventually practice gives students a substantial experience similar to their future career. Specialized legal research courses seem especially well suited to the experiential treatment, particularly if structured as a flipped classroom so that a significant portion of class is spent practicing skills. However, if the amount of lecture in a traditional format legal research course on a special topic is limited, it too should qualify as experiential.

Conclusion

¶66 The primary goal of experiential legal instruction is to prepare students to do the type of work that awaits them as legal professionals. In response to frequent reports from employers and scholars that new hires' research skills are lacking, the ABA now mandates that law schools produce attorneys who are practice-ready from day one. And since thirty-five percent of new attorneys' time is spent conducting legal research, being practice-ready clearly requires that students practice and refine their research skills throughout law school. Experiential courses are the ABA's answer for increasing students' practice skills; as such, law schools need to embrace the experiential legal research course so more students have the opportunity to strengthen their research skills and the chance to enter the profession as practice-ready professionals.