THEY SHOULD CALL IT NEGOTIATION SCHOOL, NOT LAW SCHOOL

OCTOBER 1, 2020 | JOHN LANDE | LEAVE A COMMENT

As part of my LIRA book tour, I gave talks entitled,"They Should Call It Negotiation School, Not Law School" for Becky Jacobs's (Tennessee) ADR class and the UC-Davis's King Hall Negotiation Teams student organization (thanks to Donna Shestowsky's suggestion).

The presentation points out that the vast majority of cases are negotiated, not litigated and certainly do not produce appellate opinions. It provides a general introduction to negotiation, showing that negotiation is part of everyday interactions with virtually everyone lawyers interact with, and that negotiation is not limited to the final stage of a lawsuit. It summarizes the major negotiation models and key variables that comprise the models. It encourages lawyers to be "conflict diagnosticians," helping clients identify and address the actual causes of their conflicts. It recommends that lawyers help clients do litigation interest and risk assessments to develop bottom lines based on expected court outcomes and future tangible and intangible costs of litigation. It urges students to develop good relationships with clients and counterpart lawyers when they are in practice. There are links to resources throughout the powerpoint for students who want more information.

Here's the 32-minute video and powerpoint. You are welcome to use this for your classes.

The title of the talk refers to the "hidden curriculum" in legal education implying that lawyers mostly do appellate litigation – negotiation not so much. Generally, clients' interests and negotiation are invisible in the hidden curriculum, and the implicit message is that they aren't important. Even when individual faculty valiantly include discussion of these issues, the hidden curriculum overwhelms these efforts, teaching a powerful, misleading message about what actually lawyers do.

Obviously, the idea that American law schools should be called "negotiation schools" is a big, fat lie. Even in schools with the most robust dispute resolution programs, negotiation and other dispute resolution courses constitute only a secondary part of the curriculum.

So this got me thinking about what a "negotiation school" would really look like. How about the following?

The required 1L curriculum might include the following introductory courses, and upper-class courses would provide more detailed instruction in these subjects:

- Written and Oral Communication Skills
- Common Law Analysis and Legal Research
- Working Constructively with Clients and Counterpart Lawyers
- Understanding Conflict and Using Negotiation and Other Methods of Dispute Resolution
- Strategic Case Evaluation and Management
- Professional Responsibility and Access to Justice
- History of Law and Justice in the US
- Technology and Dispute System Design Skills
- Business Transactional Skills and Practice
- Civil Pretrial and Trial Practice
- Criminal Procedure and Practice
- Administrative Law and Government Practice
- Appellate Procedure and Practice

The last four courses on this list would note that most legal cases are not finally adjudicated and would discuss how lawyers use legal procedures as part of their case management and negotiation strategies. For example, the Criminal Procedure and Practice course would include substantial coverage of plea bargaining.

In the first year, courses might be taught in a series of short modules so that students would complete foundational courses before taking courses relying on the skills and knowledge taught in the preceding courses. For example, students would take courses on communication, common law analysis, and legal research skills in the first few weeks of school to lay the groundwork for courses later in the year.

During the winter inter-session, schools might "shoehorn" a short course on legal doctrine such as contracts or torts. Students would be able to count up to 9 credits of doctrinal courses toward graduation.

This curriculum would reflect the trans-substantive nature of the general skills that lawyers generally use in virtually all types of practice. By contrast, in practice, lawyers need to regularly research, learn, and update knowledge of specific legal authority in many different subject areas.

Students would be evaluated primarily on portfolios of work-product they develop as part of their individualized learning plans. The curriculum would dramatically reduce the use of

high-stakes, end-of-semester exams that require a lot of memorization and de-contextualized application of legal rules.

The major school competition would be in client interviewing, counseling, and negotiation instead of moot court.

Students performing well in clinical and practice courses would have the easiest time getting prestigious jobs.

To become licensed to practice law, after graduation, students would complete modestly-paid one-year internships (like Canadian articling) instead of taking a bar exam. Since students wouldn't take a bar exam, they wouldn't feel compelled to take "bar courses" they aren't interested in just to increase their chances of passing the bar.

Faculty teaching legal writing, clinical, externship, and skills courses would have the highest pay and status. Faculty teaching subjects like Con Law would be paid less and have multi-year contracts instead of tenure. In a few egalitarian schools, they would be allowed to vote in faculty meetings.

Scholarship focusing on the relationship between theory and practice would have the highest status. Faculty writing about obscure topics of interest to only a handful of scholars would have a hard time getting tenure.

I realize that this idea is a bit extreme. Perhaps students should be permitted to take up to 15 credits of doctrinal courses. 🙄

Does this all seem too radical to you?

Obviously, this somewhat mischievous thought experiment is intended to be provocative. It uses some role reversal to identify unconscious assumptions that even colleagues in our community take for granted about what is necessary or appropriate for good legal education.

It's hard to even *imagine* any substantial alternative to our system of legal education to address realities of legal practice because our curriculum is so thoroughly institutionalized with our curriculum structure, textbook industry, staffing commitments, tenure norms, bar exams, US News rankings etc.

Unfortunately, American legal education is extremely resistant to change for many reasons, and it's unlikely that any law school would even consider these ideas. But you might want

to reflect on them and the underlying assumptions of our work.

What do you think? How would you design a “negotiation school” or the like?

EVENTS FOR TEACHERS AND STUDENTS NEGOTIATION VIDEO