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A Way Forward for an Ailing Legal Education Model

*James E. Moliterno**

I. A CRISIS FOR LEGAL EDUCATION

There is a crisis in legal education right now; there is a crisis in the practice of law right now. Law practice has changed as a result of technology, globalization, and economic pressures. The market for legal education's product, law graduates, has diminished. And now, for the first time in decades, the market for legal education has diminished.¹ Law schools cannot remain the same in this environment.

There has been an economic transfer that has taken place in moving away from a system in which mostly corporate clients willingly paid for training of beginners at major law firms. Law firms could pick up those costs if partners were willing to see their incomes shrink, but so far they are not doing so. The old but wildly-successful-in-its-day pyramid structure is breaking down.² Billing for newly minted associates' time is substantially decreasing.³ Far fewer law graduates find jobs in major firms, and the few who do are not being trained as they once were.⁴ Everyone interested in this issue wants to turn to the law schools and say "it's your turn folks, you have to do this for us." Law firms and their clients, prospective law students, and even the *New York Times* have turned to law schools to be more effective at preparing students for the practice of law.⁵ So there is an economic transfer that is taking place in moving from a system of corporate clients paying for the training of beginners to an effort

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¹ Ethan Bonner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1.

² See generally David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

³ *Id.*

⁴ See David Segal, *For 2nd Year, a Sharp Drop in Law School Entrance Tests*, N.Y. TIMES, Mar. 20, 2012, at B1; Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 78.

⁵ See generally Segal, *supra* note 2; Segal, *supra* note 4.

by law schools to do it.⁶ And if that were not a big enough problem, it is happening as the cost of legal education is already too high and our application numbers are too low for the current supply of legal education.⁷ It is an enormous problem that we are going to cope with. I think the only way we can cope with the enormous problem is by forging partnerships with the practicing branch.

A. Not as Recent as One Might Think

Most of the focus on legal education's current trouble is on current events. It sounds as if these troubles are purely a result of the economic crisis of the past decade. But that is obviously not the case. This has been coming for a long time, both in economic terms and the way legal education has tried to cope with changing conditions in law practice over the last thirty years. In fact, the root of the problem is to be found in the late nineteenth-century reforms of legal education and medical education not long after.⁸ Both reformed as part of the general "scientification" of higher education and the professions.⁹ But one crucial turn on the road told the tale. When medical education reformed, it decided that its mission was to produce doctors.¹⁰ When legal education reformed, it decided that its mission was to produce law professors.¹¹ Legal education's reform sought (for a complex set of reasons) to replicate graduate programs in philosophy and history, for example, where the main product of education is philosophy and history professors. We are still trying to figure out how we get to the place where legal education really is about producing lawyers, and it has been a difficult road. It has taken over a hundred years now. But we are getting closer to a better fit between legal education and the lawyer's work and career trajectory.

One bit of good news, but only a bit: for all the reasons why it is a bad time for legal education, lawyers, and law students, it is a great time to be a legal education reformer. Everybody is mad at law schools and wants us to do better. You know, everyone from the *New York Times* to prospective students to alums to the

⁶ See James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423, 434–36 (2013).

⁷ See generally Bonner, *supra* note 1, at A1.

⁸ See Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277, 277–78 (2004).

⁹ See Moliterno, *supra* note 6, at 426.

¹⁰ *Id.*

¹¹ See M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 102 (1986).

practicing branch to corporate interests. Everybody wants us to do better right now, and we must.

We are also hearing about lowering the cost of legal education. I am all for it. The interest of lowering costs resonates very much with me. I think we are going to see a reduction in the discount rate—what students actually end up paying—for legal education this year, next year, and the year after that. The sticker price might not go down, but the discount rate is going to adjust to the drop in applications we are seeing this year and that projects out to future years.

I do not absolutely oppose what some people advocate as the major cost reduction technique, which is to cut law school to two years instead of three.¹² Our approach at Washington and Lee has been: “As long as we have three years, let’s do something far more productive with that third year. Let’s not just continue to have it be the wasteland where they bore you to death. Let’s do something better for the students we have right now.” Reduction to two years, to the extent it happens, is unlikely to result in a two-year JD. More likely, as is being considered in New York right now, would be states granting students permission to take their bar exam after two years, without a law degree.¹³ Students will choose (and to a great extent, employers will choose) whether a law license after three years with a JD is preferable to a law license after two years without a JD.

II. A BETTER THIRD YEAR

What do I mean by a better use of the third year? For me, it is about better designed, better implemented, wider-ranging experiential education. Education in the role of lawyer. Let us put the students in the role of lawyer in the third year after they spend two years being a pure student. Let us prepare them to do a lot of the things that are needed in practice.

¹² See, e.g., Kristina Dell, *Fast-Tracking Law School*, TIME (July 23, 2008), <http://www.time.com/time/nation/article/0,8599,1825863,00.html>; Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 599, 605 (2012); Brian Leiter, *Four Changes to the Status Quo in Legal Education That Might Be Worth Something*, BRIAN LEITER’S L. SCH. REP. (Mar. 15, 2012, 4:00 AM), <http://leiterlawschool.typepad.com/leiter/2012/03/four-changes-to-the-status-quo-in-legal-education-that-might-be-worth-something.html>. Judge Posner is also among those who have suggested abolishing the third year. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 280–95 (1999).

¹³ See Estreicher, *supra* note 12, at 610; Karen Sloan, *Experts Debate Two-Year Law School Option*, NAT’L L.J. (Jan. 22, 2013), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202585158075&Experts_Debate_Two_Year_Law_School_Option.

A. What Legal Education Has Taught

So, think about the path that we have been on for over one hundred years. Legal education only taught one skill from about 1880 until 1980.¹⁴ It taught the critical thinking skills necessary to analyze appellate opinions. And it did it brilliantly. It still does it brilliantly, and it is not something we should stop doing. But we do not need to do it for three years. Two is enough.

Beginning in the 1970s and 1980s, we started getting more clinical courses and we, my generation of law students, got courses on writing, interviewing, negotiating, mediation, advocacy, and trial practice.¹⁵ That is a basket of skills we started to teach in the seventies, eighties, and nineties in addition to the one skill that we taught brilliantly for over a hundred years. And we have to keep teaching that seventies-era basket of skills as we go forward. But they are not enough.¹⁶ Not even close.

B. The Adjusted List of Goals

What beginning lawyers really need these days are problem-solving skills. They need business sense and savvy. They need to know how to work as a member of a team. They need to know how projects are managed, how they fit in the role of a person on that project-team, and eventually how to be the managers of those projects. There is a wide range of what students need to know to be a successful lawyer. Many of these tools that are needed by today's and tomorrow's lawyers are better taught to them by seasoned lawyers who have succeeded in today's practice environment. More on that later.

What we are trying to do at Washington and Lee is give our students a head start. We do not expect our students to be "practice-ready" upon graduation, a popular term today. The "practice-ready" term has been thrown around a lot and I think it is too high a hurdle for any law school to expect to leap. It is unrealistic to think that a three-year JD can produce law graduates who are like third-, fourth-, or fifth-year attorneys. That is not going to happen in the time we have and with the resources we have. But we *can* give students a head start on their development. At Washington and Lee, we are giving our

¹⁴ See Moliterno, *supra* note 6, at 429–30.

¹⁵ *Id.* at 430.

¹⁶ See Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 518 (2007) ("Curricular reformers seek to realign the study of law with its twenty-first century practice. They strive to expose students to a broader range of knowledge, tools, and methods for doing lawyers' work.").

students a head start on the process of becoming valued in practice. And if it used to take them three years to develop, maybe they can now get there in a year or a year and a half after they graduate and move on in practice. We want to give them a launch.

III. WASHINGTON AND LEE'S WAY FORWARD

At bottom, all we have really done in our new curriculum is allocated a year to experiential education, and required it for graduation.¹⁷ It is really simple and pretty straightforward. The first and second years are largely unchanged (although the subjects required in our first year curriculum already include some forward-thinking: the administrative state, transnational law, and professional responsibility stand alongside the traditional offerings). But teaching in the first and second year looks a lot like it has for a very long time. There are some people who have come to the mistaken conclusion that we provide experiential education from start to finish, first year through third, that we do not do traditional first year teaching. That is not the case. We are still doing the things that have been really brilliant about legal education in the first and second year.

But the reformed third year involves students being engaged in a full credit load of experiential education all in the role of lawyers. It is clinics, it is elaborate semester-long simulations. More on the new courses and on engagement in a moment.

A. Learning Law as Lawyers Do

At the middle of what happens to students in this third-year curriculum is that they learn law the way lawyers do. For example, one of the many semester-long elaborate simulation courses is called "The Lawyer for Failed Businesses." In that course, the students learn bankruptcy law. But they learn it the way lawyers do to solve a client's problem. That is how lawyers interact with the law. Lawyers do not learn law in order to pass a three-hour closed-book exam. They learn law in context and with a purpose.

Our students still do the "student thing" for two years. But the third year places them into a sort of transition time for their mental pathways. They are moving from being the student to being a lawyer and thinking like it.

¹⁷ See generally WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, *Washington and Lee's New Third Year Reform: Leading the Way in Legal Education Reform*, <http://law.wlu.edu/thirdyear/> (last visited July 16, 2013).

In the new courses, they are not only learning the 1970s basket of skills. They learn law. They learn theory. They learn business sense. They learn to be members of teams. They experience what experienced lawyers face managing projects. They solve problems. Almost every day, they solve problems, generate plans for client action, and implement those plans.

B. Our Progress to Date

In 2012–13, we were in our second year of required participation. We had two years of phase in (2009–10 and 2010–11). It was optional in those first two years, but very popular, and we have watched carefully to learn how it has gone. We examined bar exam results and determined that there was no statistically significant difference between the students in the new curriculum and those who remained in the traditional curriculum. We studied the costs of the new curriculum and found that it is no more expensive to run than our first or second years. We reviewed every new course. We both taught and learned from the new instructors. We did a very early extensive review with lots of student evaluations and focus groups. We held hours of faculty discussion that ended with a vote of confidence.

C. What Is in the Reformed 3L Curriculum?

So, “what is it?” It is two-week immersions, clinics, externships, practicum courses (elaborate simulations), law-related service, and exposure to the profession’s culture, economics, and cutting-edge issues.¹⁸

Each semester starts with a two-week skills immersion. In both immersions, there are large group meetings to deliver theory. There are small group meetings for drills, practice, and strategy meetings. And then the students do the work for their simulated client.

In the fall, every student in the third-year class is in a litigation immersion. They represent a person in a simple piece of litigation from start to finish. We have them interview the client, draft the pleadings, do a little bit of discovery, do a bit of motion practice, negotiate, counsel with their client, and eventually take that simple case to a truncated trial at the end of the two weeks.

In the spring, they do a transactional immersion and, again, all of our third-year students participate. Every student represents either the buyer or the seller in a transaction for the sale of a five- or six-million dollar furniture manufacturing

¹⁸ *Id.*

business that we have made up from whole cloth. Basically, we created all the documents and everything about the company. Every student represents someone who is role-playing the client. They deal with employment issues, executive compensation, decisions about the deal's structure, representations and warranties, indemnity clauses, and more. They learn law, negotiate, counsel their client, draft documents, and work with peers, lawyers who represent the opposite party and supervising lawyers. It is a lot of fun but it is a lot of work.

"Intense" is the word most often used by students to describe the immersions. "Like a job." Exactly. From the beginning of the fall immersion until the end of the third year, students are on a transition path, moving from student to professional.

Following the immersion in each semester, each student enrolls in at least two twelve-week experiential courses. Four of them total for their third year. Most students have taken five, actually. One of those four or five has to be a clinic or externship. It has to be a live client experience in which they represent real clients. The simulation courses we are calling "practicums." Courses like the "The Lawyer for Failing Businesses," "The Litigation Department Lawyer," "Poverty Law Litigation," and "Corporate Counsel."¹⁹ You notice that each of these is built around a practice setting. Some of our regular faculty teach these courses, and many courses are taught by wonderful lawyers who come in and essentially teach what they do. They put the student in the role of the litigation department lawyer, if that is their practice group. They design the simulations, come in and run their course, putting the student in the role of the lawyer in the course's practice setting.

In addition to the immersions, clinics, externships, and practicum courses, every third-year student is enrolled in a course called "The Legal Profession." It is not the course on professional responsibility law, which we teach in the first year. Instead, this course is a one-unit course that exposes them to critical cutting edge issues facing the legal profession. So, there are sessions on the law firm economic system and alternative business structures. There are sessions on legal culture, relationships between prosecutors and defense lawyers, and gender issues. There are sessions on special skills that are rarely addressed in the curriculum, like empirical skills or financial

¹⁹ For a list and description of the "practicums" offered at Washington and Lee School of Law, see WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, PREPARED FOR THE PROFESSION, available at [http://law.wlu.edu/deptimages/career%20planning/3L%20\(2\).pdf](http://law.wlu.edu/deptimages/career%20planning/3L%20(2).pdf).

statement reading skills for lawyers. The idea is to move the students closer to being “of the profession.”

Students must also do at least forty hours of law-related service during their third year. There is room for one traditional course per semester, if the student wants to take it, and most students do take one of the traditional courses they feel they need for the bar or for a job offer they have received.

D. Replicating the Reform

This reform is really quite doable. It is not a top-to-bottom redesign of the curriculum. There is room for a lot of faculty to do as they have always done, and because of partnerships with the practicing branch, it is not more expensive. More than half of my colleagues think that this curriculum is a great idea, but they do not want to teach in it. They still teach the courses they have always taught in the first and second year.

Adoption of this curriculum reform is really just a statement that experiential education is as important as the first-year thinking skills. Every law school has clinics, every law school has at least some courses that we would describe as practicum courses, maybe not quite enough to make them a requirement, but everyone has the resources in place to do this. It is really just a matter of saying, “the way we require students to do the first year the way it is, we require students to do experiential education in the third year: it’s just as important.”

E. A Partnership with the Practicing Branch

Excellent lawyers and law firms teach their courses for very little monetary compensation. They teach for the love of doing it, and they are teaching students who are not only students at their law firm, they are teaching whoever signs up for the course at Washington and Lee. So, some of the resource that the practicing branch is not able to give to their beginning lawyers anymore, they are giving to any law student who signs up for the courses. We could not afford to do it without them.

Not only are costs lowered by the generous teaching contributions of our practicing colleagues, they also happen to be more effective at teaching these courses. In general, there is not a precise skill-set overlap between law professors and the role to which the vast majority of our students aspire. There are some things law professors do exceedingly well and perhaps so well we are irreplaceable. Teaching the critical thinking involved in the first-year courses, for example: there may be nothing like being taught the first-year courses by an accomplished scholar of the

specific topic. But by contrast, law professors are not all excellent problem solvers, managers of teams, and business people. Not all law professors have and can convey the techniques and traits involved in high levels of interpersonal skills. Experienced, excellent lawyers know how to practice in their areas better than most law professors. (There are exceptions, to be sure, but I am speaking of the majority.) With some guidance regarding teaching issues, management of classrooms, and design and management of simulations, experienced lawyers have the capacity to be better teachers of their practice area than law professors could ever hope to be. In the law school of the future, we must take advantage of the relative strengths of all our possible teaching resources. We cannot afford to do anything less.

F. Early Empirical Data

There is a survey called the law school survey of student engagement (LSSSE).²⁰ It is managed by a staff at the University of Indiana. For schools that participate, it asks questions of law students about how wrapped up they are in their studies, how much time they put into their studies, how often they show up for class without preparing (some students do that, I am told), how many papers they write of different lengths, how often they work with colleagues or other students on projects, and how much of the time is spent applying what they learned to real world problems.²¹ In the end, the survey is trying to capture the measure of student engagement in activities that will enhance their preparedness for practice.

On the charts printed here, the prompt is at the top and the answer or answers illustrated by the graph are in parenthesis after the prompt. The two bars on the left illustrate the percentage of students at Washington and Lee giving the answer indicated in the parenthetical (light blue for 2008, before the start of the new curriculum, dark blue for 2012, the first class to be required to take the curriculum in full). The two bars on the right are the composite percentage giving the same answers by our peer schools (again, light blue for 2008, dark blue for 2012). The survey organizers do not release any particular school's

²⁰ LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LSSSE REPORTS, *available at* <http://lssse.iub.edu/reports.cfm>.

²¹ For all the questions and responses in the 2012 report, see LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT: LSSSE 2012 MEAN COMPARISONS REPORT, *available at* [http://lssse.iub.edu/pdf/2012/LSSSE%202012%20Mean%20Comparisons%20\(Lssseville%20Law\).pdf](http://lssse.iub.edu/pdf/2012/LSSSE%202012%20Mean%20Comparisons%20(Lssseville%20Law).pdf). For the 2008 data, see LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT: LSSSE 2008 ANNUAL SURVEY RESULTS STUDENT ENGAGEMENT IN LAW SCHOOL: PREPARING 21ST CENTURY LAWYERS, *available at* http://lssse.iub.edu/2008_Annual_Report/pdf/LSSSE_Annual_Report_2008.pdf.

numbers and scores. They solicit a list of peers from each school and provide a composite set of answers and scores for the group of peers. Our peer schools are those with whom Washington and Lee competes most closely in various markets.

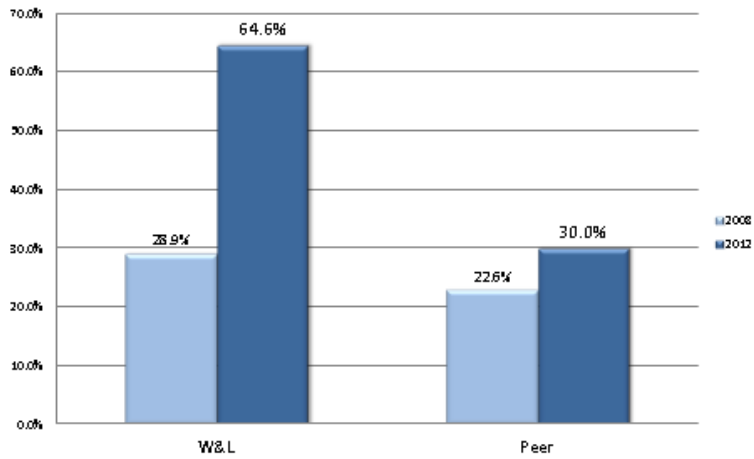
1. Overall, how hard are students working in their third year in the reformed curriculum?

In 2008, 28% of our students said “often or very often” they come to class without completing reading assignments (for third-year students). Our peer schools showed almost exactly the same number in 2008 (25.5%) and a few more “often or very often” unprepared students in 2012 (29.5%). Now, however, very few of our third-year students come to class unprepared (only 4.5%). The third-year students can not afford to come to class unprepared anymore, and they do not do it!

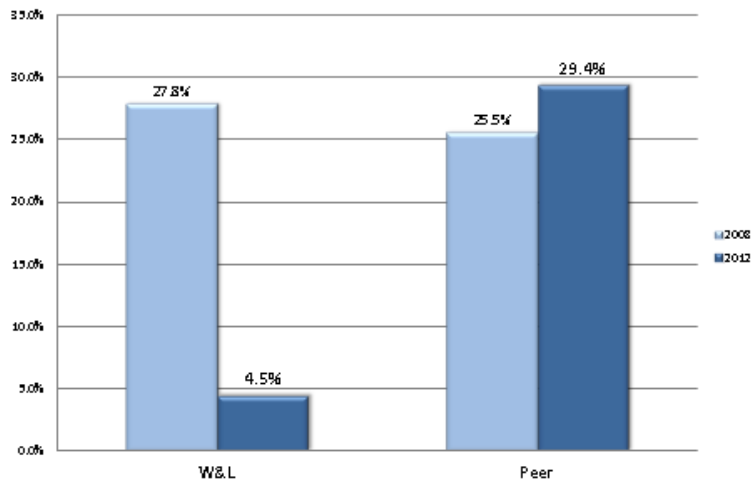
How many hours do they work outside of class other than reading? Again, the change at Washington and Lee between 2008 and 2012 is striking. In 2008, only 28.9% of our third-years reported working eleven hours or more, while, in 2012, 64.6% said they work eleven hours per week. At our peers, the number reporting eleven or more hours of work outside of class has moved only a modest amount from 2008 to 2012 (22.6% in 2008 and 30.0% in 2012).

Students are working harder in the reformed curriculum.

**Preparing for class and clinical courses other than reading
(studying, writing, doing homework, trial preparation, and other
academic activities more than 11 hrs/wk)**

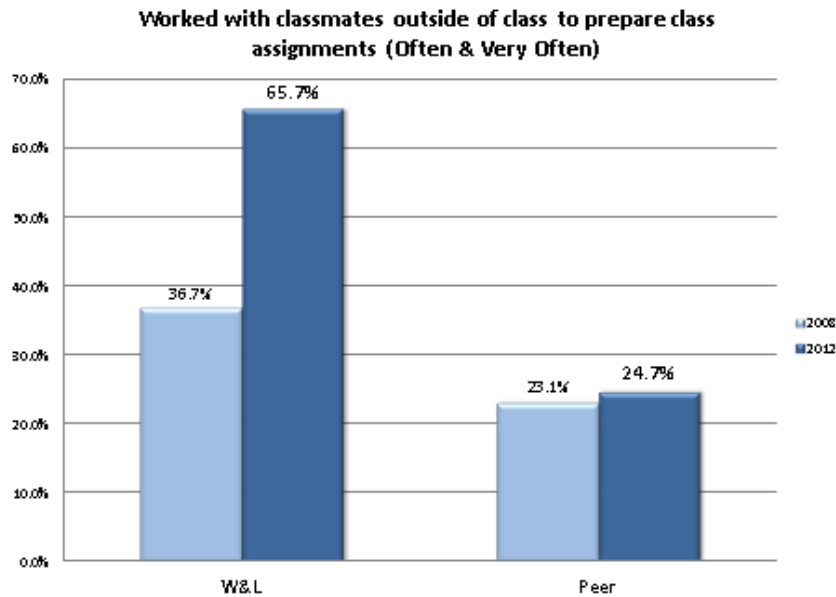


**Come to class without completing readings or assignments
(Often & Very Often)**



2. What are they doing in this additional work-time?

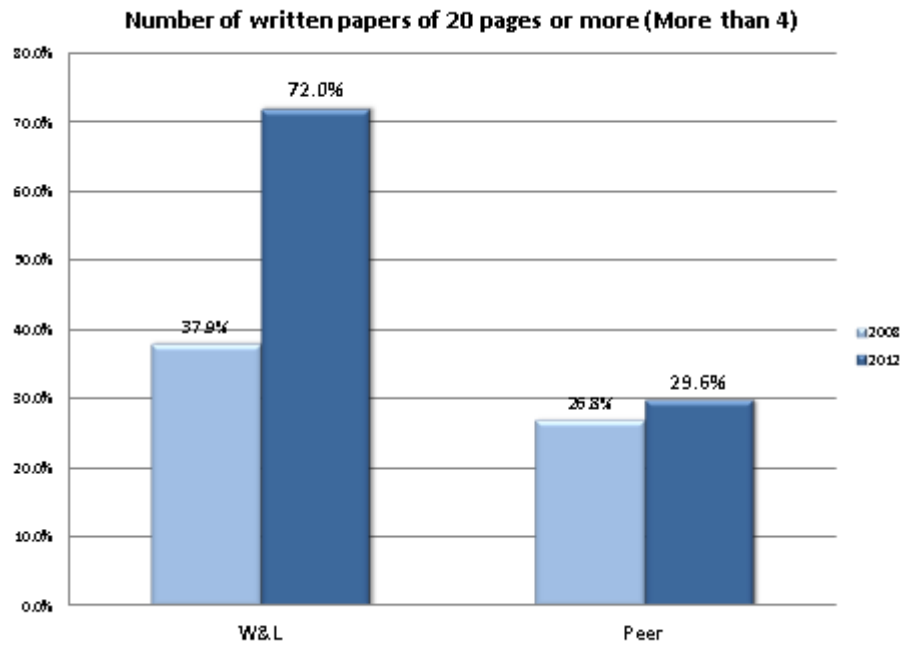
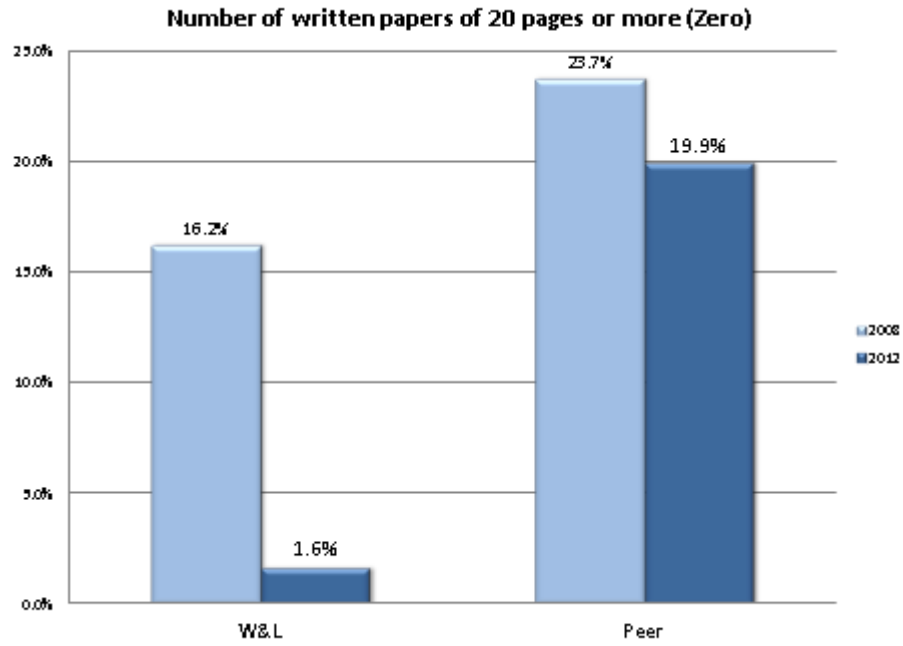
For one thing, they are collaborating with one another more. The survey asked, “How often do you work with other students on projects in and outside of class?” Washington and Lee students in 2012 were doing those collaborative activities two or three times as much as in 2008. Peer schools had almost no change in their numbers on these questions from 2008 to 2012.



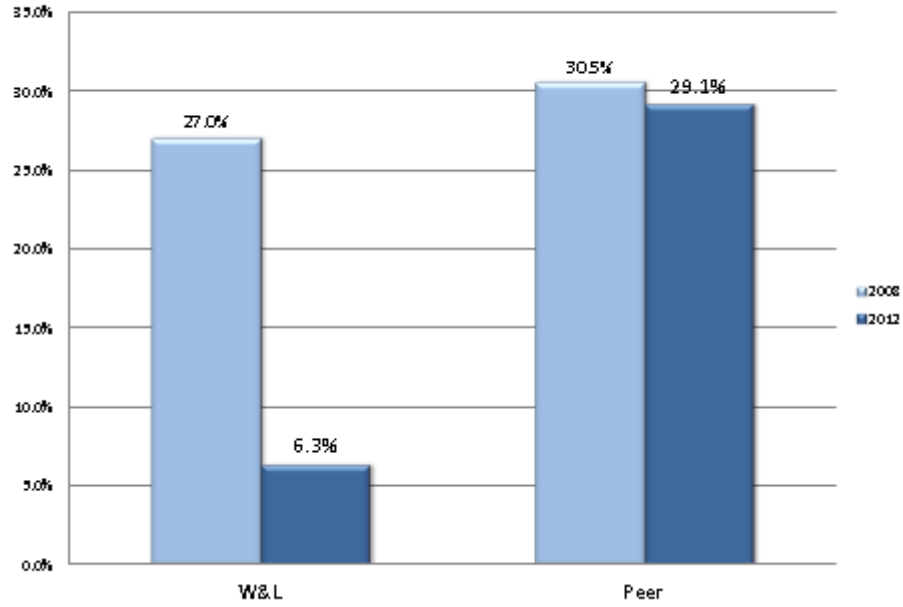
3. What else are they doing?

They are writing a lot. “How many written papers of twenty pages or more?”—it used to be that 16% said, “I did zero.” Now, virtually no one (1.6%) says that. The number of students doing four or more twenty-page papers has nearly doubled from 2008 to 2012, from 38% to 72%. All the while, students at our peer schools continue to report close to 2008 numbers.

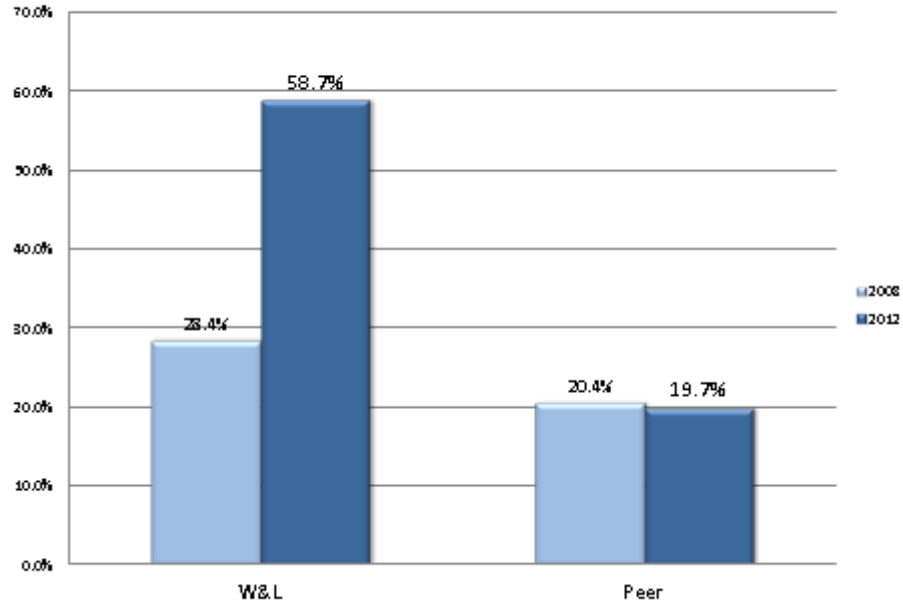
Perhaps even more significant is the frequency of writing papers of five pages or less, a very common occurrence in law practice. Again, in 2008, 27% said, “I haven’t done that at all this year.” Now, nearly all of them have done five-page papers (94%), and most of them (58.7%) have done more than seven such papers. But our peers have not improved from their similarly poor 2008 numbers.



Number of written papers of fewer than 5 pages (Zero)

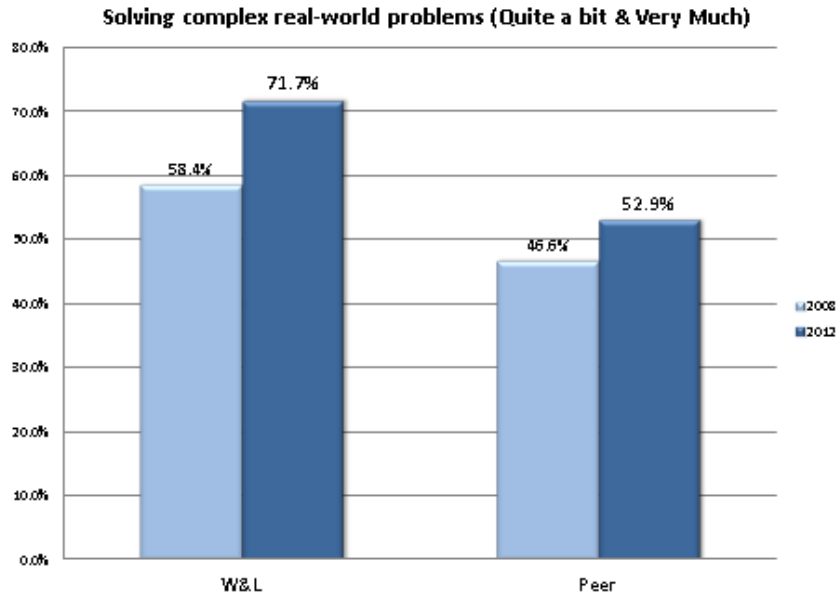


Number of written papers of fewer than 5 pages (More than 7)

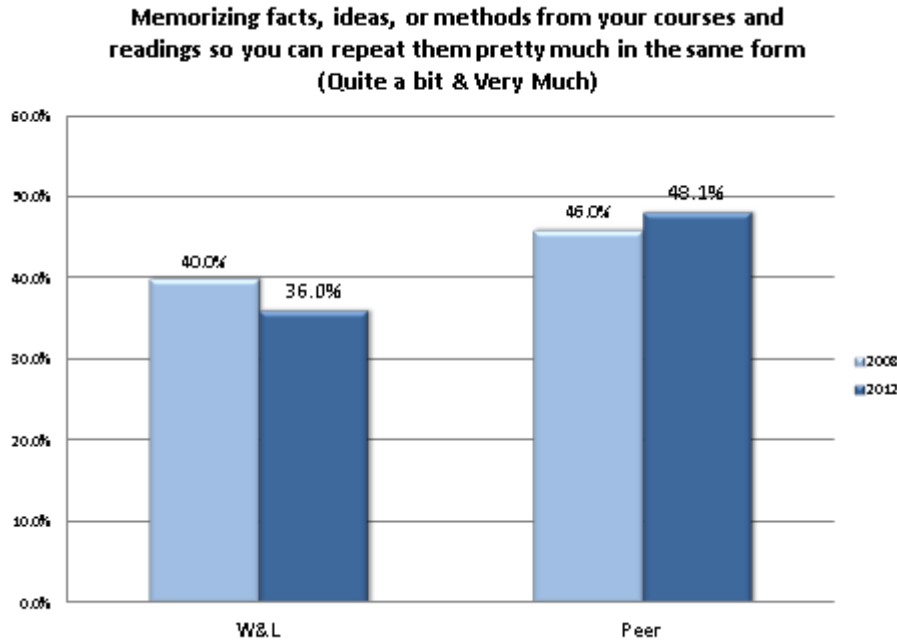


4. What else are they doing more of?

They are solving real-world problems with their legal knowledge. They are problem solving, a critical lawyer skill, and they are solving realistic problems, more than they did prior to the reformed curriculum.



One thing they do not do more of, which I am quite happy about, is that they do not *memorize things* any more than they used to. This is one number that did not go up between 2008 and 2012. It is not what the new curriculum is about. We are not teaching them to memorize anymore than they ever did. We are teaching them how to use information, not just pack it into their brains.



What has really happened is that students are spending more time being more productive on things that will matter for them as lawyers. That is what our new curriculum has meant to us and our students.

CONCLUSION

Legal education cannot stand apart from its markets, the markets for its graduates and the markets for its legal education product. Dramatic changes in law practice cannot be ignored until they pass. And practice will not adjust to synch up with legal education's status quo.

Costs should be contained. But whether costs are contained or not, students need an education that is more effective, more active, and more tailored to reality. Without abandoning what is successful about legal education, including at least some version of what has traditionally happened in the first year, law schools can produce this more effective legal education with increased emphasis on experiential education.