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The Santa Clara Experiment: A New Fee-Generating Model for Clinical Legal Education

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THE SANTA CLARA EXPERIMENT: A NEW FEE-GENERATING MODEL FOR CLINICAL LEGAL EDUCATION

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I. INTRODUCTION

Santa Clara University's Law Clinic was established over twenty-five years ago. From January 1995 through May 1996, we experimented with a fee-generating model at the Clinic[1] which consisted of an employment law project operating in conjunction with the criminal defense clinic already in place. Our results exceeded our expectations and offer an encouraging new model for a clinical program that can

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[1] Prior to January, 1995, the Santa Clara University Law Clinic had two full-time tenured or tenure track teaching positions handling 13 students in a semester.

generate substantial fees without compromising the goals and values of clinical educators.

In recent years a lively and often heated debate has arisen in clinical scholarship about the feasibility and utility of implementing fee-generating legal clinics.[2] This debate has been fueled by publication of the *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (MacCrate Report), a 1992 study done by the American Bar Association.[3] The MacCrate Report stressed the concern that the curricula offered in most American law schools do not adequately prepare students for the practice of law. Specifically, the report emphasizes that law graduates lack the skills and values needed to practice law.

The MacCrate Report is only the most recent acknowledgement of the serious gap that exists between the theory taught in law schools and the practice skills needed in the real-world representation of clients.[4] As one commentator observed: "Many law teachers - especially clinicians - agree with the main message of the MacCrate report; the question is what to do and how to pay for it."[5] To the extent that clinicians have taken issue with the MacCrate Report, it is because it offers no suggestions for funding the expensive training it mandates.[6]

Proponents of the fee-generating clinic argue that it is the only

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[2] *See, e.g.* Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 CLIN. L. REV. 457 (1994); Gary Laser, *Significant Curricular Developments: The MacCrate Report and Beyond*, 1 CLIN. L. REV. 425 (1994); Martin Guggenheim, *Fee-Generating Clinics: Can We Bear The Costs?*, 1 CLIN. L. REV. 677 (1995); Lisa Lerman, *Fee-For-Service Clinical Teaching: Slipping Toward Commercialism*, 1 CLIN. L. REV. 685 (1995).

By fee-generating clinics we mean those that produce fees substantial enough to defray significant costs of the program. This type of fee-generating program is distinguished from the type that had previously been in place at Santa Clara. In the earlier program clients paid minimal fees ($200-300 a case), and the total income in any given year was not significant enough to have real impact on the funding of the program.

[3] TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM 235 (1992), [hereinafter MACCRATE REPORT]. The Task Force that issued the MACCRATE REPORT was created by the American Bar Association Section of Legal Education and Admissions to the Bar "to look at public and professional expectations of what lawyers are and ought to be, and what skills and values they need to fulfill those expectations, and how they go about acquiring those skills and values during and after law school." Press Release, American Bar Association Task Force on Law Schools and the Profession (August 9, 1992).

[4] This controversy is not new. For an early and well-known critique of the "modern" casebook methodology of Christopher Columbus Landell, see Jerome Frank's *Why Not A Clinical Lawyer-School?*, 81 U. OF PA. L. REV. 907 (1933). *See also* Jerome Frank, *Both Ends Against The Middle*, 100 U. OF PA. L. REV. 20 (1951).

[5] Lerman, *supra* note 2, at 685.

[6] *See* John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993).

model that allows an intensive clinical experience to a large number of law students, given the high cost of clinical education.[7] Opponents of the model contend that its "superficial appeal" masks dangerous threats to the educational mission of clinical educators, specifically, that fee-generating clinics: 1) undermine the educational goals of clinical education, 2) compromise clinic education's traditional commitment to public-interest lawyering, and 3) lower the academic standing of the individual clinician.[8] Additional criticisms include concerns that case demands and pressures minimize the ability of clinicians to pursue scholarship,[9] pose a risk that client billing will become unwieldy and imprecise,[10] force clinicians to select cases from a profit rather than pedagogical perspective,[11] raise ethical issues by "using unpaid student labor to raise money,"[12] and alienate the private bar by siphoning off clients.[13] While these critics have taken aim at the fee-generating model, they have failed to offer concrete suggestions as to how the mandates of the MacCrate Report might be accomplished for the largest number of law students.

Until now, opponents of the fee-generating model have targeted one program — that developed and championed by Gary Laser and Richard Matasar at the Chicago-Kent School of Law. Undeniably, the Chicago-Kent program has been economically sound and has grown significantly over a relatively short period of time.[14] Criticism of the Chicago-Kent program centers on the requirement that clinicians generate their own salaries and the concern that any economic benefit to law schools of fee-generating programs will come at too great a cost to the student, client, clinician, and private bar.

In the planning stages of our experimental program at Santa Clara, we shared many of the concerns voiced by these critics. We also had another concern: that students would not be able to provide competent representation in the complex area of employment litigation. In fact, none of the problems we had anticipated going into the

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[7] *See, e.g.,* Matasar, *supra* note 2; Laser, *supra* note 2. *See also* MACCRATE REPORT, *supra* note 3, at 254 n.36 (citing data on costs of clinics and concluding that "[the] goal of offering enrollment in a live client in-house clinic to every student before he or she graduates may not be feasible from a budgetary perspective for some time").

[8] Guggenheim, *supra* note 2, at 681-82.

[9] Lerman, *supra* note 2, at 690.

[10] *Id.* at 700-02.

[11] *Id.* at 696-97.

[12] *Id.* at 704-05.

[13] *Id.* at 705-06.

[14] The areas covered by clinicians at the Chicago-Kent program include employment discrimination, civil litigation, domestic and international commercial litigation, federal tax litigation, real estate transactions, criminal defense litigation, immigration, and health law. Laser, *supra* note 2, at 438.

program ever materialized. For example, to our surprise we found the private bar, and in particular alumnae, extremely supportive and encouraging. We also found that client billing in the lucrative employment cases was no more complicated than the billing practices that had been in place for years at Santa Clara Law Clinic, where modest fees have always been charged for legal work. Likewise, issues surrounding the use of "unpaid student labor" in employment cases were much the same as they are in the less lucrative criminal cases. On this issues, we simply disagree with the critics who suspect that the use of "unpaid student labor" is unethical.

Regarding the other concerns stressed, it is important to note two key differences between Santa Clara's program and that at Chicago-Kent: 1) unlike the Chicago-Kent program, at Santa Clara the clinician's salary is not dependent on fees generated,[15] 2) the Santa Clara program has two distinct components — an employment project and a criminal misdemeanor project. As explained in this article, these differences were key factors in the success of our program.

After two years of operation, we found that the fees generated by the cases had little or no bearing on the educational mission of our program. Also, because of the abundance of cases available to us, we did not find ourselves in the difficult position of having to choose cases based on monetary concerns rather than pedagogical interests. The cases we litigated were educationally sound and financially lucrative. Further, because our salaries were not dependent on the money we earned, our status among our colleagues was not affected. To the extent that the demands of cases placed added burdens on us, the fees generated made it possible to hire fellows[16] to assist with the addi-

[15] Since the inception of the law clinic at Santa Clara, clinician salaries have never been dependent on fees generated by the program. The employment law project described here evolved when a tenured member of the clinical faculty took a two-year leave and her position was filled by one of the authors of this article, whose primary experience was in employment litigation. Her salary was paid by the law school, as any visitor's salary would be and was not dependent on fees generated by the clinic.

In the Chicago-Kent model, clinical professors are currently being hired on long term contracts that require them to bring in fees from their clinical cases which will generate 150% of salary. The additional 50% over and above the clinician's individual salary is calculated to cover additional "overhead costs" (such as health benefits, secretarial, and pension) with the law school contributing only space, library resources, and malpractice insurance. Monies generated in excess are shared between the clinician and the law school according to a "graduated tax." Any clinician who fails to generate the requisite amount is assessed a penalty, which must be paid back to the law school. These clinicians are not on tenure track and, therefore, have no scholarship or community service responsibilities. They participate "fully" in the governance of the law school, except decisions on hiring and tenure. Gary Laser, *supra* note 2, at 438.

Although the Chicago-Kent program has taken center stage in these debates, it is not the only fee-generating clinic operating in American law schools.

[16] Santa Clara's fellowship program offers a one to two year position for recent law

tional work, freeing us up to pursue scholarship. Lastly, the combination of criminal cases (where we continued our on-going work representing indigent defendants, battered women and people with AIDS) and employment cases (where, as it turned out, we represented clients who might not otherwise have found competent representation) allowed us to enhance the public interest work of Santa Clara's Law Clinic, a goal that has long been central to this program.

In this article, we focus primarily on the employment rather than the criminal component of the program. We did this because the criticisms of fee-for-service clinics hinge on the demands of complex cases that generate substantial fees, which is more characteristic of our employment cases than our criminal cases. The employment cases tend to be more protracted than the criminal cases and, while the criminal cases do generate modest fees, the employment cases demand a more substantial contingency fee following successful resolution of the case. Our emphasis on employment cases is an effort to address head-on the concerns of our critics.

II. PEDAGOGICAL GOALS

The MacCrate Report outlines specific goals for legal education as ten fundamental skills: problem solving, legal analysis and reasoning, legal research, fact investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas;[17] and, four fundamental values: providing competent representation, striving to improve the profession, professional development, and promoting justice, fairness, and morality.[18] While there is general agreement among clinicians that these articulated goals and values are germane to clinical teaching, clinical programs vary as to which skills and values are emphasized.[19] Our experimental fee-for-service clinic attempted to embrace the pedagogical goals and values outlined in the MacCrate Report and one additional goal: to earn enough money to make a significant contribution to the cost of providing clinical legal education to our students. Since,

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graduates interested in law teaching. The program targets law graduates traditionally underrepresented in law teaching, providing financial and peer support. Fellows have the opportunity to collaborate with experienced law teachers and are encouraged and supported in the publication of legal scholarship. A stated goal of the program is to advance the public interest mission of the law school and as such, fellows have a natural place in Santa Clara's Law Clinic.

17 MACCRATE REPORT, *supra* note 3, at 138-40, 141-207.

18 *Id.* at 140-41, 207-21.

19 *See, e.g.*, Homer C. LaRue, *Developing an Identity of Responsible Lawyering through Experiential Learning*, 43 HASTINGS L.J. 1147 (1992).

unlike other fee-generating models, we were not saddled with the burden of having to raise our own salaries, we were not overly concerned with the amount of money we would raise. In fact, the income we did earn exceeded what we believed possible over so short a period of time.

III. EXPERIENTIAL LEARNING THROUGH A REFLECTIVE PRACTICUM

Much of learning theory supports the idea that adults learn best through experiential learning.[20] Consistent with this theory, role assumption has always been a "defining feature of clinical education."[21] Although traditional legal education has been almost exclusively theoretical, the goal of clinical legal education has been to "bridge the gap between the theory of the classroom and the practice of the real world."[22] Clinical legal education integrates abstract theory into actual legal problems. Through clinical education, students can learn how the practitioner confronts a situation of uncertainty and uniqueness, reflects on the issues presented, and solves real-life legal problems. Clinical education prepares students to respond to the challenges posed in practice where one is confronted with problems that cannot be solved by the routine application of theory because they do not present themselves as "well formed structures" to which pure theory can be applied.[23] The competent practitioner is challenged to "construct" not only a solution but the problem itself.[24]

A challenge for clinical educators is to develop a reflective practi-

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[20] *See, e.g.*, Frank S. Bloch, *The Androgogical Basis of Clinical Education*, 35 VAND. L. REV. 321, 325 (1982).

[21] Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 283 (citing the Association of American Law Schools-American Bar Association Committee On Guidelines For Clinical Legal Education, Guidelines For Clinical Legal Education (1980) [hereinafter Guidelines] at 12, which defines clinical legal education as follows:

> 'Clinical Legal Studies' includes law student performance on live cases or problems, or in simulation of the lawyer's role, for the mastery of basic lawyering skills and the better understanding of professional responsibility, substantive and procedural law, and the theory of legal practice. The performance or simulation of the lawyer's role may include one or more of the following: 1) representing or assisting in representing a client in judicial, administrative, executive, or legislative proceedings; 2) assisting a client as office or house counsel; or 3) undertaking factual investigations, empirical research, policy analysis, and legal analysis on behalf of a client.

Guidelines at 14.

[22] Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLIN. L. REV. 231, 247 (1995).

[23] DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER 3-4 (1987).

[24] *Id.* Schön observes that the problems of the real world often do not present themselves as problems at all, rather they appear as "messy, indeterminate situations" upon which the practitioner must first impose order in order to find an appropriate solution.

cum that examines what it is that competent professionals do when solving problems in the "indeterminate zones of [legal] practice" which are riddled with "uncertainty, uniqueness, and value conflict."[25] In his influential work on educating professionals, Donald Schon argues that a professional is, in essence, an artist and that artistry cannot be taught, but that it can be coached.[26] Thus, central to this learning theory is the notion that "artistry," as taught in the practicum, is a collaborative process involving learning that occurs when the student performs and reflects, when the coach critiques and demonstrates, and when students learn from each other.[27] The coach's role is seen as "demonstrating, advising, questioning and criticizing."[28]

The final step in a reflective practicum is a discussion of the process that has just occurred and an articulation of what was done and why. This "reflection on reflection-in-action" provides the model for the future professional's critique of her own performance throughout her professional life, and thus encourages continued professional growth.

The general consensus among clinicians is that a primary goal of clinical education should teach students to become "reflective practitioners."[29] Critics argue that a reflective practicum is not possible in a fee-for-service clinic. Our experience at Santa Clara refutes that conclusion. With our model, we were able to concentrate on teaching students to become reflective practitioners in a clinic that generated substantial fees.

IV. A Fee-For-Service Clinic as a Reflective Practicum

Consistent with the broad goals of the MacCrate Report, our aim at Santa Clara was to create a reflective practicum emphasizing skills theory and application,[30] "reflection-in-action" (learning from doing) and "reflection on reflection-in-action" (later thinking about what you

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[25] *Id.* at 6.

[26] *Id.* at 17.

[27] *Id.* at 38.

[28] *Id.* at 38.

[29] *See, e.g., Report of the Committee on the Future of the In-House Clinic*, 42 J. Legal Educ. 508, 513 (1992); Anthony G. Amsterdam, *Clinical Education - A 21st Century Perspective*, 34 J. Legal Educ. 612, 616 (1984); Michael Meltsner & Phillip G. Schrag, *Scenes From A Clinic*, 127 U. of Pa. L. Rev. 1, 2 (1978); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 Akron L. Rev. 463, 474 (1995).

[30] We are using the term "skills theory" to emphasize that the dichotomy between "theory" (as taught in traditional Langdellian classrooms) and "practice" is false. Every skill practiced by lawyers is replete with theory, and the intern who learns only application without theory has acquired knowledge that is already obsolete. *See generally* Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577 (1986).

did to improve your performance in the future).[31] Because our program was a litigation clinic, students were also naturally confronted with issues of role and professional identity, ethics, and "fact skepticism."[32] A central objective of this reflective practicum was to expose students to a wide range of experience. To this end, we assigned each student to both criminal misdemeanor and employment cases.[33] This mix of cases provided the opportunity for students to assume full responsibility for some cases and to work collaboratively with a supervisor on others. It offered students exposure to clients from a variety of socio-economic backgrounds and provided opportunities for confronting issues of diversity, service, and justice.

Our teaching methodologies were both directive and nondirective; we employed role assumption (live client and simulation), evaluation, modeling, demonstration, and didactic and dialectical forms of teaching.[34] We utilized a combination of readings, lecture, demonstra-

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[31] The term "reflection-in-action" and "reflection on reflection-in-action" are additional terms coined by Donald A. Schön. Schön defines "reflection-in-action" as:

> [a] process by which a new response is generated in the situation, in response to surprise and under conditions of uncertainty, in a way that involves on-the-spot experimentation and that does not necessarily take place in words . . . reflection on reflection-in-action is an attempt to describe the knowledge that was generated and the conditions under which it was generated and on the on-the-spot experimentation that was carried out. The two of these in combination . . . are . . . a major part of what counts as artistry in practice.

Schön, *Educating The Reflective Legal Practitioner*, *supra* note 22, at 247.

[32] The term "fact skepticism" has been defined as "the idea that the legal system is incapable of reconstructing the complexity of past events with enough accuracy to afford certainty to decision makers or observers about what has occurred and what should occur." Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 718 (1992).

[33] Employment cases are complex and thus are ready targets for critics who believe hard cases have no place in clinical programs. As we explain in this article, however, we found employment cases very useful in the clinical setting. For a view that advocates taking tough cases to broaden student experience, to challenge the clinician, and to keep the practice interesting, see Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 CLIN. L. REV. 545 (1996). Reingold's "benchmark of the 'hardness' of the case is the extent to which it: (1) poses the risk of taxing the program's resources; (2) may be controversial either in the public eye or to some constituent group of the law school; (3) is likely to outlive (figuratively if not literally) the students assigned to it; and (4) presents legal issues of a scope, scale, character, or complexity not ordinarily handled by the program." *Id.* at 546-47.

[34] This mix of methodologies has been explored by several authors. *See* Mina Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989); Hoffman, *supra* note 21. Hoffman explores in depth the various learning and teaching methodologies. For instance, he observes that role assumption, coupled with evaluative critique, is particularly well-suited to teaching lawyering skills such as interviewing, negotiating, developing case strategy, and trial advocacy. Hoffman argues, however, that a combined method of "demonstration, role assumption and evaluation is a far superior method of teaching lawyering skills than reliance on any one method" because it is not only more efficient, it also permits more "complete and in depth" exploration of the subject matter than is strictly

tion, and simulation early in the semester so that students could be oriented quickly and provided with a theoretical framework for later tasks in role.[35] As students became acclimated to their roles and the substantive and procedural law applicable to the cases, they took on increasing responsibility for planning and making difficult strategic and tactical decisions.[36]

Students worked in teams on both criminal and employment cases. A team of two students was given responsibility for each criminal case and, depending on the complexity and stage of the employment case, four to six students were assigned. Continuity was assured by two methods: 1) memoranda detailing the progression of the case, and 2) "senior associates" (students taking their second semester of clinic) who acted as bridges for clients and helped orient new students to the cases.

Both directive and non-directive teaching methods were used depending on the difficulty of the task and the sophistication of the individual student. Some clinicians advocate a purely non-directive teaching methodology for even the most mundane tasks, arguing that it is essential in the setting of the reflective practicum to permit learning through repeated trial and error.[37] Others have questioned the

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called for in a given situational problem. *Id.* at 286. Role assumption is less suited to conveying comprehensive knowledge of broad subject matter because it is less organized and too inefficient. *Id.* at 287. Many clinicians take issue with this approach and maintain that the only acceptable methodology is strict role assumption coupled with nondirective teaching. *Compare* Jane Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1073-75 (1985). In the Santa Clara project, we rejected a completely nondirective approach for handling our employment caseload because of the sheer complexity of this type of litigation.

[35] "Skills training," particularly emphasizing interviewing and counseling skills, is introduced early in the semester during a weekend "boot camp" which has long been a part of Santa Clara's clinical program. During the remaining weeks of the semester, we covered topics such as case theory and theme, negotiation, civil and criminal procedure, motion practice, discovery, taking and defending depositions, and trial advocacy skills. Several classes were used to refine case theory or strategy in cases we were actually working on or to conduct simulations of actual hearings or depositions for which students were preparing. At times we involved outside speakers, including members of our faculty, and we frequently involved the clients themselves.

[36] Peter Toll Hoffman has described this "staged supervision" concept in detail. *See* Peter Toll Hoffman, *The Stages Of The Clinical Supervisory Relationship*, 4 ANTIOCH L. J. 301 (1986). At Santa Clara, we found that it was relatively easy to move through all three stages in supervising student handling of misdemeanor cases, producing at the last stage a supervisory relationship in which the student acts as lawyer and the coach acts merely as "confirmer and guider." *Id.* at 309. The complexity and prolonged life of our employment cases, however, precluded us from moving farther than stage two in which the intern and supervisor engage in a collaborative effort. *See id.* at 307.

[37] *See, e.g.*, Aiken et al., *supra* note 34, at 1073-1075. The authors recount a situation in which interns had puzzled for eight weeks over a social security regulation that was problematic for their client's case. Even though the supervisors knew of another helpful regulation, they refrained from sharing this information so that the students could experience the

pedagogical value of so rigid a methodology especially in the earliest stages of clinical training.[38]

In her article critiquing fee-generating clinics, Lisa Lerman, a strong advocate of non-directive teaching, offers an "illustration [of] the quality of reflection that is possible in academic clinical teaching" and argues that "*fee-for-service clinical teaching offers significant disincentives to this type of teaching.*"[39] One such illustration is of a typical call to opposing counsel. She reports:

> a phone call to opposing counsel asking for a week's delay in a hearing date might be discussed at several case team meetings .... [T]he case team might discuss whether the request should be made by telephone, letter, mailgram or personal contact; who should make the call and to whom she should speak; how the request might be phrased. Team members might anticipate the range of possible responses, and might consider whether anything had to be given up as the price of making the request; this inquiry might lead to a re-evaluation of the decision to ask for a postponement. The interns might rehearse the contact with the lawyer by role playing it. After the actual contact was made, another case team meeting might be used to review the outcome. This retrospective review might include significant emphasis on process, such as an examination of whether the interns followed up any leads of the opposing counsel (such as hints about settlement) and if so, whether they did so by design or out of deference to the opposing counsel's greater experience. The case team might look at which intern did the most talking during the contact, and why, and at the emotions of the call and how they affected the outcome. The advisors would raise questions that the interns did not themselves identify, until the subject had been covered thoroughly. The meeting might conclude with an intern-run evaluation of what they had learned from this scrutiny of a minor incident.[40]

In Professor Lerman's example, through a "reflective learning" process, students learned the value of planning and gained confidence in the lawyering role and insight into their own role in professional collaboration. In our experience, valuable lawyering skills need not necessarily be taught in the context of a "minor event."[41] These skills can be taught effectively in the context of complex and factually-rich legal problems, while at the same time increasing students' under-

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satisfaction of finding it for themselves and learn how to deal effectively with complex regulations. *Id.* at n.88.

[38] *See, e.g.,* Hoffman, *supra* note 36, at 303-05; Kotkin, *supra* note 34, at 199-200.

[39] Lerman, *supra* note 2, at 691 [emphasis added].

[40] *Id.* at 692 (citing Aiken et al. *supra* note 34, at 1054 n.33).

[41] *Id.* The characterization of this example as a "minor event" was taken from Lerman's article.

standing of legal theory and case analysis. The fact that these complex legal problems might arise out of an economically profitable case need not affect the outcome.

In our program we achieved positive results by preselecting critical stages of cases for intense scrutiny by all of the students, (e.g., client interviewing and case evaluation, theory and theme development, taking and defending depositions, counseling, court hearings, various alternative dispute and negotiation opportunities, and trials). The reflective learning process also occurred spontaneously during case conferences and in one-on-one supervision meetings with students.

A. Reflective Learning in Fee-for-Service Cases

Each semester, a criminal and an employment case were selected as the focal point of two extended classes on case theory and theme. Students were assigned preparatory readings on theory and theme development[42] and given a short factual memorandum prepared by the students assigned to the case chosen as the focal point of the class, along with supporting case material.[43] After a lecture on theory and theme formulation, theory and theme were discussed in the context of the actual case. All of the students and supervisors raised questions, much like medical rounds, testing the strengths and weaknesses of the case, and suggesting areas for further investigation and refinement.[44] These classes were lively and of great interest to students. An illustration of the reflective practicum in operation at Santa Clara can be seen in the following examples.

1. An Employment Case: A Class on Theory and Theme

A typical employment case presents a unique challenge to clinical teaching. Unlike the criminal cases, the employment cases routinely involve numerous witnesses, the review of volumes of documents, and they often take several semesters to complete. As a result, the employment cases do not offer students the same ready opportunity for independence in case-planning and execution as the criminal cases. This is central to the criticism that complex cases do not permit reflec-

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[42] We typically assigned one of the following: Edward J. Imwinkelreid, *The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme*, 39 VAND. L. REV. 59 (1986); DYNAMICS OF TRIAL PRACTICE, (R.L. Carlson & E.J. Imwinkelreid 2d ed. 1995).

[43] For example, in criminal cases, students were routinely given a copy of the police report and a summary of witness statements.

[44] Tentative themes are offered, critiqued, and refined. The class is videotaped for later review by the student who will prepare the theme and theory memorandum and students who are later assigned to the case.

tive learning. Mindful of these differences, in the employment cases we adopted a more collaborative model and a more directive supervision style in the early stages of the student's experience. We anticipated that absent sufficient direction, students would become overwhelmed by the cases' complexity.[45] In structuring the supervision of the employment cases, we adjusted our methodology to accommodate this concern.[46]

At the beginning of each semester, in addition to training on interviewing and counseling, we gave a lecture covering the basic substantive and procedural law applicable to employment and employment discrimination cases.[47] Following an initial client interview,[48] students prepared a memorandum detailing the facts learned, possible causes of action, and ideas for additional investigation. During a meeting of the students and supervisor to review the memorandum, students were queried about their tentative theory of the case, possible legal issues, and factual strengths and weaknesses of the case. A decision was then made to accept or reject the case, or to conduct further legal research or factual investigation.[49]

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[45] This tendency for students to become overwhelmed in the earliest stages of role assumption is noted by Peter Toll Hoffman, *supra* note 36, at 303.

[46] We decided to handle no more than four active employment cases at any time. We felt that a greater caseload would reduce available supervision time to unacceptable levels and place an unnecessary strain on financial resources. Our litigation was funded by monies generated from early settlements of cases and by arranging co-counseling agreements with alumnae who sought clinic help on cases. This method of funding is only marginally acceptable. The law school should be willing to provide monies for a start-up litigation fund. An investment of $25,000 would be sufficient for this purpose, and easily can be repaid within the first eighteen months of the clinic operation. Faculty in our combined clinic also teach classes in the regular curriculum (criminal law and evidence). If clinic faculty had no additional teaching load, and if fellows were added to the program, as we will advocate later in this article, the number of active cases could be increased.

[47] During the first semester of the program, before we had a full caseload, all students were assigned intake functions during their regularly scheduled office hours. A form was developed to aid students in covering relevant topic areas in an initial telephone screening of cases. Students prepared a memorandum following the initial screening which set forth the client's problem, a brief factual narrative, and a recommendation on whether a more extensive interview should be conducted. Within forty-eight hours of the initial screening, the intern met with the supervisor to review the memorandum. At that point, a decision was made to reject the case, conduct further questioning by telephone, or bring the prospective client in for an in-depth interview.

[48] The initial client interview in an employment termination or sexual harassment case normally takes three hours and is handled by two students. With the consent of the client, the interview is videotaped for later evaluation and critique.

[49] In evaluating the merits of the case, interns are encouraged to look ahead towards the likely outcome at trial or non-trial disposition, and consider a host of variables. The variables that are considered and later discussed with the client include: whether the causes of action are likely to survive dispositive motions; the strength of likely employer defenses; the range of recovery, less likely mitigation and the costs of suit; whether the target defendant is able to pay a judgment; the egregiousness of the employer conduct and

Once a case was accepted, two additional students were assigned as co-counsel and weekly case conference meetings were scheduled. At the first weekly meeting, students were challenged to develop a case plan[50] and budget. Based on that work, students assumed responsibility for conducting further research, conducting witness interviews, developing a "cast of characters,"[51] and preparing a chronology of events, an organizational chart, a case calendar, a methodology for document control and retrieval, a filing system, and the first draft of a theme and theory memorandum[52].

In the following case example, we represented a mid-level manager who had been terminated from employment after eight years with a Silicon Valley electronics firm. He had received excellent performance reviews and salary increases in each year prior to his termination. At the time of his termination, the client (then 55 years old) was told that he was being let go for performance problems, none of which had been documented or had been the subject of any prior discipline. The company was defending by claiming that plaintiff was employed at-will and could be fired without a showing of just cause. The defendant also claimed that the plaintiff had been fired for a number of performance problems for which he had been verbally warned.

In preparation for the class, which was attended by the client,[53]

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its impact on damages; whether the client is sympathetic or has "jury appeal"; the psychological impact of protracted litigation on the client; whether the client's version of the facts is corroborated; and a host of other case specific issues.

[50] Generally, the students correctly identified witnesses who must be interviewed, potential deponents, and the need for a chronological narrative. At this stage of the case, however, students rarely realized the need for other early case-management tools like the cast of characters, case calendar, document management, and theme and theory memorandum. These would be suggested by the supervisor and discussed as a group.

[51] The "cast of characters" is a useful tool for organizing information in one place on all potential plaintiff and defense witnesses. It, like many of these documents, is supplemented and revised over the life of the case. The document includes: personnel background, employment history, position and job title with employer, events the character witnessed or has personal knowledge of, documents in his or her possession, and anticipated testimony. *See* JANICE GOODMAN ESQ. & CHRISTOPHER BELLOW, EDS., EMPLOYEE RIGHTS LITIGATION: PLEADING & PRACTICE § 1.03[5] (1995).

[52] The theme and theory memorandum is the heart of the case. It sets forth the elements of the prima facie case, incorporating the facts initially developed through the client interview, anticipates possible defenses, and begins the development of a narrative. This is the unifying document that will guide future discovery strategies. Although one intern generally writes the document, its development is a collaborative event involving the entire body of clinic students.

[53] We initially conducted the theory and theme classes without the client because we were concerned that students would feel constrained in offering criticism of the client's behaviors on the job, raise issues of personal responsibility, or argue strenuously for the rights of the employer. On the other hand, we felt that we lost much of our client-centered approach by not including the client. Finally, we decided to invite the client to participate.

the students assigned to the case met with the clinic supervisor and isolated what they considered to be the strongest facts for the plaintiff. At the class, the facts were listed on the blackboard:

1) his eight years of employment prior to termination;
2) his eight years of good performance reviews;
3) his annual salary increases of between eight and ten percent (the norm was five to six percent);
4) the company's progressive discipline policy that was not followed in his termination;
5) his retirement and stock option plan which indicated the company's commitment to a long-term relationship with him.

The dialectical portion of the class began by reviewing the jury instructions for the five causes of action raised in the case.[54] After some initial discussion, one of the theories of recovery was easily rejected because of problems with proof. We then asked students to assume the role of jurors in the case and tell us what facts they needed to know to decide the case on the remaining theories.

A portion of the discussion follows:

Student #1:	Why did [client] think he had an implied contract [that he would not be terminated except upon just cause]? I've worked in the electronics industry and they always tell you that you're "at-will" in your employment letter.
Student #2:	What do you mean? An employer can't just fire you for no reason. Employees have rights.
Supervisor:	Well what about downsizing? Don't people lose their jobs all the time?
Student #2:	If the company has financial problems, they have a right to let people go.
Supervisor:	Under the law is it presumed that people have lifetime employment?
(Silence)	
Supervisor:	What's wrong with a new manager coming in and firing the old management team? Shouldn't he have a right to work with people he believes in?

The results were uniformly positive. We found little constraint in student discussion and critique, added richness to the dialectic, and an increased rapport between the client and students.

[54] The causes of action were: breach of an express contract, breach of an implied contract, breach of a covenant of good faith and fair dealing, age discrimination, and wrongful discharge in violation of public policy.

(General agreement)

Student #3: No. I don't believe that. Employees should have rights too.

Student #4 (student assigned the case): In California there is a statute that says employment is presumed to be "at will."

Supervisor: So is that the law?

Student #4: No, it's a rebuttable presumption. Under certain facts, the employee could have implied contract.

Student #3: Do we know whether [client] had an employment letter? What did it say?

Student #4: He did have a letter, but it was silent on the issue of how a termination could occur.

Student #3: What does the job manual say?

Supervisor: The manual says all employees are "at will" unless someone at the level of a Vice-President or President says otherwise and then it must be stated in writing.

Student #1: Well that's it, isn't it? He didn't have a letter that said he wasn't an "at will" employee, did he?

Supervisor: Is that it? What's the law on the issue?

Student #1: That's what I don't understand. They talk about an "implied term" arising from the conduct of the parties . . . what does that mean?

Supervisor: What do you think it means?

Student #1: I don't know. What about the parol evidence rule?

Student #4: We did a memo on that issue in another class. The law in California is that what parties do is just as important as what they say in writing and might even override what's written.

Supervisor: When can party conduct override a writing like the "at will" language in the manual?

Student #4: Well, if it occurs after the fact, it might be a contract modification, or if the language is ambiguous . . . and I think the manual is ambiguous because it also talks about needing to give oral and written warnings prior to termination and [client] didn't get those.

Student #5: I thought the parol evidence rule meant that no contrary evidence could come in if the agreement was in writing.

Student #6: You have to have an agreement first. What was the agreement?

Supervisor: How do you think the courts will decide if there was an integrated agreement and what the agreement was?

(Silence)

Supervisor: Well, let's start by looking at the cases.

(Discussion of the case law followed.)

Student #1: [to client] I'm still wondering why you thought you had a contract.

Client: Ok, well. . .I was told when I was hired that the company was growing and that I had a great future with them, and that they wanted me to come and grow with the company. Every time I got a raise, my boss would say the same kinds of things . . . you know, good job, keep it up, let's do the same thing next year . . . and well, we all knew that we couldn't just fire someone without documentation . . . Human Resources was really adamant about that.

Student #5: Did you have a contract at your last job?

Client: Yes, I thought I did. I had a secure job there — I only left because [defendant] was a bigger company. I would have more responsibility, more money, and an opportunity to move up in the company.

Student #6: Did [defendant] know that was what you expected?

Client:	Yes, the person who recruited me to [defendant] was my old boss. I knew him to be fair . . . when I got hired at [defendant], my new boss also stressed that as long as I did a good job, I had nothing to worry about . . . I'd always have a job.
Student #8:	Did you ever have to fire anyone?
Client:	Yes.
Student #8:	How did it happen?
Client:	Well, it was an on-the-spot firing. The employees were fighting on the job and there's an exception in the policy for that kind of behavior.
Supervisor:	Is that covered in the manual . . . let's look, yes, there it is. Did you ever think about firing anyone else?
Client:	Yes, our former purchasing manager was laid off because my boss wanted to get rid of him, but we couldn't justify it under the terms of the employee manual. He was an older guy, and Human Resources was worried that he'd file an age discrimination charge.
Supervisor:	Tell us more about what happened in that case . . . .

This discussion was continued in case team meetings and sessions held in preparation for drafting discovery requests and deposition questions. It led to a review of relevant cases and a refined case theory supporting the client's reasonable basis for believing he had an implied employment contract. It also led to the identification of new witnesses and reinterviews of other witnesses to develop corroboration of the client's story. This approach provided students with a model for analyzing legal abstractions and contextualizing them to develop a simple factual story that was believable and coherent. Students were then able to identify gaps in the story, pinpoint areas of vulnerability, and develop ideas for further investigation and discovery to overcome possible defenses. The progression also offered a departure point for assigned students to begin planning depositions for opposing witnesses. Finally, we were able to discuss, at length, students' attitudinal biases about employee interests in job security and employer rights, how those biases might be reflected in the jury pool or by the judge, and how we might structure voir dire questions at trial

to select a favorable jury.

In these classes, we combined directive teaching (lecture) and nondirective teaching (students themselves developed the theory and theme in a particular case with coaching by the teacher). We found these classes produced a fertile environment in which students could explore and apply a particular skills theory, *i.e.* they actively engaged in legal and factual analysis.[55] Further, students took part in framing a model for problem-solving that they can recreate in their own practices.

An example more closely analogous to that of Professor Lerman[56] occurred during the drafting of paper discovery and the "meet and confer"[57] process. When drafting document inspection demands, the students looked backward to the theory and theme already developed, and forward to anticipate objections to discovery demands. They prepared memoranda justifying the relevance and cost-benefits of the requested discovery in advance of receiving objections. Once objections had been filed, interns evaluated the objections, prepared responses, anticipated rebuttal, and role-played the anticipated dialogue with opposing counsel. Thereafter, the students and supervisor participated as co-counsel in the actual "meet and confer" conference. After the conference, students summarized what occurred and recommended a course of action. The "meet and confer" was then subjected to a thorough post-mortem in which the roles of opposing counsel, supervisor, and interns were subjected to intense scrutiny. The post-mortem was also utilized to reflect on the negotiating style of our opponent, discuss any unexpected arguments raised by opposing counsel, evaluate the merits of the arguments, fashion responses, and attempt to predict the likely outcome before a discovery commissioner if we were unable to resolve the dispute. This process, like that of Professor Lerman, underscores the importance of planning, permits analysis of professional role, and demystifies the discovery process, reducing anxiety as students adjust to their new roles. It achieves these benefits in a supportive atmosphere for the student, while ensuring excellence in representation for the client.

The theme and theory class and the on-going development of

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[55] This collaborative learning environment is an example of what Frank S. Bloch has called "a spirit of mutuality between teachers and students as joint inquirers." Bloch, *supra* note 20, at 338, (citing MALCOLM KNOWLES, THE MODERN PRACTICE OF ADULT EDUCATION 41 (1970)).

[56] See *supra* text accompanying note 40.

[57] In California, prior to the filing of any motion to compel discovery the parties are required to make a good faith effort to informally resolve any discovery dispute; failure to do so is sanctionable conduct. CAL. CIV. PROC. § 2023(a)(9)(Deering 1995). This requirement is known colloquially as the "meet and confer" obligation.

case theory that occurs naturally in the preparatory stages of litigation can be instrumental in the reflective practicum in a variety of ways. The continuous dialogue between students and supervisors constitute "reflection-in-action" as students learn theory development by doing, creating and modifying it. The ways we guided students in how to reflect on improving their performance at theme and theory building (*i.e.* "reflection on reflection-in-action") included the use of 1) focus groups 2) settlement conferences, 3) mediation and 3) trial.

The focus group consisted of community volunteers who sat as "jurors" while students conducted mock trials based on their own cases. Much like the social science research conducted in connection with jury studies[58], through these focus groups, students were able to identify the strengths and weaknesses of their case theory and theme while receiving valuable feed-back on their performance in the mock trial setting. In cases that actually go to trial, the same insight can be gained through post-trial juror interviews.

In the employment case settlement conference and in mediation, students made an elaborate presentation of their case theory aimed at a favorable non-trial resolution of the case. In the criminal cases, less elaborate presentations were made in plea bargaining sessions with prosecutors but in these sessions too, students gained valuable insight by testing the effectiveness of their preparation and analysis. Reflection on "reflection-in-action" followed each of these events when a post-mortem meeting was held for students and supervisors to scrutinize the experience and evaluate what was learned.

Throughout the semester, theme and theory classes were repeated as dictated by the demands of particular cases and by the educational opportunities offered. The following illustration shows the similarity of the reflection process in a non-complex, criminal misdemeanor case. Again, the complexity of the case and the amount of money generated had no effect on the value of the learning experience.

2. *A Criminal Misdemeanor Case: A Class on Theory and Theme*

We represented a single mother of five children, ages one to eight, who was arrested and charged with endangering the welfare of her children. The police had responded to a nuisance call from a sleeping neighbor who had been disturbed by her children. The police arrived to find her small basement apartment in complete disarray. The client, who worked the graveyard shift at a local supermarket,

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[58] *See, e.g.*, JURYWORK: SYSTEMATIC TECHNIQUES (Beth Bonora & Elissa Krauss eds., 2d ed. 1996).

had been ill for several days and unable to clean the apartment. The landlord had also failed to fix the toilet, a situation which resulted in unsanitary conditions. Additionally, there were loose electrical cords, food and debris strewn across the floor, and recycling bins strewn near the front door.

A portion of the class follows:

Supervisor: Where do we start?

Student #1: With the jury instructions.

(Instructions are read)

Student #2: Those sound a lot better than the case law.

Supervisor: (To team members) Given these instructions, what do you see as the strengths of your case?

Student #2: She's a hard worker.

Student #1: She's a nice person, very articulate.

Student #3: She's not on welfare . . . she's just poor.

Student #4: The children are all healthy.

Student #1: They're all smart. The kids are honor students.

Supervisor: What are the weaknesses?

Student #5: The place was a real dump. The pictures are appalling.

Supervisor: What else?

Student #7: Yeah, she's not married, and she's having lots of kids. Aren't jurors going to resent people like her?

Supervisor: Maybe, but she's not on AFDC. Will that cut some of the resentment?

Student #8: Why didn't she marry the father? What about him, doesn't he have some responsibility here?

Student #1: He's married to somebody else. He offered to get a divorce, but she [client] is a strict Catholic and doesn't believe in divorce. She also doesn't believe in birth control. The father was charged — he pled guilty and got probation.

Student #9: What has the D.A. offered her?

Supervisor: They offered her probation.

Student #9: That's not a bad offer.

Supervisor: But, what other implications do we need to be concerned about if she takes probation?

Student #9: Could the state take her kids?

Supervisor: That's a real threat.

Student #2: But, if she loses at trial she might go to jail and then she'd lose her kids for sure.

Student #1: The irony is that she temporarily lost custody of a couple of the kids right after her arrest. Before she could get them back one of the kids was physically abused in foster care. All because she's a messy housekeeper.

Supervisor: Do you think all of that is relevant evidence? Is it admissible?

(Silence)

Supervisor: If I were the D.A., I'd argue it's irrelevant to the charges and fight to keep it out. I agree it's very good defense evidence, but we need to articulate a good argument for its admissibility. But do we think a jury can overcome their aversion to what those photos show about the condition of the house?

Student #5: Well, there are lots of people who work hard and have lots of kids and still keep their homes clean.

Supervisor: So what does that tell us about the story we want to tell about how this happened?

Student #6: Well, we want to make it seem like this isn't the norm. That it's not always like this.

Supervisor: How do we do that?

Student #2: Well, she was sick. She was only getting two or three hours of sleep a night because her babysitter had cut back on her hours.

Student #1: This is a very small, cramped space. It doesn't take too long to get messy.

Student #5: All that mess? It takes awhile.

Student #7: No it doesn't. This was the most active time of the day for them. She was sick. Did you ever see the movie "Home Alone?"

Student #5: Are there any photos we could use where the house is nice and clean, like a birthday party or something?

Supervisor: That's a good idea . . . why don't we check it out with [client].

Student #8: Why weren't the kids in school?

Student #2: It was a holiday.

Student #5: How much money does she make?

Student #1: $25,000. But she pays $1,000 a month in childcare.

Student #3: How did she make ends meet. What about her family, why didn't they help?

Student #2: She seems to have a good relationship with her parents. But, I think she's really embarrassed by how she was living.

Student #4: Has anything changed since [client] was arrested?

Student #2: Everything. She moved. The father has assumed more responsibility. They've gotten some help.

Supervisor: Is that relevant? Will we be able to introduce it? Think about it. What else do you want to know?

Student #4: Did the kids have chores? What role did her church play in her life.

Supervisor: Those are good questions. What else?

Student #5: What did she do to try to fix the problems, couldn't she withhold rent given the conditions?

Student #1: She wasn't paying the rent. The father of the kids knew the landlord and had something worked out with him. She didn't really feel like she had much control.

Student #2: The landlord will testify for her . . . the pipe was broken to the toilet. To fix it he needed a loan because the floors had to be torn up and the pipe replaced. She was using a camp toilet and taking it out to a municipal spot and dumping it every day. The one year old was potty-training.

Supervisor: Even though the client may be technically guilty, is she morally guilty? Would a jury convict this woman?

Student #5: Well, the kids were not physically hurt. They weren't emotionally hurt . . . . What's the penalty? Will she lose her kids?

(The discussion continued, developing the client's story of what had occurred and why.)

Supervisor: So who do we think we want as jurors?

Student #6: If I were a parent, I could only sympathize to a point. I'd stop feeling sorry for the mom and start feeling sorry for the kids. How do we screen out people who keep a very clean house and can't understand anyone who doesn't?

Student #3: Would people with multiple kids be more sympathetic?

Student #2: I think people with busy lifestyles in general. I'm just a law student, but I'm exhausted at the end of the day. When I think of all the things she had going on . . . .

Student #4: What about women in general? Would they be less sympathetic to another woman?

Supervisor: Can any of you stand up right now and try an opening statement putting the client in the best possible light?

Student #6: She had five kids at home, ages two to eight . . . she's a hardworking person, a good mother . . . there was plenty of time to turn the house upside down.

Student #2: I think we should get the focus off the dirty house and onto our client. This is about a mom who loved her kids . . . .

Through this exercise, students were challenged to examine their own values from the perspective of a client who inhabits a very different world, with different values and limited options. Students began to recognize the complexity and uncertainties of trial work. They learned the importance of humanizing the client and conveying the client's story in a way that would most persuasively reach the jury. In this process, they also confronted the very real problems of predicting how a client's story would be filtered through the individual juror's own attitudes and life experience.

3. *Other Methods of Reflective Learning in a Fee-for-Service Clinic*

Through this process of theory and theme development in criminal and employment cases, students acted as both lawyer and co-counsel. They received the benefit of a collaborative "brain-storming session" involving other students and both supervisors. In the criminal case, the student assumed the primary role of legal representative throughout the litigation. In the employment case, representation was a collaborative effort between students and the supervisor.

A format similar to that used in the theory and theme class was used to prepare for taking and defending depositions, evidentiary hearings in criminal cases, settlement and mediation conferences, and trial preparation. On occasion, we included student simulation and supervisor demonstration.

For the criminal cases, all written work was prepared by students in successive drafts until a final draft was ready. In the same way, students in the employment case prepared all written work including the complaint, discovery, and motions.[59] Although this process was lengthy and often inefficient, it posed no threat to client service. Since caseloads were kept manageable, the turnaround time for work product equalled or bettered that achieved by large firms.

In both criminal and employment cases students prepare and argue motions,[60] and represent the client at trial. In the criminal cases, students take sole responsibility during all pretrial motions and the trial itself. Although the employment cases handled by the Law Clinic have, to date, all reached settlement before trial, had any of the cases gone to trial the supervisor would have taken a more active role. The students would, however, have been expected to handle most of the representation. This arrangement is similar to the way in which responsibility is allocated in depositions. For example, the supervisor

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[59] Typically, teams of two students were assigned to draft document inspection demands, requests for admissions, and special interrogatories. Before students began work on a document a supervisory meeting was held during which students presented tentative ideas and were encouraged to exercise initiative and creativity in their first draft. Rarely had the student thought to tap the client as a source of inspiration and direction. This course of action was suggested by the supervisor and the next meeting was generally more fruitful. After a collaborative review, the intern was usually given sample pleadings. At the next meeting, the supervisor critiqued the product, challenging the student to look ahead to demurrers, objections, and motions to compel. The supervisor made editorial changes, but rarely "authored" any pleading. A similar methodology was followed when students responded to written discovery demands by opposing counsel.

[60] In the employment cases, motions to compel served as an invaluable learning tool because interns were forced to revisit their theory of the case, analyze concepts of relevance, privilege, and privacy, and engage in a cost-benefit analysis. Contacts with opposing counsel often first occurred at this stage. Students and supervisor shared in these exchanges collaboratively although, depending on logistics or subject matter, the intern or supervisor at times acted alone.

routinely defends the client deposition,[61] while students conduct depositions of other witnesses under direct supervision. Generally, this allows each student to conduct at least one deposition lasting between one and two full days.[62] Although interns do not represent the client at the deposition, they do collaborate with the supervisor in preparing the client. Preparation usually takes three or four days and consists of the review of pleadings, document review, a theory discussion with the client, and a simulated deposition.[63]

V. Student Representation in Complex Litigation

One of the most difficult questions we asked ourselves initially was whether students could effectively represent clients in matters as complex as employment termination cases. Employment cases demand a firm grasp of the Rules of Civil Procedure, the evidence code, the state and federal substantive law and discovery practice, and often the integration of a complicated fact pattern. These cases are vigorously defended and mistakes made or excellence achieved during the discovery stages is usually case determinative. The practitioner must very quickly familiarize herself with the industry practices, standards, and terms of art of the employer in order to evaluate and attack the claims of poor employee performance usually raised in justification of the termination. Success often hinges on informed and skilled questioning of adverse deponents. Depositions may be emotionally charged, implicating sexual or financial privacy issues, issues of client self-esteem, and charges of intentional misconduct by the employer.

From the outset, we were concerned that students be given the greatest learning opportunity possible without compromising the rep-

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[61] Typically, the client deposition was conducted over a number of days, usually between three and seven. The client's supervisor's deposition was also lengthy, consuming three or four days. Other depositions were narrower in scope and thus more manageable.

[62] It is the senior associate who conducted the deposition during the second semester of his or her clinical experience. By that time the student had become comfortable with the attorney role, had a thorough knowledge of the case, had usually had a court appearance in a criminal case, and had observed a deposition. On occasion, two students conducted a deposition as a team, dividing up areas of examination. At intern conducted depositions, the supervisor provided feedback during breaks and gave a lengthy post-mortem. Rarely did the supervisor intervene — never unless the quality of client service was likely to be impaired absent intervention. *See supra* text accompanying notes 67-70.

[63] Students collaborated in all stages of client preparation and often acted as opposing counsel during the simulation. This offered them and the client an opportunity to develop a defense perspective on the case, thereby sharpening theory development. The simulations were videotaped and viewed by client, student, and supervisor. This allowed the client an opportunity to improve and provided an excellent opportunity for evaluation and critique of student performance. Similar preparation preceded the intern conducted depositions, including client involvement and a simulation in which either the supervisor or client assumed the witness role.

resentation to which the client is entitled. Whether and when to intervene in student representation are issues with which we struggled throughout the life of the project. How to strike the delicate balance between promoting the professional growth of the student while providing competent representation to the clinic client remains a crucial ethical issue.[64]

There is evidence in the literature that suggests that the tension between the clinicians' "educational obligations to students and their professional obligations to clients"[65] is universally felt. Some clinicians have advocated non-intervention "except in the rare instance of imminent error that would seriously damage a client."[66] Others believe that it is not sufficient simply to avoid malpractice because the client rightfully has an interest in "avoiding anxieties and demands caused by student mistakes and delays."[67] A recent study of clinicians suggests that although most of those surveyed endorsed non-directiveness in supervision, 74% also believed that the client should receive "the best possible legal service."[68] Understandably, the authors of the study found it difficult to reconcile these views about client service with the commitment to non-directive supervision also espoused by most respondents.[69] They suggest that the balance must be struck in favor of meeting the educational needs of the student and that clinicians should frankly admit that while "highly competent, even excellent service [can be provided], the best possible [service]" need not be provided.[70]

Mere avoidance of malpractice should not be a standard that we, as clinicians, endorse. Such a standard falls short of the level of professionalism we should expect of our students and ourselves. At the same time, student error endangering the clinic client's interest in excellent service is not uncommon. Therefore, throughout the life of our project, we monitored the educational needs of our students and the quality of service to our clients.

The admitted dangers inherent in student handling of employment cases were avoided by "assigning students manageable portions of complex cases that are challenging but still within the law student's

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[64] This issue has not be satisfactorily explored in clinical scholarship. One author who has explored this issue suggested criteria for intervention when the student performance poses an unacceptable risk to the client. See George Critchlow, *Professional Responsibility, Student Practice and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415 (1991).

[65] James H. Stark et al., *Directiveness In Clinical Supervision*, 3 PUB. INT. L.J. 35 (1993).

[66] Aiken et al., *supra* note 34, at 1073.

[67] Critchlow, *supra* note 64, at 428.

[68] Stark et al., *supra* note 65, at 45.

[69] *Id.*

[70] *Id.* at 67.

capabilities."[71] By working collaboratively with experienced practitioners, (both clinic supervisors and co-counsel), students were given an invaluable opportunity to learn through "reflection-in-action" and modeling. We found the employment cases to be particularly suitable for a law clinic, "because they foster genuine mutual inquiry between the student and the teacher."[72]

VI. The Role of the Private Bar

In conceptualizing our program, we were concerned that a fee-generating law clinic would be seen by members of the private bar, especially our alumnae, as unfair competition. This concern has been articulated as a critique of the fee-generating model:

> One potentially harmful consequence of the fee-for-service structure . . . might be resentment from private practitioners who have to pay bills to support all the services that the law school clinicians receive without cost. These services include not only Lexis, Westlaw, and library research services, but also rent, utilities, salaries for administrative support staff, law clerk wages, and other administrative costs . . . . In essence the clinicians might be viewed as having unfair advantages in competing for client business.[73]

Concern that we not alienate members of the local bar prompted us to conduct an informal survey of several members of the plaintiffs' and defense bar, including alumnae, who handled employment cases. Those with whom we spoke were unanimously enthusiastic about our proposed project. The consensus was that even in the relatively small marketplace of Santa Clara County (where our cases would be tried), there are too few attorneys representing plaintiffs in employment cases.[74] Throughout the life of the project, we worked cooperatively

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[71] *Id.* at 353.

[72] Bloch, *supra* note 20, at 352.

[73] Lerman, *supra* note 2, at 705.

[74] Because employment litigation has grown so quickly in recent years, it remains an area underserved by the private bar. This is due in part to the Civil Rights Act of 1991, which expanded the legal relief available to plaintiffs and granted a right to trial by jury.

Other factors probably at play are the difficulty in proving intentional discrimination and the costs of pretrial preparation. Proof problems are less onerous in California than many other jurisdictions because it is often possible to plead alternative causes of action sounding in contract. Contract claims do not, however, allow for recovery of hedonic and punitive damages. A typical employment case costs between $10,000-20,000 to litigate. It is not unusual to depose between five and ten witnesses, some over multiple days. Additional costs may also include a forensic economic expert, a psychologist or psychiatrist, a labor or human resources expert and an investigator. Employment cases are labor intensive. It is not unusual to log in excess of 250 hours of attorney time in the preparatory stages. As a result, even one or two of these cases can quickly take over all of the available time for a small practitioner. Since these cases take between 12-18 months to bring to trial, a small practitioner can face financial ruin before realizing a profit.

with local counsel and routinely received referrals from them, eventually co-counseling two cases with alumnae.

Among the clients represented at Santa Clara's fee-for-service clinic were mid-level managers, teachers, and waitresses and issues included wrongful termination and sexual harassment. In some of the cases we accepted, the client had been rejected by or was unable to afford private counsel.[75] In other cases, private counsel came to the clinic rather than bear the cost of representation alone. Rather than resentment from the private bar, we received support and encouragement for our project.

VII. Case Selection

A. Profit v. Pedagogy

One major criticism of the fee-for-service model is that cases may be selected on a profit, rather than a pedagogical, basis.[76] In our experience at Santa Clara, this apprehension was unfounded. Although some cases were rejected because they were not economically viable,[77] there were ample cases available that were both economically and educationally sound. Moreover, within the design of our program we had the added advantage of providing our students the opportunity to represent clients in both criminal misdemeanor and employment cases. The diversity of this practice exposed our students to two very different, yet complementary, practice models. They undertook representation of a diverse clientele, became familiar with different discovery models, experimented with different roles, and benefitted from a variety of teaching methodologies. The fact that our employment cases generated considerable fees in no way detracted from the educational results we achieved.

The threat to the educational mission comes not from selecting cases which are fee-generating for use in clinical teaching, but from mandating that the clinician bear complete responsibility for generating her salary and overhead costs. This demand, coupled with the type of financial bonus incentive the clinician at Chicago-Kent receives if successful, raises a distinct danger that clinicians will assume a larger

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[75] Many of the plaintiffs' bar are unwilling to accept these cases on a purely contingent fee basis because of the time and cost involved in preparation and the financial risk of an unfavorable result.

[76] Lerman, *supra* note 2, at 698-99.

[77] For instance, a client may have an appealing case on liability but may have completely mitigated damages by obtaining a comparable, or superior, position. Rarely should an action be brought if there is no wage loss because jurors are reluctant to award compensatory or punitive damages in the absence of economic harm to the plaintiff unless the employer conduct was outrageous. An obvious exception can be found in sexual harassment claims, in which the outrage of the jury can translate into a significant award.

caseload than can be reasonably handled in the setting of a reflective practicum. Where salaries are in no way dependent on fees generated, there is little danger that cases will be selected for their potential profit rather than their educational value.

B. Profit v. Public Interest

The concern that generating profit might pose a threat to the public interest mission of clinical educators is not only untrue but at Santa Clara we found exactly the opposite. With the profit we earned we were actually able to enhance the public interest work of this program.

Prior to the start of our experimental fee-generating program, Santa Clara Law Clinic generated some income — on average $6,000 a year — primarily through its criminal cases. The clinic customarily charged from $150 to $300 per case. Although the clinic occasionally represented clients free of charge, mosts clients who could not afford our services received representation from the Public Defender's office. The fees we generated covered litigation costs (e.g. investigation, filing fees, copying, and discovery) and allowed us to make a minimal contribution to the University. In the first year of our experiminental program, we received over $66,000[78] in fees from the employment cases. With the added income, we accepted more criminal cases on a pro bono basis than we had in the past because we were able to absorb the litigation costs of criminal clients who could not otherwise afford even our normal, nominal fee.[79]

As a direct result of the substantial fees earned, we have also added a supervisor to our clinical staff. This fellow[80] has allowed us to expand our program by increasing our enrollment by 50%. We are now providing clinical opportunities to more students, and accepting a correspondingly greater number of cases. Traditionally, Santa Clara Law Clinic's public interest work included representing people with AIDS, battered women, and indigent criminal defendants. With additional staffing, we have been able to increase representation in these cases and enhance our public interest program. Consistent with our public interest mission, our fellowship program is specifically designed to provide financial and peer support for law graduates traditionally underrepresented in law teaching.

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[78] In actuality, we earned more than $66,000 in that first year. Because of the lag time between accepting a case and final resolution, we did not receive income on some of those early cases until more than a year later.

[79] *Supra* note 2.

[80] *Supra* note 16.

VIII. The Status of Clinicians

In his article critiquing the Chicago-Kent model, Marty Guggenheim warns that a fee-generating clinic that requires clinical faculty to raise their own salaries creates a dangerous and unacceptable "double standard." This double standard brands the clinician as an expendable "outsider" who is not truly valued by the academy.[81] To illustrate this point, Guggenheim writes of the absurdity of requiring a constitutional law scholar to raise her own salary as a condition of employment.[82] Lisa Lerman echoes this concern and also postulates that the Chicago-Kent model will negatively affect the ability of clinicians to produce scholarly work, develop teaching materials, or engage in other professional activities. Her concern is that the clinician will be hampered by the need to generate billable hours during the summer months to meet her financial obligation.[83] We agree that these are serious concerns. As any clinician knows, it is very difficult to find time to supervise students effectively, manage a caseload, participate in law school governance, and produce scholarship. Many clinicians leave lucrative private practices and come to work in a university setting precisely because they want the opportunity to engage in scholarship. Any model which impedes clinical scholarship poses the danger that clinical teachers and the clinical enterprise will be marginalized.

It is because of these concerns that we agree with critics who argue that it is unwise to require clinicians to generate salary and overhead as a condition of employment. Clinicians have struggled too long and too hard in the move toward acceptance of their programs and parity with their colleagues. The fact that one aspect of one fee-generating model may be problematic does not mean that the benefits of such a program should be discarded. In order to cure the deficiencies in legal education outlined in the MacCrate report,[84] law schools must be committed to their clinical faculty and to the educational mission of the clinical enterprise.

One way in which fees generated can preserve the status of clinicians is through the support of a fellow. At Santa Clara, with money generated by our employment program we have been able to hire a full-time fellow to assist with teaching and case supervision. This support allows the clinician time for serious study and scholarship. Further, by supervising a clinic class over the summer, the fellow provides continuity in case management and frees the clinician for scholarly work. Not requiring that clinicians generate their own salaries and

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81 Guggenheim, *supra* note 2, at 681-82.

82 *Id.* at 682.

83 Lerman, *supra* note 2, at 702-03.

84 *See supra* text accompanying notes 3-4, 18-19.

adding fellows to clinic staff enables the clinician to maintain her status and the clinic to maintain the integrity of its educational mission.

IX. The Road Ahead

As anyone working in the area of legal education knows, budgetary problems faced by law schools today present an unprecedented threat to clinical education. If we are going to take seriously the criticisms of the MacCrate report, legal educators must turn to new ways of supporting clinical education. As our experience at Santa Clara proves, this can be accomplished without sacrificing pedagogical goals.

To achieve a workable balance between the professional interests of the clinician and the benefits of fees generated by cases, we advocate incorporating safeguards into a fee-generating model. In addition to not making a clinician's salary dependent on fees generated, we recommend that mandatory caps (beneficial to both clinician and student) be imposed on the number of cases handled by the clinician. For example, in the context of employment termination cases, we would advise that no more than four active cases be handled by a single clinician at any given time.

Based on our experience, even a modest fee-for-service clinic has the potential to produce income substantial enough to pay for most if not all of the operating costs of that clinic. A program combining criminal misdemeanor and employment cases[85] supervised by two full-time faculty and one fellow[86] can serve 20 students each semester.[87] Given a case turnaround time of 12 to 18 months from the filing of the complaint to trial or non-trial disposition,[88] the clinic can expect to resolve an average of three cases per year. The average employment case settles in the range of $150,000 and $300,000.[89] At a standard contingent fee of between 33 1/3 and 40% of recovery, this means that the clinic can estimate a recovery of fees in the range of $150,000 to

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[85] Although our model contemplates a clinic made up of criminal and employment cases, the basic structure of this model could be equally successful utilizing other concentrations. This would, of course, depend on selecting legal areas that complement one another by offering students both the independent learning experience provided by the criminal cases and the collaborative learning opportunity provided by the employment cases.

[86] We contemplate that a fellow would have a minimum of two years experience in practice and would be paid not more than $40,000 annually on an eleven-month contract.

[87] The clinic at Santa Clara proved successful operating as a one semester program with one or two students a semester enrolling for a second term. In the clinic we propose, all students would enroll for two semesters.

[88] This is the standard "fast track" pace of cases in Santa Clara County. It also approximates the turnaround time for civil cases in most federal courts.

[89] These figures are based on settlements in employment cases in the San Francisco Bay area as reported over a two-year period. *See* Jury Verdicts Weekly (1994-95).

$360,000 annually.

Assuming that the recovery falls at the low end of the range, the fees generated would support a full-time faculty salary and benefits with overage. If the recovery is even slightly better, at $200,000, the salary and benefits of the fellow are also covered. Although the clinician's salary is not dependent on fees generated, as it is at Chicago-Kent, the added income would provide additional resources for the law school by substantially defraying the costs of a clinical program that provides an excellent experience to more students and enables legal education to move substantially closer to meeting the goals of the MacCrate report.

CONCLUSION

The assertion of critics that there is "an inverse relationship between the economic efficiency of legal work and its pedagogical value"[90] is unfounded. It is possible to be true to our pedagogical goals, maintain our status among our colleagues and the integrity of our clinical programs, and at the same time generate money on which the future of clinical education depends.

As anyone working in the area of legal education knows, budgetary problems faced by law schools today present an unprecedented threat to clinical education. If we are going to take seriously the criticisms of the MacCrate report, legal educators must turn to new ways of supporting clinical education. As our experience at Santa Clara proves, this can be accomplished without sacrificing our goals.

[90] Lerman, *supra* note 2, at 691.