

Western New England University School of Law  
**Digital Commons @ Western New England University School of Law**

---

Faculty Scholarship

Faculty Publications

---

2011

# Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic

Robert Statchen

*Western New England University School of Law*, [rstatchen@law.wne.edu](mailto:rstatchen@law.wne.edu)

Follow this and additional works at: <http://digitalcommons.law.wne.edu/facschol>

 Part of the [Corporation and Enterprise Law Commons](#)

---

## Recommended Citation

56 N.Y.L. Sch. L. Rev. 233 (2011/2012)

This Article is brought to you for free and open access by the Faculty Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

ROBERT R. STATCHEN

## Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic

*ABOUT THE AUTHOR:* Assistant Clinical Professor of Law, Western New England University School of Law. J.D. Chicago-Kent College of Law, LL.M. in Taxation Boston University, M.B.A. University of Connecticut, B.A. Clark University. I owe great thanks to those who discussed with me the ideas in this article or who reviewed and commented on drafts, including Lauren Carasik, Nicole Dandridge, Maggie Finnerty, Eric Gouvin, Carmen Huertas, Harriet Jones, Julie Lawton, Serge Martinez, Jay Mitchell, Brenda Smith, Dana Thompson, Paul Tremblay, and Ian Weinstein. I am grateful for the insight and commentary of participants at the Teaching Drafting and Transactional Skills Conference at Emory Law School, the Clinical Theory Workshop and the Clinical Law Review Workshop at New York University School of Law, where I presented earlier drafts of this paper. Finally, I am extremely grateful to Julie McKenna for her excellent research assistance and collegial support.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

*Unfortunately, law schools have not created comprehensive programs for teaching students how to produce the documents that lawyers typically use in practice. Law schools should determine what types of legal documents their graduates will be expected to produce when they begin law practice and provide instruction in how to produce such documents. After all, it does no good to teach a student to think like a lawyer if the student cannot convey that thinking in writing.<sup>1</sup>*

### I. INTRODUCTION

The recent and rapid growth of transactional clinics,<sup>2</sup> and more specifically small business clinics (SBCs),<sup>3</sup> mandates that time and attention be given to pedagogical methods within this specialized clinical structure.<sup>4</sup> This article will focus on the drafting component of an SBC. It is often asserted that legal education does not effectively provide students with business-oriented, practical skills training.<sup>5</sup> At the heart of an SBC, is the necessity to prepare appropriate written client work product.

- 
1. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 149 (2007) [hereinafter “BEST PRACTICES”], [http://www.cleaweb.org/best\\_practices-full.pdf](http://www.cleaweb.org/best_practices-full.pdf).
  2. See *infra* Part II.A.
  3. For purposes of this article, the generic term “small business clinic” will refer to law school clinics that provide legal services to small businesses, and primarily micro-enterprises (entities that would require less than \$35,000 in start-up capital). Reference in this article to “transactional clinics” will refer to SBCs as well as non-litigation clinics focused on real estate, tax, intellectual property, non-profit organization assistance clinics, housing development, and other transactional issues. As transactional clinical education develops as a pedagogical method within the legal academy, it will be important to further distinguish teaching methods available for the separate types of transactional clinics. I posit, however, that the drafting process recommended in this article can be generally adapted and applied in all transactional clinics that require the drafting of client work product.
  4. Professor Findley recognized a similar lack of focus on teaching methods for recently developed innocence projects in law schools and his section on the foundations of pedagogical goals of clinical education provided an excellent overview of the general pedagogical goals of clinical education. Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 236–39 (2006).
  5. George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 318 (2009) (“[Professor] Gilson and others have discussed legal education for business lawyers. They vary in their prescriptions, but all agree there is a crisis.”); see also CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN’T TEACH YOU* (2d ed. 2008) (“[L]aw schools do a woefully inadequate job of preparing non-litigation lawyers—corporate, financing, commercial and real estate lawyers—to perform the most fundamental tasks that are expected of them.”); Eric J. Gouvin, *Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429, 430 (2009) (“I fear that to the extent law schools are attempting to provide their students with professional skills and values, they are doing it in a way that is skewed toward litigation practice and gives short shrift to transactional practice.”); Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69, 71 (2009) (“Once relegated to a single course on ‘business planning,’ supplemented here and there by adjunct-taught electives in real estate transactions or the like, law school curricula at every level of law school are being pushed to include a new focus on teaching future practitioners how to do deals.”); Wayne Schiess, *Legal Writing is Not What it Should Be*, 37 S.U.L. REV. 1, 6 (2009) (“Law schools do not adequately train students in legal drafting.”).

SBCs also provide an excellent opportunity for students to acquire interviewing, researching, drafting, counseling, problem-solving, and other areas of expertise.<sup>6</sup> This article attempts to provide a process for efficiently teaching students drafting<sup>7</sup> skills appropriate for an SBC and, ultimately, for transactional practice.<sup>8</sup>

A clinical professor supervising an SBC must balance competing goals of delivering professional client work product, providing an appropriate educational experience for students,<sup>9</sup> and, for some SBCs, fulfilling a social and economic justice

- 
6. See, e.g., Alex Curcuru, *The World is Indeed Flat: Preparing Students for the Global Market Through Law School and Small Business Incubator Partnerships*, 78 UMKC L. REV. 543, 555–57 (2009) (reviewing existing and potential partnerships between business incubators and law school transactional clinics); Eric Gouvin, *Learning Business Law by Doing It: Real Transactions in Law School Clinics*, 14 BUS. L. TODAY, Sept.–Oct. 2004, at 53, 54 (seeing a need to further law students' business acumen, Professor Gouvin founded a small business clinic in 2003 at Western New England University School of Law that ultimately became part of the Western New England University Law and Business Center for Entrepreneurship); Sean M. O'Connor, *Teaching IP from an Entrepreneurial Counseling and Transactional Perspective*, 52 ST. LOUIS U. L.J. 877, 881 (2008) (noting that in conjunction with his regular intellectual property courses, Professor O'Connor founded an Entrepreneurial Law Clinic at the University of Washington School of Law); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J.L. & POL'Y 195, 204 (2003).
  7. For purposes of this article, I differentiate between legal writing and legal drafting. Legal writing generally refers to preparing persuasive documents such as legal briefs and motions. Legal drafting generally refers to the preparation of binding legal text, such as statutes, rules and regulations as well as contracts, wills and trusts and public legal documents, such as notices and instructions. See Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1197 n.220 (2004); Tushar Kanti Saha, *Teaching Legal Writing to a Large Undergraduate Class: A Tanzanian Experience*, 3 J. MARSHALL L.J. 19, 24 (2009). As a part of the legal drafting genre, I would also include memoranda to clients explaining the documents which have been prepared for them or giving a statutory or regulatory analysis.
  8. This article does not shy away from the practical, nuts and bolts, boots-on-the-ground nature of its subject matter, i.e., how to teach students to draft client-ready transactional documents in an SBC and ultimately in practice. I do not enter the law school versus trade school debate, but argue implicitly that if a law school determines it wants to provide transactional services to live clients (which many law schools have recently done), the clinical supervisor must implement a process to create client work product professionally and efficiently. See AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION 4 (1992) [hereinafter "MACCRATE REPORT"], <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> ("The lament of the practicing bar is a steady refrain: 'They can't draft a contract, they can't write, they've never seen a summons, the professors have never been inside a courtroom.' Law schools offer the traditional responses: 'We teach them how to think, we're not trade schools, we're centers of scholarship and learning, practice is best taught by practitioners.'"); see also BEST PRACTICES, *supra* note 1, at 18 ("We also agree with [Professor Watson's] statement that 'most law teachers that I am acquainted with deny that law schools are 'trade schools.' . . . The result of the denial is that law schools are poor trade schools . . . ' We hope this statement of best practices will help law schools become better trade schools, in the best sense of the term." (quoting Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 96 (2001))).
  9. See BEST PRACTICES, *supra* note 1, at 144 ("Principle: The clinical faculty appropriately balances the goal of giving students independence and responsibility with the goal of protecting clients' interests."); see also, Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653, 654–55 (1993) ("The clinical teacher's dual role as a teacher and an attorney representing clients thus creates a potential conflict. This conflict typically arises where a student is not providing what the clinical teacher believes to be adequate representation. If the clinician does not intervene, the client's interest may be jeopardized. But if the clinician intervenes, intervention may deprive the student

## CLINICIANS, PRACTITIONERS, AND SCRIBES

role.<sup>10</sup> Based on the diverse legal needs of a small business (e.g., entity formation, intellectual property, employment, tax, and finance), the significant role documentation serves in meeting these needs (e.g., client memoranda, organizational documents, contracts, and employee applications/manuals), and the reality that clinical students must acquire other professional skills during their clinical experience (e.g., problem-solving, researching, interviewing, and counseling), an efficient drafting process is required to facilitate students' ability to produce real world, client work product in one, or at most two, semesters. The drafting process I propose in this article borrows from clinical (collaborative/partnership supervision)<sup>11</sup> and legal writing (new rhetoric)<sup>12</sup> pedagogies, and also incorporates the value creation theory<sup>13</sup> that is well-established, if not foundational, in the transactional law community.

Due to the importance of written work in an SBC, there is a tendency for the clinic to morph into a legal drafting course, potentially to the neglect of the other lawyering skills referenced above.<sup>14</sup> An exclusive focus on legal drafting, however, is not what the students enrolled in the clinic for, nor is it ever the only goal defined by

---

of the learning associated with doing the work himself and may send the message that students do not need to be responsible and work hard.”); David Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1535 (1998) (“There are therefore strong educational benefits to be achieved by defining the clinical model in a way that maximizes student autonomy. However, if such an approach, while educationally sound, were inconsistent with legal constraints, educational theory would have to give way to professional realities.”); Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501, 504 (2006) (“Clinical teachers facing practice-based deadlines continually must balance the need to ensure that a student’s work product meets the standard of competent representation against the educational imperative of preserving the student’s individual voice and sense of personal efficacy. For clinical teachers, maintaining this balance entails monitoring the extent to which they become implicated in a student’s written work—and guarding against the risk that the writing may become almost unrecognizable to the student as it progresses through multiple revisions.”).

10. Not all SBCs or transactional clinics perceive their role as promoting social and economic justice or responding to access to justice issues. The SBC at Western New England University School of Law where I teach actively pursues a social and economic justice mission primarily through economically and geographically based client selection and community outreach. While the applicability, necessity, or advisability of a social justice role for transactional clinics is beyond the scope of this article, I believe the drafting methods contained herein would be applicable regardless of whether a social or economic justice mission is incorporated into the clinic’s mission. See generally Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic’s Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23 (2006); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1466 (1998); Laurie Hauber, *Promoting Economic Justice Through Transactional Community-Centered Lawyering*, 27 ST. LOUIS U. PUB. L. REV. 3 (2007); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997) [hereinafter *Small Business*].

11. See *infra* Part III, notes 65–77 and accompanying text.

12. See *infra* Part III, notes 79–91 and accompanying text.

13. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); see *infra* Part III.

14. This is a trap I believe I fell straight into during my first year teaching and supervising in a small business clinic, and this article also constitutes a public apology to my first year students. See Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes*

the clinical instructor. Conversely, if the instructor simply provides forms or “precedent work”<sup>15</sup> without appropriate instruction, there is a danger that the student can morph into nothing more than a scribe or clerk. Far from creating a scribe, clinical education seeks to transform the student-clinician into an effective practitioner.<sup>16</sup>

As recognized within the ABA Standards for Approval of Law Schools<sup>17</sup> and the 1992 MacCrate Report,<sup>18</sup> as well as the more recent *Best Practices*<sup>19</sup> and Carnegie Report,<sup>20</sup> a law student needs to learn professional and efficient drafting skills. In furtherance of this goal, there are recently developed resources available for teaching transactional document drafting. For example, in addition to specific upper-level

---

*to Bartleby Syndrome*, 24 *TOURO L. REV.* 601 (2008) (discussing how clinics have the potential to impart how the practice of law could be, rather than how it is often perceived or currently is).

15. Throughout this article, I will use the term “precedent work” to refer generically to the use of prior client work product, commercial forms books, internal office forms banks, and, generally, any previously prepared document used to begin the drafting process.
16. *BEST PRACTICES*, *supra* note 1, at 123 (“Experiential education is a powerful tool for forming professional habits and understandings.”); WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS* 58 (2007) [hereinafter “*CARNEGIE REPORT*”] (“When seen as parts of a connected whole, the practical courses in lawyering and clinical-legal education make an essential contribution to responsible professional training. . . . [T]hey can do more than expand the legal apprentice’s repertoire of knowledge and skill. Critically, they are the law school’s primary means of teaching students how to connect the abstract thinking formed by legal categories and procedures with fuller human contexts.”).
17. *See AM. BAR ASS’N STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS.*, § 302 (2009–2010), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2011\\_2012\\_standards\\_and\\_rules\\_for\\_web.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.authcheckdam.pdf) (setting forth specific standards, which include: “Standard 302(a)(3) and (4): A law school shall require that each student receive substantial instruction in . . . writing in a legal context . . . [and] . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession” and “Standard 302(b)(1): A law school shall offer substantial opportunities for live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence”).
18. *See MACCRATE REPORT*, *supra* note 8, at 138–39 (identifying specific skills relating to writing including: “Skill § 4: Factual Investigation: In order to plan, direct and (where applicable) participate in factual investigation, a lawyer should be familiar with the skills and concepts involved in: . . . 4.4 Memorializing and Organizing Information in an Accessible Form,” and “Skill § 5: Communication: In order to communicate effectively, whether orally or in writing, a lawyer should be familiar with the skills and concepts involved in: 5.1 Assessing the Perspective of the Recipient of the Communication; 5.2 Using Effective Methods of Communication”).
19. *BEST PRACTICES*, *supra* note 1, at 43 (“Principle: The program of instruction aims to develop competence, and graduates demonstrate at the point of admission the ability to solve legal problems effectively and responsibly, including the ability to . . . draft agreements and other documentation to enable actions and transactions to be completed.”).
20. *CARNEGIE REPORT*, *supra* note 16, at 110 (“In more advanced courses, today’s understanding of composition allows writing to become less a simple demonstration of content mastery and more a supple, pervasive device for developing reflective capacities to do legal research, critique and construct arguments, and draft legal instruments.”).

## CLINICIANS, PRACTITIONERS, AND SCRIBES

courses in contract drafting,<sup>21</sup> first-year contract courses can include drafting elements within their curricula.<sup>22</sup> Furthermore, transactional document drafting skills are being incorporated into upper-level courses in a variety of subjects including intellectual property,<sup>23</sup> employment,<sup>24</sup> corporate finance,<sup>25</sup> property,<sup>26</sup> and general corporate law.<sup>27</sup> Similarly, the legal writing community has developed a body of scholarship transitioning the legal writing focus from appellate litigation to the inclusion of transactional document preparation.<sup>28</sup> Additionally, legal writing, doctrinal, and clinical professors have developed simulation courses that provide significant opportunities for students to be exposed to transactional practice.<sup>29</sup>

21. Robin A. Boyle, *Contract Drafting Courses for Upper-Level Students: Teaching Tips*, 14 PERSP. 87 (2006) (providing “course structure and teaching tips” for upper-level contracts drafting courses).
22. See Scott J. Burnham, *Drafting in the Contracts Class*, 44 ST. LOUIS U. L.J. 1535 (2000); Christina L. Kunz et al., *Incorporating Transactional Skills Training Into First-Year Doctrinal Courses*, 10 TENN. J. BUS. L. 331 (2009); David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 U. TOL. L. REV. 689 (2003).
23. Llewellyn Joseph Gibbons, *Teaching Intellectual Property Licensing Transactionally*, 34 U. TOL. L. REV. 717 (2003).
24. Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447 (2009).
25. Rachel Arnow-Richman et al., *Teaching Transactional Skills in Upper-Level Doctrinal Courses: Three Exemplars*, 2009 TENN. J. BUS. L. 367 (2009).
26. Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten “Dirt Lawyer”*, 62 U. PITT. L. REV. 355 (2001).
27. William J. Carney, *Teaching Problems in Corporate Law: Making it Real*, 34 GA. L. REV. 823 (2000); Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 490–492 (2002) (describing a course in which students spend the first half of a semester studying how lawyers manage deal-related problems and the second half reviewing actual deal documents and interviewing the lawyers who drafted and negotiated them).
28. Lisa Penland, *Teaching Non-Litigation Drafting to First-Year Law Students*, 16 PERSP. 156 (2008); Wayne Scheiss et al., *Teaching Transactional Skills in First-Year Writing Courses*, 10 TENN. J. BUS. L. 53 (2009); Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59 (2007); Wayne Schiess, *Legal Writing is Not What it Should Be*, 37 S.U. L. REV. 1, 6–13 (2009) (identifying nine reasons why most legal writing is mediocre, at best, which include law schools’ failure to adequately teach drafting, lawyers’ reliance on form documents that are poorly drafted, and drafters’ superficial understanding of transactions). Additionally, The Legal Writing Institute has an Upper Level Legal Writing Courses Committee Division on Drafting. See *Committees & Reports*, LEGAL WRITING INSTITUTE [http://www.lwionline.org/committees\\_and\\_reports.html#upperlegalwriting](http://www.lwionline.org/committees_and_reports.html#upperlegalwriting) (last visited Oct. 6, 2011).
29. Leslie L. Cooney & Lynn A. Epstein, *Classroom Associates: Creating a Skills Incubation Process for Tomorrow’s Lawyer*, 29 CAP. U. L. REV. 361 (2001); John F. Dolan & Russell A. McNair, *Teaching Commercial Law in the Third Year: A Short Report on a Business Organizations and Commercial Law Clinic*, 45 J. LEGAL EDUC. 283 (1995); Robert C. Illig, Therese H. Maynard, Cherie O. Taylor & Irene Kosturakis, *Teaching Transactional Skills Through Simulations in Upper-Level Courses: Three Exemplars*, 10 TENN. J. BUS. L. 15 (2009); Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. 221, 222 (2009) (offering a series of one-credit “Transactional Practice Labs” that are taught as add-ons to traditional business law courses); Kenneth N. Klee, *Teaching Transactional Law*, 27 CAL. BANKR. J. 295 (2004); Praveen Kosuri et al., *You Too Can Create a Simulation Exercise (or Even a Course)*, 10 TENN. J. BUS. L. 101 (2009); Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. LEG. EDUC. 498 (1995); Okamoto,



There are also an increasing number of textbooks that provide guidance for law students (or new lawyers) to improve their drafting skills.<sup>30</sup> Emory University School of Law Center for Transactional Law and Practice, led by Professor Tina Stark, a pioneer in the field of teaching transactional drafting, hosted conferences in 2008 and 2010, both of which focused solely on teaching transactional law and skills and brought together doctrinal, legal writing, and clinical professors to explore these issues.<sup>31</sup> Finally, the practicing bar is producing useful continuing legal education (CLE) material or in-house training methods for efficiently preparing transactional documents.<sup>32</sup>

While these resources provide guidance for drafting transactional documents, they do not address the specific needs of teaching drafting in a transactional clinic environment that requires students to acquire drafting skills expeditiously so that they can almost immediately prepare client-ready work product.<sup>33</sup> Furthermore, while

---

*supra* note 5 (explaining a course in which the students meet and interview the bankers, lawyers, and entrepreneurs who structured and negotiated a particular high-profile deal); Amy Deen Westbrook, *Learning from Wall Street: A Venture in Transactional Legal Education*, 27 QUINNIPIAC L. REV. 227, 240 (2009) (explaining a simulation-like program where students are placed with “sponsors” who assign projects “that a future employer or supervising attorney would find valuable or interesting”).

30. LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* (5th ed. 2010); LENNÉ EIDSON ESPENSCHIED, *CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE* (2010); CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* (2002); WAYNE SCHIESS, *PREPARING LEGAL DOCUMENTS NONLAWYERS CAN READ AND UNDERSTAND* (2008); TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2007).
31. *See Centers & Clinics: Transactional Education: What's Next?*, EMORY UNIVERSITY SCHOOL OF LAW CENTER FOR TRANSACTIONAL LAW AND PRACTICE (June 4–5, 2010), <http://www.law.emory.edu/centers-clinics/center-for-transactional-law-practice/2010-conference.html>; *Centers & Clinics: Teaching Drafting and Transactional Skills: The Basics and Beyond*, EMORY UNIVERSITY SCHOOL OF LAW CENTER FOR TRANSACTIONAL LAW AND PRACTICE (May 30–31, 2008), <http://www.law.emory.edu/centers-clinics/center-for-transactional-law-practice/conferences/2008-conference.html>.
32. JEAN L. BATMAN, *ADVISING THE SMALL BUSINESS: FORMS AND ADVICE FOR THE LEGAL PRACTITIONER* (2007); *EMERGING COMPANIES GUIDE: A RESOURCE FOR PROFESSIONALS AND ENTREPRENEURS* (Robert L. Brown & Alan S. Gutterman eds., 2d ed. 2011); *Teaching Contract Skills to Young Lawyers*, AM. BAR ASS'N SEC. BUS. L. (Aug. 4, 2006), <http://apps.americanbar.org/buslaw/newsletter/0052/materials/pp3.pdf>; MARVIN GARFINKEL, *REAL WORLD DOCUMENT DRAFTING: A DISPUTE-AVOIDANCE APPROACH* (2d ed. 2010).
33. I should, however, specifically reference the very interesting program at the University of Baltimore School of Law, which hired a separate legal writing instructor as part of an Advanced Clinical Writing Program. *See* Cheri Wryon Levin, *The Doctor is in: Prescriptions for Teaching Writing in a Live-Client In-House Clinic*, 15 CLINICAL L. REV. 157, 157, 178–79 (2008). While Professor Levin provides very useful guidance in teaching legal writing to clinicians, her unique position makes it difficult to apply many of her techniques in a traditional clinical setting. Similarly, while Professor Angela J. Campbell's 1993 article addressed legal writing in a law school clinic, its administrative law focus creates an opportunity for additional analysis in the transactional context. *See* Campbell, *supra* note 9. Finally, an excellent and thorough article examining pedagogy of legal writing in clinics was very recently published highlighting the need for a pedagogical approach to teaching legal writing in a clinic. Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285 (2010). These three articles provide a foundation for analyzing clinical drafting, and they greatly facilitate the next step of studying and developing drafting practices in specialized clinics, in this case SBCs or transactional clinics in general.



## CLINICIANS, PRACTITIONERS, AND SCRIBES

courses either including or focusing on transactional drafting are increasing, it is still unlikely that a clinical student will have had exposure to these relatively new teaching methods and focus.<sup>34</sup>

Textbooks used in clinics are typically not specialized based on the subject matter of the clinic but generally discuss lawyering skills.<sup>35</sup> Given that transactional clinics historically have represented a small minority in the clinical world, these textbooks are somewhat litigation focused.<sup>36</sup> Furthermore, when these resources discuss transactional issues,<sup>37</sup> they primarily focus on oral counseling rather than drafting.<sup>38</sup> Finally, while scholarly writings thus far have focused on the benefits of transactional clinics;<sup>39</sup> they have not discussed appropriate pedagogical approaches. Accordingly, a systematic process to assist students in navigating this crucial period during their clinical experience (and professional development) is necessary.

The intended audience for this article is both SBC professors and students. For the professors, the goal is to encourage a discussion on best practices for drafting documents in transactional clinics, with my recommendations serving as a starting point for critical review. For students, the goal is to highlight the importance of transactional drafting in their clinical experiences and explicitly state that the processes for this clinical teaching method are still evolving and will benefit greatly from their input on how the material is presented.

To provide a context for this discussion, Part II of this article provides an overview of the recent growth of SBCs in law schools and presents brief case studies reflecting the types of clients my SBC serves. Part III applies both pedagogical and doctrinal theories to clinical instruction methodology by exploring the principles of non-directive versus collaborative/partnership supervision and examines the transition in legal writing theory from a product-oriented focus to a process-oriented (“New Rhetoric”) focus. In conjunction with these clinical and legal writing approaches, I utilize Professor Ronald Gilson’s value creation theory as the foundation and guiding

---

34. See Schulze, *supra* note 28, at 84–86 (examining a survey that indicates that only 30.43% of schools include any transactional instruction in first year legal research and writing curriculum and only 27.71% of schools include upper-level instruction in transactional drafting. The study does note an increasing trend in these offerings.).

35. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004); DAVID F. CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* (2002); STEPHEN ELLMAN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* (2009).

36. See, e.g., G. NICHOLAS HERMAN & JEAN M. CARY, *A PRACTICAL APPROACH TO CLIENT INTERVIEWING, COUNSELING, AND DECISION-MAKING: FOR CLINICAL PROGRAMS AND PRACTICAL SKILLS COURSES TEACHER’S MANUAL* 120–23 (2009) (noting that out of fifteen counseling role plays, one involved a transactional issue (negotiation of licensing agreement)).

37. BINDER, *supra* note 35, at 208–33, 415–37 (“Chapter 9 (Gathering Information for Business Transactions), Chapter 10 (Techniques for Gathering Information About Proposed Business Transactions), and Chapter 20 (Counseling “Deals” Clients”).

38. See *supra* note 33 (discussing drafting in clinics, but not focused on the unique needs of transactional clinics).

39. See *supra* note 6.

principle for students to consider when drafting client documents and serving transactional clients generally. In Part IV, I propose a process for drafting documents in an SBC that includes assessing the clinic, selecting a drafting strategy, effectively and efficiently revising drafts, and fighting for feedback from students, clients and graduates.

## II. THE SMALL BUSINESS CLINIC

To place the drafting methodology in context, this section will address the current status of transactional clinics, and particularly SBCs, within the legal academy and provide case studies of typical SBC clients.

### *A. The Rise of Transactional Clinics*

The number of transactional clinics, and particularly SBCs, began to increase in the late 1990s and represents an evolutionary step in clinical education.<sup>40</sup> In 1997, Professor Susan Jones was one of the first legal scholars to begin to chronicle the development of transactional clinics within the legal academy.<sup>41</sup> She notes that the origins of small business and community economic development clinics can be found in housing development clinics that emerged in the 1970s and early 1980s, which largely focused on affordable housing, tenant organizing, housing representation efforts, larger anti-poverty strategies and complementing legislative, litigation, and political avenues in the housing arena.<sup>42</sup> Professor Jones notes that in 1996, the small business clinics at George Washington University and Pennsylvania were the only ones listed in the AALS 1996 Directory of Clinical Teachers, although she was personally aware of three other similar programs at Harvard, the University of Maryland and William Mitchell College of Law.<sup>43</sup> Professor Jones updated these

---

40. For recent and thorough discussions on the history of clinical legal education in general, see Margaret Martin Barry et al., Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 3 (2000); Douglas A. Blaze, *Dej Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939 (1997); John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 322–24 (2007). *But see* MACCRATE REPORT, *supra* note 8 (“As recently as twenty years ago, the typical skills training component of a law school curriculum consisted of a first-year moot court program, and perhaps a trial advocacy course.”).

41. Jones, *Small Business*, *supra* note 10 at 195–96; *see also* SUSAN R. JONES, LEGAL GUIDE TO MICROENTERPRISE DEVELOPMENT (2004); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL’Y 249, 250 (2004). It also appears that during this period the private bar was concurrently seeking ways to initiate community economic development projects. *See* AM. BAR ASS’N THE ABC MANUAL: STARTING AND OPERATING A BUSINESS LAW PRO BONO PROJECT (2000), [http://apps.americanbar.org/legalservices/probono/businesslaw/abc\\_manual/abc\\_manual.pdf](http://apps.americanbar.org/legalservices/probono/businesslaw/abc_manual/abc_manual.pdf); JEFFREY R. PANKRATZ, MEETING THE LEGAL NEEDS OF COMMUNITY-BASED DEVELOPMENT ORGANIZATIONS: THE ROLE OF THE PRIVATE BAR (1992).

42. *See* Jones, *Small Business*, *supra* note 10, at 204.

43. *See id.* at 205 & n.44. Professor Jones also references an informal survey conducted by the Georgetown University Law School Harrison Institute that identified sixteen additional schools that offered community economic development clinics and/or classes.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

numbers in 2004, noting at that time there were approximately thirty small business and related clinics nationwide.<sup>44</sup>

More recently, in 2008 the Ewing Marion Kauffman Foundation (Kauffman Foundation) commissioned a report which found forty-eight “law school small business, entrepreneurship and community development clinics.”<sup>45</sup> Consistent with these findings, the Center for the Study of Applied Legal Education Report on the 2007–2008 Survey identified thirty-eight “community/economic development” clinics and twenty-eight “transactional” clinics.<sup>46</sup>

Most recently, the Kauffman Foundation created a website which consists of an online community and tools devoted to expanding legal entrepreneurship curriculum and education.<sup>47</sup> This website maintains “a list of clinics operated at law schools in the United States that provide assistance to entrepreneurs and innovators,” and currently identifies one hundred twenty-seven such programs.<sup>48</sup> Despite this increase in transactional clinics, appropriate teaching materials have not been formally developed. Given the lack of pedagogical focus on the specific needs of transactional clinics, identifying the types of documents drafted and the clients served in these clinics may be an effective starting point to understanding their unique drafting requirements.

### *B. Small Business Clinic Documents and Clients*

In one semester, a student in an SBC drafts a wide variety of documents including personal bios, client interview outlines, client meeting agendas, post-communication

---

44. Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 260 (2004); see also Eric J. Gouvin, *Learning Business Law by Doing It: Real Transactions in Law School Clinics*, 14 BUS. L. TODAY, Sept.–Oct. 2004, at 53 (reporting that in 2004 there were approximately twenty small business clinics and that most of them had been formed within the previous ten years).

45. Anthony J. Luppino, *Can Do: Training Lawyers to Be Effective Counselors to Entrepreneurs* (2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1157065](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157065); see also Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW. ENG. L. REV. 151 (2007). For the past nine years, the Kauffman Foundation has also co-sponsored with various institutions an annual one-day Transactional Clinical Conference. These conferences have been a crucial resource for clinical professors, as they work to develop transactional clinical education as a distinct pedagogy. More recently, the American Association of Law Schools 2010 Conference on Clinical Legal Education also created a separate working group for transactional and small business clinicians. See *Conference on Clinical Legal Education Workbook*, ASS'N OF AM. L. SCHS. (May 4–8, 2010), <http://www.aals.org/clinical2010/booklet.pdf>.

46. DAVID A. SANTACROCE & ROBERT R. KUEHN, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION: REPORT ON THE 2007–2008 SURVEY (2008), <http://csale.org/files/CSALE.07-08.Survey.Report.pdf> (noting that this report also identifies thirty-three tax clinics, twenty housing clinics, sixteen intellectual property clinics and ten securities clinics). As the nomenclature for the concept of a “transactional clinic” develops, more specialization can be added. However, all of these numbers do further support the fairly dramatic upward trend in the number of transactional clinics. *Id.*

47. See ENTREPRENEURSHIP, <http://www.entrepreneurship.org/en/Entrepreneurship-Law.aspx> (last visited Oct. 6, 2011).

48. *Law School Entrepreneurship Clinics*, ENTREPRENEURSHIP, <http://www.entrepreneurship.org/en/entrepreneurship-law/law-school-entrepreneurship-clinics.aspx> (last visited Sept. 29, 2011).

notes, retainer letters, planning timelines, corporate formation documents, contracts, administrative applications (e.g., IRS Form 1023 application for tax exempt status), client legal memoranda, internal research memoranda, billing entries, client surveys, client emails, internal emails, checklists, and reflective journal entries. The first assignment I give students before orientation is to write a one-page bio. I ask them to look at attorney bios on law firm websites and write in whatever format they deem appropriate (minimal, humorous, personal). These bios are distributed to the class at orientation to facilitate the formation of our “new firm.” The next writing assignment they have, after a two-day orientation, is to prepare an initial client interview outline. Throughout the semester, whenever there is an anticipated client phone call or meeting, the students are required to prepare an agenda of what they hope to accomplish in the communication as well as a post-communication note to file regarding what transpired.

After the client interview, students prepare client retainer letters.<sup>49</sup> After the retainer letters are prepared, the students develop a work plan for what needs to be accomplished for each client. This work plan must coordinate the projects for all clients that the students are representing. In my clinic, the client work product may include a choice-of-entity client memorandum, a preliminary trademark availability analysis, a form service agreement, a partnership, operating, or buy-sell agreement, or an internal legal research memorandum.<sup>50</sup> This work is all accomplished under my license to practice.<sup>51</sup>

Throughout the semester, all students prepare billing records for each client which I review weekly. Additionally, the students are also required to prepare weekly reflective journal entries. At the end of the semester, the students prepare final correspondence to the client, attaching a client questionnaire. In the past, students

---

49. This is done with a form letter, which the students must modify for the client’s specific needs. *See infra* Part IV.B.3.i.

50. The issue of whether a general practice small business clinic is competent enough to handle all these varied issues is the subject for another article that analyzes both the capability of the clinic supervisor as well as the reality that absent such practice, the basic legal needs for certain aspiring entrepreneurs could be left unmet. *See, e.g.,* JoNel Newman, *Re-Conceptualizing Poverty Law Clinical Curriculum and Legal Services Practice: The Need for Generalists*, 34 *FORDHAM URB. L.J.* 1303 (2007) (Professor Newman makes a strong argument for generalists in meeting the needs of poverty law practice. SBC clinics support this concept, often providing advice in employment law, tax, intellectual property, corporate formation, and contracts. The specialization of transactional clinics could severely limit the goal of community economic development, i.e., if you tell a business you can help with contracts but not with tax or employment law, there is no other resource for the client to get the advice she needs to effectively establish her business.); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 *CLINICAL L. REV.* 333, 345–46 (2009). *But see also* Chavkin, *supra* note 9, at 1543 (1998) (“Perhaps most significant, if the skills needed to handle a matter are not possible for a new student lawyer to master, this may tell us that clinic design is inadequate in allowing students to handle these kinds of cases.”); Katherine R. Kruse, *Biting off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 *CLINICAL L. REV.* 405, 427 (2002) (“By limiting the students’ work to a single type of case, area of law, or small number of clients, law school clinics can make the time and space for the students’ learning curve to catch up with the creativity of their imaginations.”).

51. Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 *IND. L. J.* 653 (2010).

## CLINICIANS, PRACTITIONERS, AND SCRIBES

have also prepared subject-matter presentations for clients and members of the community. To effectively prepare such a wide assortment of documents in a short amount of time (my clinic is one semester), students must expeditiously acquire drafting skills sufficient to produce professional and competent client and internal work product.

Regarding the clients my clinic services, I initially group the clients according to the information on their applications. I initially classify them as either “A,” “B” or “C.” “A” clients can have revenues ranging from \$100,000 to \$300,000 and usually three to five employees. “B” clients have revenues from \$25,000 to \$100,000 and have from zero to two employees (or in many cases attempt to utilize independent contractors rather than employees). “C” clients are usually pursuing the business in addition to their full-time job, and may have zero to \$25,000 in revenues. My goal is to expose the students to each type of client. The following provides specific examples of each category of client.

Labor-intensive service providers comprise the bulk of the high revenue “A” clients.<sup>52</sup> Generally, these include landscaping, transportation, and janitorial service companies that have been operating for one to three years. While these clients generally have higher revenues, they also will have much higher labor costs.<sup>53</sup> These clients are sometimes operating as sole proprietors or general partnerships and need assistance assessing whether they should form a limited liability entity and, if so, drafting their formation documents.<sup>54</sup> When there is more than one owner, this will often involve drafting some form of partnership or buy-sell agreement (e.g., an operating agreement for a limited liability company or a shareholder agreement for a corporation).<sup>55</sup> These clients also often need customer contracts prepared (or current contracts revised). Primarily however, their legal needs involve their employees. Some have been classifying their workers as independent contractors, often under the mistaken belief that if the workers are not full-time employees they do not need to comply with the numerous state and federal hiring and employment requirements.<sup>56</sup>

---

52. Overall, SBC clients reflect the current domestic reality that the United States has evolved from a manufacturing based economy to a service based economy. KATHERINE KOBE, SMALL BUS. ADMINISTRATION, *THE SMALL BUSINESS SHARE OF GDP, 1998-2004*, 3 (April 2007), <http://www.sba.gov/advo/research/rs299tot.pdf> (“For several decades the U.S. economy has been experiencing a shift from goods-based production to an economy that is much more services-based.”).

53. Going back to the social justice mandate our clinic operates under, some may argue that these are not appropriate clients. However, these clients have such high labor costs that their profit margin (which is ultimately their ability to make a wage from the endeavor) is usually relatively low, and there are little to no resources available for obtaining cost-effective professional services, such as legal representation.

54. CONSTANCE E. BAGLEY & CRAIG E. DAUCHY, *THE ENTREPRENEUR’S GUIDE TO BUSINESS LAW* 51–108 (3d ed. 2008); *EMERGING COMPANIES GUIDE: A RESOURCE FOR PROFESSIONALS AND ENTREPRENEURS* 59–102 (Robert L. Brown & Alan S. Gutterman eds., 1st ed. 2005); JEAN L. BATMAN, *ADVISING THE SMALL BUSINESS: FORMS AND ADVICE FOR THE LEGAL PRACTITIONER* 93–108 (1st ed. 2007).

55. *Infra* Part IV.B.3.ii.

56. See, e.g., Marsha E. Hunter, *Contingent Workers and Independent Contractors in Massachusetts*, 45 Bos. B.J. 8 (2001); JAMES M. BICKLEY, *TAX GAP: MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS* (2009), 2009 WL 5529651; U.S. GOV’T ACCOUNTABILITY OFFICE, *EMPLOYEE*

Clients who recognize the necessity for accurate classification of workers may then need properly drafted employment applications, independent contractor agreements or employee manuals.<sup>57</sup> While we stress that it is important for these clients to understand the administrative requirements for having employees, they often benefit from referrals to local payroll and bookkeeping services that cater to smaller businesses.<sup>58</sup>

Clients in the “B” category are often individuals who are specialized service providers. These businesses can include management consultants, “life” coaches, home improvement contractors, and graphic designers. These businesses have also included more unique services (e.g., an environmentally concerned diaper delivery service, an organic produce and meat delivery service for local farmers, grout cleaners, and specialized website operators). Similar to the “A” clients, these clients often have choice-of-entity questions, but with relatively minimal personal assets and no employees, the need for such an entity is much less prominent.<sup>59</sup> Clients in this category who have resources available for liability protection often benefit from commercial insurance products which will also provide for defense costs in the case of litigation. It is often useful to refer such clients to commercial agents who cater to smaller commercial enterprises.<sup>60</sup> Quite often, “B” clients also need customer agreements and in some cases supplier contract review. These clients also often have unique names and therefore benefit from a preliminary trademark availability search.<sup>61</sup> Very often, these clients are establishing a web presence and therefore have legal needs surrounding website terms of use and other means of limiting their liability resulting from their Internet presence. The graphic designers usually have copyright issues relating to the work they complete for their clients. The business consultants may also have copyright issues relating to the manuals or other written work product they produce for clients.

Clients in the “C” classification have the most varied needs and often present the greatest difficulty for students because their business models are not established. These clients may conduct some limited manufacturing and have included clients making handmade greeting cards, hemp diapers, and beaded jewelry, and are often concerned with warranty information.<sup>62</sup> More commonly, these clients are at the idea stage of their business, and often have fairly grandiose plans. These clients may want

---

MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (2009), <http://www.gao.gov/new.items/d09717.pdf>.

57. *Infra* Part IV.B.3.

58. *Infra* Part III.C.4 (regarding the SBC adding value by acting as a reputational intermediary).

59. *Infra* Part IV.B.3.ii.

60. *Infra* Part III.C.4 (regarding the SBC adding value by acting as a reputational intermediary).

61. STEVEN H. BAZERMAN & JASON M. DRANGEL, *GUIDE TO REGISTERING TRADEMARKS 20* (rev. supp. 2010); see *Law School Clinic Certification Pilot Expansion*, U.S. PAT. AND TRADEMARK OFFICE, [http://www.uspto.gov/ip/boards/oed/practitioner/agents/law\\_school\\_clinic\\_expansion\\_2010.jsp](http://www.uspto.gov/ip/boards/oed/practitioner/agents/law_school_clinic_expansion_2010.jsp) (last modified Apr. 28, 2010, 3:07 PM).

62. For example, the jewelry client was concerned with liability for magnetic backings on her artwork.



## CLINICIANS, PRACTITIONERS, AND SCRIBES

to start a bio-fuel company, charter school, motor cycle shop, or private home-based adult care facility. It is usually premature at this point to form a limited liability entity for these clients, as their needs often revolve primarily around future regulatory compliance for their enterprises. This regulatory analysis can often produce lengthy client memoranda and counseling sessions. These clients can be somewhat frustrating for students, as the regulatory analysis of these larger projects can result in the recognition that the endeavor has a limited likelihood of success or will require significant capital. These situations provide a variety of teaching moments, including a discussion of attorneys' risk level versus entrepreneurs' risk level and the need for attorneys to not only point out the road blocks to business people, but also try to find viable alternatives.<sup>63</sup> This discussion also can facilitate the recognition that even if this endeavor is not successful, the clinic has, at a minimum, raised the business and legal acumen of the business client such that their next endeavor will have a greater likelihood of success.

This overview highlights the types of clients that an SBC can serve. This variety of client work product mandates that students obtain competence in a multiple areas of law, as well as numerous lawyering skills, in a short period of time. Developing this competence in regards to drafting requires focused attention upon teaching methods and pedagogy.

### III. PEDAGOGICAL AND DOCTRINAL THEORIES APPLICABLE TO THE DRAFTING PROCESS

In identifying "practical skill" as one of the three pillars for the framework of legal education, together with legal analysis and professional identity, the Carnegie Report recognizes the different pedagogical approaches necessary for skills training: "Thus teaching to develop practical skill, particularly when it involves work with clients, frequently requires settings and pedagogies different from those used in the teaching of legal analysis. Such teaching develops distinctive habits of mind, along with important skills of interaction."<sup>64</sup>

Since SBCs and transactional clinics are a relatively new phenomenon, an effort to analyze various teaching pedagogies within this learning environment is necessary. Non-directive, collaborative and partnership approaches from the clinical community, "New Rhetoric" and process-oriented approaches from the legal writing community, and value-adding business attorney functions from the doctrinal community, taken in concert, all have the ability to add structure and substance to the implementation of teaching and learning in the clinical environment. These approaches are discussed more fully below.

---

63. BINDER, *supra* note 35 at 209 ("Thus, it is not surprising that many business people think that lawyers magnify risks, jeopardize deals by drafting and negotiating too aggressively, and try to kill deals by counseling them not to take risks.").

64. CARNEGIE REPORT, *supra* note 16, at 14.

*A. Drafting Documents Through Collaborative and Partnership Based Supervision*

Non-directive and non-intervention theories have historically dominated clinical pedagogy.<sup>65</sup> In his 1998 article, Professor Chavkin noted that “[e]very intervention is a failure of supervision.”<sup>66</sup> When a new SBC professor reads this statement written by one of the leaders in the clinical teaching world, it can create doubt as to whether an effective SBC is possible.<sup>67</sup> Would providing students with forms or precedent documents to use with clients constitute the pinnacle of intervention? And yet, are not precedent documents a foundational element of a transactional practice? This apparent dichotomy may be one reason that integration of transactional practice into the clinical world can be perceived as difficult. Defining an appropriate method of supervision for drafting in an SBC is necessary.<sup>68</sup>

As scholars have discussed, the non-directive and non-intervention approach to clinical legal education in practice is far from an absolute.<sup>69</sup> In reviewing the pedagogy

- 
65. Brodie, *supra* note 50, at 352 n.78 (citing BEST PRACTICES, *supra* note 1, at 195 (“The goal of most clinical teachings is to allow students to carry complete responsibility for their cases while the teacher serves as a resource when needed. There are times, however, when the clinical teacher should intervene to protect the clients from harm.”)); Chavkin, *supra* note 9, at 1537–38 (“[T]he [clinical] supervisor must design a training program within the clinic that provides the student attorneys with sufficient interpersonal and other skills to competently interact with clients and appropriate non-directive supervision thereafter to protect the rights of clients to ‘competent’ representation. The burden then is one of providing sufficient guidance and supervision so that intervention does not become necessary.”). For more recent articles that review the principle of non-directive supervision, see Findley, *supra* note 4, at 266 and Harriet N. Katz, *Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy*, 41 GONZ. L. REV. 315, 319–26 (2006).
  66. Chavkin, *supra* note 9, at 1542 (Professor Chavkin follows this somewhat inflammatory assertion with the admission that no aspect of his article was more controversial or drew a more heated response than this one. Further, Professor Chavkin’s article as a whole thoughtfully lays out all viewpoints in the ongoing debate regarding the varying levels of appropriate intervention and supervision in clinical education).
  67. Interpreting the results from a 1999–2003 survey of new clinicians, Professor Katz noted that the “surveyed clinicians reported that ‘being non-directive’ was one of the ‘hardest things about clinical teaching,’ [but] they made no comments regarding other supervisory methods.” Katz, *supra* note 65, at 326 (quoting Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49, 84–85 (2004)). See also Kruse, *supra* note 50, at 407 (“For pedagogical reasons, many clinics choose to limit their students’ work to a few carefully chosen cases that are small and manageable enough to give the students full ownership and control over the cases, to develop the primary relationship with the client, and to see the cases from beginning to end.”).
  68. Margaret Martin Barry, *Clinical Supervision: Walking That Fine Line*, 2 CLINICAL L. REV. 137, 145–46 (1995) (“The supervisor’s role is akin to that of a mentor with a twist; one whose guidance is driven by the desire to foster self-reliance and competence but who has the power to become more directive, and will do just that, if the client’s interests are at risk. Such a supervisory commitment to be directive only when necessary can be very intimidating for the student who ‘wouldn’t mind a little hand holding at the moment, thank you.’ . . . Knowing when to take over can also be very stressful for the supervisor who needs to determine at what point the client’s interests require that she become more directive.”).
  69. Katz, *supra* note 65, at 317 (Arguing that non-directive supervision as a sole teaching method creates “significant constraints for clinical education.” She recommends teaching methodologies that also include modeling and collaboration.); see also Okamoto *supra* note 5, at 85 (“Meaningful participation in lawyering settings dictates collaboration and teamwork. Students learn from peers and from working as teams.”).

## CLINICIANS, PRACTITIONERS, AND SCRIBES

associated with non-directive versus collaborative learning, Professor Kowalski noted that “[s]ome scholars have argued that an unyielding adherence to nondirective methods can undermine learning by ignoring the need for a graduated approach to independence, and can also rob students of the opportunity to learn from observing expert attorneys at work.”<sup>70</sup> More specifically, Professor Kowalski describes Professor Hoffman’s three graduated stages of supervision (beginning, middle and final):

In the beginning of the supervisory relationship, the instructor offers much more explicit explanations and instructions. Once students gain some knowledge and experience, the middle stage allows for a more collaborative approach that includes joint decision making and problem solving, as well as significant independent inquiry. Finally, in the last stage, the teacher takes a more nondirective approach, allowing the student to control the process when her decisions represent legitimate approaches to representation.<sup>71</sup>

Varying methods of supervision, to include partnership and collaboration, provide transactional clinicians an opportunity to create a “real-world” learning experience within the clinical model.<sup>72</sup> For example, Professor Kruse described the expansion of her family law/prison inmate clinic into broader community service projects and the “partnership model” of supervision that emerged.

Professor Kruse explained that her traditional teaching approaches needed to be modified because she played a greater role in filling the informational and contextual gaps and in providing continuity between stages over time.<sup>73</sup> Similar to providing students with forms that have been modified over previous semesters, Professor Kruse told the students in the second project year what the previous year’s students had concluded regarding an issue and had them incorporate that work into their next steps.<sup>74</sup> At the end of the semester, she recognized that her students’ requests for more direction (e.g., forms to assist in drafting motions) reflected their desire to serve more clients who lacked access to justice.<sup>75</sup>

Similarly, in reviewing student experiences from externship placements, Professor Harriet N. Katz identified five models of teaching and found that the implementation of each method resulted in powerful learning moments for the students.<sup>76</sup> These

---

70. Kowalski, *supra* note 33, at 305 (citing Peter Toll Hoffmann, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L. J. 301 (1986)).

71. *Id.* at 308.

72. Professor Kowalski’s survey of clinicians only included three transactional clinics. *Id.* at 295. However, in her analysis of the responses provided, there are certainly commonalities in current drafting processes that further demonstrate the opportunity for transactional clinic professors to learn from litigation and other clinical practices. *Id.* at 345–50 (discussing prioritized and instructive feedback).

73. Kruse, *supra* note 50, at 441.

74. *Id.*

75. *Id.* at 443.

76. Katz, *supra* note 65, at 330.

methods were modeling, feedback, collaboration, direct supervision, and nondirective supervision.<sup>77</sup>

Partnership and collaborative models for experiential teaching are appropriate for the SBC experience.<sup>78</sup> Students learn the value of having a well maintained precedent library, but also see how precedent work is improved and modified over time. They can recognize that they add significant value to the process simply by providing “fresh eyes” on the documents. The SBC professor facilitates this learning process by creating an environment where the modifications offered by students are not only accepted but sought after and encouraged. Students learn that precedent documents are not “the answer.” The students recognize that their creativity and initiative are necessary when working with precedent documents as a starting point.

*B. Process (New Rhetoric) Writing Theory Applied to Clinical Document Drafting*

Analysis and implementation of document drafting within a law school clinic presents opportunities for collaboration between legal writing and clinical programs.<sup>79</sup> Legal writing pedagogy identifies two main approaches for teaching legal writing—the traditional “product” approach, also called the formalist perspective and the newer “process” approach, referred to as the new rhetoric.<sup>80</sup> Professor Levin provides an excellent overview of these two approaches:

To oversimplify, the product approach concentrates on the formal components of legal writing, formats, organization, and language and style, and is mainly concerned with clarity and accuracy. The writer’s principal focus is on what to write and the rules for writing while the professor’s principal focus is on critiquing the final product. This approach assumes that the thinking process is finished before the writing process begins. In contrast, the process approach concentrates on the process of writing by helping students develop an understanding of how and why the product came into being. This approach

---

77. *Id.*

78. See also Brodie, *supra* note 50, at 363–64 (“There is value to the student and teacher working in partnership in a subject area in which the teacher is herself inexperienced. This model indeed compromises the student’s autonomy; the teacher cannot send the student out to discover the law, confident that she herself knows what the search will reveal. Instead, the teacher must position herself to learn the necessary material, either on her own simultaneously as the student does so or, more likely, in partnership with the student. In such a circumstance, the supervisor models the crucial lawyering abilities to learn a new area of law, calibrate advice to a client in light of one’s own pace of learning, consult with experts, without revealing client confidences, and other important lawyering tasks.”).

79. Phyllis Goldfarb, *So Near and Yet So Far: Dreams of Collaboration Between Clinical and Legal Writing Programs*, 4 J. ASS’N LEGAL WRITING DIRECTORS 35 (2007); Kowalski, *supra* note 33 at 286–87; Sarah O’Rourke Schrup, *The Clinical Divide: Overcoming Barriers to Collaborations Between Clinical and Legal Writing Programs*, 14 CLINICAL L. REV. 301 (2007).

80. See Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Content*, 49 J. LEGAL EDUC. 155, 156–57 (1999); Campbell, *supra* note 9, at 663; Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 721–23 (1997); EDWARDS, *supra* note 30; Kowalski, *supra* note 33, at 311–14; Levin, *supra* note 33, at 178–79. See also CARNEGIE REPORT, *supra* note 16, at 111 (“The teaching of legal writing can be used to open a window for students onto the full complexity of legal expertise.”).

## CLINICIANS, PRACTITIONERS, AND SCRIBES

considers writing to be a recursive (rather than linear) process whose basic stages are pre-writing, writing, and revision. These stages overlap and intertwine. The process approach emphasizes the rhetorical context of the writing, *i.e.* the audience or multiple audiences for whom it is written and the purposes or multiple purposes for which it is written.<sup>81</sup>

More concisely, “[n]ew rhetoricians . . . believe that writers discover what they want to say as they are writing.”<sup>82</sup> As well stated by Professor Kowalski, “[i]t is the very process of writing that exposes weaknesses in reasoning and authority and forces the lawyer to delve ever deeper into the problem to find the root causes and their solutions.”<sup>83</sup> The process approach has been described as “the next link in the evolutionary chain of legal writing theory.”<sup>84</sup> The writing process envisioned under this theory can be presented as follows:

As the name implies, this student-centered model divides writing into three steps: (1) prewriting, with its planning, researching, analyzing, and organizing functions; (2) writing preliminary drafts of the legal document; and (3) editing, revising, and polishing the drafts.<sup>85</sup>

Innovations for implementing this process can include annotated memorandum editing checklists, use of sample memoranda, self-evaluation forms, and peer editing.<sup>86</sup> As Professor Campbell noted, “[h]owever, these concepts cannot be applied without modification.”<sup>87</sup> Again, the issue of directive versus non-directive supervision against surfaces. Professor Campbell concludes that “in a clinic in which teaching legal writing is a primary educational goal, the clinician’s role is likely to be somewhat more directive or interventionist than in other types of clinics.”<sup>88</sup> Professor Levin similarly states that “when deadlines are pressing, regardless of the ability of the student or the severity of the problems with the writing, directive comments may be necessary to insure that the deadline is met.”<sup>89</sup> In explaining appropriate supervision during this process, Professor Levin describes “directive comments” as those which “instruct the

---

81. Levin, *supra* note 33, at 178–79 (internal quotations omitted).

82. Campbell, *supra* note 9, at 664.

83. Kowalski, *supra* note 33, at 312 (citing Mary Beth Beasley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers)*, 10 *LEGAL WRITING: J. LEGAL WRITING INST.* 23, 30–38 (2004)).

84. Durako et al., *supra* note 80, at 720.

85. *Id.* at 722–23; *see also* Campbell, *supra* note 9, at 664 (identifying both a three stage process (pre-writing, drafting and revision) and a five stage process (prewriting, writing, rewriting, revising and polishing)).

86. Durako et al., *supra* note 80, at 725 (noting that this article contains samples of each of these techniques as appendices to the article, which provided me with an excellent starting point for drafting similar documents in the SBC context).

87. Campbell, *supra* note 9, at 654.

88. *Id.* at 684. “When I presented an earlier draft of this paper to a group of clinicians, several people commented that they tended to be more interventionist with student writing, and that writing was somehow different.” *Id.* at 680.

89. Levin, *supra* note 33, at 182.

writer what to write, whereas non-directive comments, often in the form of questions, help the student writers explore their options without telling them what to write.”<sup>90</sup>

Ultimately, having a process in place will reduce the times when the clinician must resort to overtly directive supervision.<sup>91</sup> A properly maintained forms library can be the foundation of that process. These forms should be annotated to give students guidance as to where and when the materials used in the samples were obtained. Further, this process assumes that there will be regular (not less than weekly) meetings to discuss the status of documents and the drafting process. In my clinic, this ongoing revision process is also facilitated by use of a practice management software program that maintains multiple versions of documents as well as standard track changes and editing features in word processing software.

By providing an effective starting point for the students and a process for drafting, appropriate focus can be given to the sophistication of the legal analysis. Thereafter, collaboration can be enhanced through revision and discussion. In the end, this improved client work product will add greater value for the client.

### *C. Adding Client Value Through Effective Document Drafting*

The value creation model was first articulated by Professor Gilson when he asked the question “What do business lawyers *really* do?”<sup>92</sup> Ultimately, he answers that business lawyers have the potential to create value by facilitating private ordering<sup>93</sup> as transaction cost engineers.<sup>94</sup> He asserts that “what business lawyers do has value only if the transaction on which the lawyer works is more valuable as a result” of the

---

90. *Id.*

91. *See infra* Part IV.C.

92. Gilson, *supra* note 13, at 241 (emphasis in original). Many have reviewed, critiqued, and extrapolated on this theory since its first publication. *See generally* Dent, *supra* note 5 Professor George Dent argued that Professor Gilson’s focus on M&A transactions was misplaced in that business lawyers are more aptly described as “enterprise architects” dealing with a variety of issues for the client. Professor Dent’s article is extremely useful in expanding on the ways in which business lawyers create value for clients, which I believe is consistent with Professor Gilson’s original theory of value creation. A 2010 conference hosted by Emory University School of Law Center for Transactional Law and Practice was extremely fortunate to have both Professor Gilson and Professor Dent deliver a keynote address which is posted online. *See* George W. Dent, Jr., Professor, Case Western Reserve Univ. School of Law, & Ronald J. Gilson, Professor, Stanford Law School, Keynote Speech at Emory University School of Law Center for Transactional Law and Practice: Conference: Transactional Education: What’s Next? (June 5, 2010), <http://www.law.emory.edu/centers-clinics/center-for-transactional-law-practice/2010-conference/conference-audio.html>.

93. Gilson, *supra* note 13, at 303; *see also*, Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client’s Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17 (2003) (continuing the process of defining what business lawyers do and how they create value in a knowledge based economy); Steven L. Schwartz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007) (examining data from an empirical study he conducted which concludes business lawyers primarily add value by reducing regulatory costs).

94. Gilson, *supra* note 13, at 244. *See also* Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer*, 74 OR. L. REV. 239, 242, 251–55 (1995) (providing both an overview of Gilson’s Capital Asset Pricing Model framework and exploring how Silicon Valley lawyers might create value).



## CLINICIANS, PRACTITIONERS, AND SCRIBES

lawyer's participation.<sup>95</sup> Further, he notes that the reason lawyers play a dominant role in business transactions is due to the complex regulatory influences relating to tax, labor, product liability, employment, securities and corporate law.<sup>96</sup>

Professor Gilson also queried that if his assertions are correct, “why have law schools done so bad a job in training business lawyers?”<sup>97</sup> He chastised the legal academy for failing to provide lawyers (and law students) with “a self-conscious understanding of the function they really perform.”<sup>98</sup> He concludes in 1984 that law schools are simply unable to teach the practical skills required, although law schools could potentially contribute by instructing students on theories of “economics-finance and transactional cost economics.”<sup>99</sup>

While the dollar values of the transactions conducted in an SBC will constitute a small fraction of the deal values contemplated by Professor Gilson in his article, these micro-experiences present the opportunity to give students the “self-conscious understanding” of their role in adding value for clients and their business venture.<sup>100</sup> Additionally, Professor Gilson's value creation, transaction cost engineer, and private ordering theories give the SBC community a foundation and common language upon which to build its pedagogy. The question of value creation can be an appropriate starting point for a clinical professor to explore with the students as to what they will actually be doing for the client and how that will impact any required documentation. From the first day of orientation, the question of how the students can add value to the client's venture sets a framework for the entire clinical experience. Whether interviewing, researching, counseling, or drafting client work product, the students can always regain their bearings by remembering this crucial aspect of business lawyering.

So what value can students actually add to the client's venture? Can the value added be simply assisting a client in pursuing a venture that she may not have had the opportunity to pursue, but for the assistance provided by the clinic? Professor Gilson points out that one method of creating value is allowing a transaction to go forward when it might otherwise not have occurred.<sup>101</sup> Therefore, if students can assist a business to get started that might not have otherwise been able to proceed, they are creating value. Additionally, by researching the regulatory and/or statutory

---

95. Gilson, *supra* note 13, at 244.

96. *Id.* at 296.

97. *Id.* at 303.

98. *Id.* at 302.

99. *Id.* at 305. Professor Gilson later expanded the potential disciplines by citing the economics of information, the positive theory of agency, and the theoretical basis of negotiation. Ronald J. Gilson & Robert H. Mnookin, *Foreward: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 6 (1995).

100. Gilson, *supra* note 13, at 302. Professor Dent notes that despite Professor Gilson's pessimism in 1984 regarding practical skills training, courses in writing and drafting, negotiation, alternative dispute resolution, counseling and simulations have increased since the original article, including a “deals” that teaches professional skills taught by Professor Gilson. George W. Dent, Jr., *Business Lawyers As Enterprise Architects*, 64 BUS. LAW. 279, 284–85 (2009).

101. Gilson, *supra* note 13, at 264.

requirements, a student can facilitate a cost effective method for the client to acquire information.<sup>102</sup> This could include reducing both monetary and non-monetary costs.<sup>103</sup> Importantly, reducing costs gains even greater significance when dealing with clinic clients of extremely limited resources where the client investment reflects a significant percentage of the client's business and personal resources.

In a clinical setting, these general methods of adding value (e.g., allowing the business to go forward and reducing non-monetary costs) may be too abstract to fully engage students. Fortunately, the value-added concept can be applied to specific documents drafted within the clinic. Professor Steven Schwarcz has recently compiled empirical evidence to analyze six hypotheses which assert how transactional lawyers add value.<sup>104</sup> Specifically, he identified that "transactional lawyers add value by (1) minimizing the potential for *ex-post* litigation; (2) reducing transaction costs; (3) reducing regulatory costs; (4) acting as reputational intermediaries; (5) providing client privilege and confidentiality; and (6) creating economies of scope."<sup>105</sup> The first three methods are directly impacted by the students' ability to effectively draft documents. The latter three are less directly related to drafting; however a brief review of these methods provides a complete picture of the SBC's ability to add client value.

Based on surveying both transactional attorneys and their clients, Professor Schwarcz concludes that transactional attorneys primarily add value by reducing transaction-regulatory costs,<sup>106</sup> although he also identifies certain value-added aspects in most of the other hypotheses as well. Despite Professor Schwarcz's limited conclusion, his compartmentalization of value-adding activities can be used as a structure to assess specific activities within the SBC. The following provides specific examples, within this structure, of how SBCs can add value to a client's business endeavor.

### 1. *Minimizing the Potential for Ex-Post Litigation*

Many SBC clients need service contracts drafted. Due the limited bargaining position of the clients, the terms generally cannot be overbearing or potential clients or customers will simply not sign the agreements. Additionally, the contracts cannot be voluminous (or much more than three to five pages in most cases), as lengthy contracts will again intimidate and dissuade potential clients or customers. Clinicians must think about the best way to limit the client's liability while simultaneously helping the client get new business.

---

102. *Id.* at 272.

103. Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 489 ("By 'value' this article essentially means monetary value. This would include not only lowering direct costs but also indirectly saving costs, such as reducing the time and effort that parties need to devote to a business transaction. Value also may include less tangible (and thus less quantifiable) factors, such as employing an experienced lawyer to increase client confidence and reduce anxiety.").

104. *Id.*

105. *Id.* at 491.

106. *Id.* at 506.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

These drafting goals can be accomplished with properly drafted “boilerplate language” such as limitation of damages, liquidated damages, and prevailing party clauses.<sup>107</sup> Students must go through the process of applying, and at times modifying, “boilerplate language” to the specific client to assess the true applicability. For example, an arbitration clause may be intended to reduce the costs of litigation for both parties. However, if the client’s most likely claim against a client or customer is failure to pay, and the value of the goods or services delivered is only a few thousand dollars, students must evaluate whether an arbitration clause adds value. An arbitration clause in that situation actually removes the opportunity for the client to bring a claim in a cost-effective, small claims court proceeding. Such situations will obviously require client-specific analysis.

SBC contract drafting also presents the opportunity for students and clients to recognize how business lawyers add value as compared to commercial document providers.<sup>108</sup> Clients will often come in with form documents which they have received from an online legal document service provider.<sup>109</sup> A thorough review of the form contract terms, however, often quickly shows precisely how business lawyers add value. For example, in one case a client came to the clinic with a horse boarding agreement she had obtained from a national equestrian industry group. The form contract included a clause that attempted to limit the service provider’s liability, except in the case of negligence. Yet, in Massachusetts, equestrian professionals’ liability exposure is specifically reduced by statute, generally limited to intentional acts or acts or omissions constituting willful or wanton disregard.<sup>110</sup> If the client had used that form agreement without getting input from a business attorney, she would have been eliminating her statutory liability protection. If the students had not thoroughly reviewed the proposed “standard” language while representing the client, this could arguably have been a case of malpractice. This is of course the clinical supervisor’s ideal “teaching moment” to discuss the interaction between the new legal service providers, clients who may feel all they need is a standard fill-in-the-blanks form, and the value business attorneys can bring to drafting contracts.

---

107. *See generally*, TINA L. STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE*, 209–30 (2003).

108. *See* Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 *ACTEC J.* 1, 19–23 (2010) (discussing the position that the LegalZoom service is the unauthorized practice of law and describing his personal experience with LegalZoom); Michael S. Knowles, *Keep Your Friends Close and the Laymen Closer: State Bar Associations Can Combat the Problems Associated with Nonlawyers Engaging in the Unauthorized Practice of Estate Planning Through a Certification System*, 43 *CREIGHTON L. REV.* 855, 877–81 (2010) (explaining trends in the unauthorized practice of law, including web-sites like LegalZoom); Jason Green, *Websites May Create Unauthorized Practice Questions*, 14 *LAWYERS J.* 6, 6 (2007) (discussing whether document preparation websites are the unauthorized practice of law depends on what the definition of the practice of law actually is).

109. Curcru *supra* note 6, at 549–50 (noting that there is a shortage of sound legal advice for start-up businesses and clients therefore will seek online document services).

110. *MASS. GEN. LAWS ANN. Ch. 128 § 2D* (West 2011).

## 2. *Reducing Transactional Costs*

SBCs can also add value to the client's venture by reducing unnecessary transactional costs. As indicated above, many SBC clients perceive that choice-of-entity is a significant legal issue which they must address before proceeding with their business.<sup>111</sup> When they do not have access to legal advice, these clients often form an entity through a state's online registration service or a third-party service provider that charges a fee for registration.<sup>112</sup> As a result of forming the entity, the client will likely incur transaction costs in the form of annual fees as well as the expense of filing an additional tax return. However, in many cases, a client has no personal assets that would be reachable by a judgment creditor.<sup>113</sup> Furthermore, the client is often the person performing all operations for the business and, therefore, can rarely avoid personal liability through entity protection.<sup>114</sup> Finally, any creditor is most likely going to require a personal guarantee prior to extending any credit or favorable payment terms. Therefore, explaining to the client how the entity protection does (or does not) protect them, presents an opportunity to reduce the transactional costs that client may incur in operating the venture.

Furthermore, if the client has funds to allocate to risk reduction, the analysis can also present the opportunity to compare the costs of forming an entity with the cost of obtaining a commercial insurance policy. In many cases, the fact that a commercial insurance policy will likely include provisions to provide defense costs in case of litigation can make this method of risk reduction preferable over formation of a limited liability entity. Counseling the client on this issue, both orally and via a client memorandum, benefits the client and is a great learning experience for the student.

Finally, in regards to choice-of-entity, if an entity is appropriate, the students can prepare the formation documents as well as a client memorandum explaining the formalities required to benefit from the statutory protection. Among other issues, clients can be counseled in writing and in person as to the appropriate method of signing their name on behalf of the entity as well as the dangers of intermingling personal and business funds. This again creates a teachable moment to discuss that this type of advice is what the online legal service providers fail to provide and where the business lawyer can add value.

A preliminary trademark availability search can also help the client avoid unnecessary regulatory and operational costs. A client may decide to file a trademark

---

111. *See supra* note 54 and accompanying text.

112. *See, e.g., Corporations Online Filing System, THE COMMONWEALTH OF MASS.*, [https://corp.sec.state.ma.us/corp/loginsystem/login\\_form.asp?NewFiling=True](https://corp.sec.state.ma.us/corp/loginsystem/login_form.asp?NewFiling=True) (last visited Sept. 30, 2011).

113. In Massachusetts, there is a \$500,000 homestead exemption and retirement accounts are protected by statute. If a client has other assets that would be reachable, it is likely they would not qualify for our clinic. However, clients also need to understand that in the case of a judgment against them individually, their future assets and wages could be exposed to judgment creditor collection actions. *See Leigh-Ann M. Patterson Durant & Janie Lanza Vowles, Posttrial and Appellate Rights*, MASS. CON'T LEGAL EDU., INC. (2008); *see MASS. GEN. LAWS* ch. 224, § 14–16. The students who researched the collectability of future wages and assets in such actions were Joseph Moen and Robin Gallagher.

114. *Infra* Part IV.B.3.ii.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

application without legal assistance.<sup>115</sup> This can result in mistakes in the filing, e.g., not properly identifying the appropriate international class or improperly describing a proposed logo. These mistakes can result in the United States Patent and Trademark Office (USPTO) rejecting the application in an office action which is difficult for a layperson to understand. This often leaves the client incurring additional legal fees in correcting the initial application as well as responding to the substantive basis for rejection. Additionally, as many trademark owners will utilize trademark monitoring services, if the application is filed and another owner perceives the potential for a conflict, they will likely send a strongly worded cease-and-desist letter, and again, it may be difficult for the layperson to assess the validity of the allegations. At this point, it is also likely that the client has incurred significant marketing expenses in the initial efforts to brand the new mark.

By performing a preliminary availability search, an SBC can notify the client if there are any obvious conflicts which would restrict their usage of the mark. This can include both likelihood of confusion with a registered mark as well as potential rejection based on the mark being generic or geographically descriptive. Rather than spending money on filing a trademark application which may be rejected, the client can focus their resources on trying to create a truly unique mark. If there is a conflict or substantive basis for rejection, the client can be counseled as to the fact that the ability to litigate a questionable mark is likely cost-prohibitive at this point in their business development. This advice, often in the form of a written opinion, can allow the client to avoid both regulatory and litigation costs and focus on developing a protectable intellectual property portfolio in the form of a legitimate trademark.

### 3. *Reducing Regulatory Costs*

The Small Business Administration reports that the smallest firms (fewer than twenty employees) spend thirty-six percent more per employee than larger firms to comply with federal regulations.<sup>116</sup> State and local regulatory issues add an additional layer to that oversight and economic burden.

For example, a client seeking to open a catering business in Massachusetts would need to comply with the Massachusetts State Sanitary Code<sup>117</sup> which incorporates and supplements the Federal 1999 Food and Drug Administration's Food Code.<sup>118</sup> To initiate the process in the City of Springfield, Massachusetts, the client is required to apply for a permit with the Department of Health and Human Services Division

---

115. See *Trademark Electronic Application System (TEAS)*, U.S. PAT. AND TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/teas/index.jsp> (last modified Sept. 2, 2011, 1:20PM).

116. NICOLE V. CRAIN & W. MARK CRAIN, SMALL. BUS. ADMINISTRATION, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (Sept. 2010), <http://archive.sba.gov/advo/research/rs371tot.pdf>.

117. 105 MASS. CODE REGS. § 590.011.

118. FDA FOOD CODE § 8-301.11, *et seq.* (1999), <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode1999/ucm054598.htm> (last updated May 29, 2009).

of Environmental Health<sup>119</sup> and register as a vendor with the Department of Revenue.<sup>120</sup>

A client seeking to sell used motorcycles in Springfield, Massachusetts is required to file a Business Certificate Worksheet and Workers' Compensation Insurance Affidavit with the City Clerk; an Application for a License to Buy, Sell, Exchange, or Assemble Motor Vehicles or Parts Thereof; a Tax Certification Affidavit with the City of Springfield License Commission; a Permit for Gas Storage and Open Air Parking with the City Council; a signage permit with the Department of Inspectional Services; and a Zoning Permit with the Zoning Board of Appeals.<sup>121</sup>

An SBC can counsel a client on these types of issues. While oral counseling is useful in this situation, the students can add greater benefit for the client by providing a properly drafted memorandum which will allow the client to review the material multiple times and utilize the memorandum as a reference.

#### 4. *Acting as Reputational Intermediaries*

An SBC can add value to its client by "renting" the clinic's good reputation to clients.<sup>122</sup> Any business person, regardless of size, needs the assistance of multiple professionals and business institutions. For small business owners, this can include accountants, bookkeepers, payroll service providers, commercial insurance agents, bankers, and community lending agencies.

Unfortunately, SBC clients will often have limited resources and often believe there are no professionals who will serve a business of their size. Admittedly, there are certain professionals who would not want or be able to work with these smaller clients.<sup>123</sup> However, there are a significant number of small, local business professionals who specifically cater to micro enterprises. The SBC can become integrated into the community such that it is aware of what service providers will work with smaller clients and provide a quality service. Through this community integration, the SBC will become a resource for the clients of these various professionals.

#### 5. *Providing Client Privilege and Confidentiality*

"[L]awyers [also] add value by providing clients with a measure of privilege and confidentiality."<sup>124</sup> SBC clients will have the standard confidentiality issues regarding

119. See NEW APPLICATION FOR HEALTH GOOD SERVICES PERMIT, [http://www.springfieldcityhall.com/hhs/fileadmin/health/forms\\_and\\_applications/health-food-services-permit.pdf](http://www.springfieldcityhall.com/hhs/fileadmin/health/forms_and_applications/health-food-services-permit.pdf).

120. MASS. GEN. LAWS ch. 64H, § 7 (2001). The students who researched the regulatory issues related to catering services in Massachusetts were Jonathan Gilzean, Kyle Stellar, and Staci Zaretsky.

121. See generally CITY OF SPRINGFIELD PERMITTING GUIDEBOOK (2009), [http://www.springfieldcityhall.com/planning/fileadmin/Planning\\_files/forms/SpringfieldPermittingGuideFinal\\_10-20-091.pdf](http://www.springfieldcityhall.com/planning/fileadmin/Planning_files/forms/SpringfieldPermittingGuideFinal_10-20-091.pdf). The students who researched these permitting issues were David Keller and Bradley Andrews.

122. Schwarcz, *supra* note 103, at 493.

123. For example, my SBC is premised on the fact that the services we provide do not compete with the local bar in that our clients are not in a position to purchase legal services at this point in their business development.

124. Schwarcz, *supra* note 103, at 493.



## CLINICIANS, PRACTITIONERS, AND SCRIBES

intellectual property or unique business enterprises that they may be developing or contemplating. Also, as with any client, to conduct a liability analysis and make recommendations as to appropriate risk-reducing measures, it is important to understand the extent to which clients' personal assets need protection.

However, there is also another level of confidentiality unique to the SBC client in a clinic which chooses to focus on social and economic justice issues.<sup>125</sup> Coming to the SBC may be the clients' first step in a completely new experience and these clients may experience feelings of trepidation and inadequacy. Furthermore, they may be concerned that if customers or other businesses learn that they are receiving free legal services (perhaps perceived as some type of welfare), the business itself may lose credibility within the business community. Acting under my law license, the students tell the clients at the first meeting that the clients are entitled to confidentiality under both the attorney-client privilege and the rules of professional responsibility. They can explain that this confidentiality extends even to the fact they are SBC clients at all.<sup>126</sup> This confidentiality gives the clients the opportunity to express themselves openly and facilitates the exchange of information needed to provide the appropriate legal advice and documents.

### 6. *Creating Economies of Scope*

Finally, the concept of "economies of scope" represents value added as a result of the "non-legal" jobs completed by the attorney for the business client (i.e., having the same investment support multiple profitable activities less expensively in combination than separately).<sup>127</sup> In this analysis, Professor Schwartz asserts that negotiating and drafting deal documentation constitutes non-legal activities and, primarily, that a lawyer is only needed to review the documentation from a legal standpoint. However, having the lawyer involved in all aspects of the drafting process (e.g., negotiating, drafting, and legal review), can reduce transaction costs. In a clinic that does not charge for its services, or even in a clinic that charges a nominal fee,<sup>128</sup> the client's primary investment is time. In an SBC, students generally will draft and negotiate the documents and often assist in determining what documents are appropriate. These services are in addition to the pure legal task of legal review. Furthermore, in clinics that collaborate with business schools to provide business services, this again provides an economy of scope in giving the client one place to find legal and business assistance.<sup>129</sup> Finally, it is worth noting that if the clinic, whether in conjunction with a business school or not, did not provide the "non-legal" services of drafting and

---

125. *See supra* note 10.

126. In the final client survey however, we do ask clients if they consent to be included in our client list and whether they would like to make any statement regarding their experience which we could use in our marketing materials. Of course, clients are not required to participate in this manner.

127. Schwarcz *supra* note 103, at 494.

128. *See, e.g., Small Business Opportunity Center, NORTHWESTERN LAW BLUHM LEGAL CLINIC*, <http://www.law.northwestern.edu/legalclinic/sboc/clients/index.html> (last visited Sept. 30, 2011).

129. Jones *supra* note 44. *See also*, Schlossberg *supra* note 6.

negotiating, there generally would not be a resource available for clients with access to economic justice barriers.

This section regarding pedagogies of clinical and legal writing education and the doctrines of what transactional attorneys do to add value for the client lays the foundation for developing a process for drafting in the small business clinic. That process is discussed in the next section.

#### IV. A SMALL BUSINESS CLINIC DRAFTING PROCESS

The following document-drafting process attempts to balance the needs of students to participate in a well-rounded, enriching, and stimulating practical skills experience with the professional mandates of serving live clients. Prior to beginning the drafting process, three preliminary considerations should be addressed. The first involves the structure of the clinic, the second involves educating the students as to the formal craft of legal drafting, and the third addresses the students' need to acquire substantive knowledge prior to drafting.

##### *A. Preliminary Considerations*

###### *1. Clinic Structure*

The structure of a clinic will impact the drafting process.<sup>130</sup> Quite simply, the less time and resources students have to devote to preparing client work, the more defined structure and pre-prepared forms are necessary. The factors that impact time and resources include: student-faculty ratio, duration of clinic (i.e., one or two semesters), amount of academic credit awarded, number of clients served, number of clients assigned to each student or team of students, restriction on students' outside employment, availability of practice management and document management technology, the length and substance of the clinic orientation, the sophistication of clients (i.e., will they require more explanation in the planning stage?), and number of areas of law covered (e.g., employment, corporate, intellectual property, tax). The answers to these questions directly impact the appropriate document drafting strategy.

My clinic is a one semester, six credit course open to eight students. Once selected for the clinic, the students are placed into two-person law firms. The students are expected to bill sixteen hours each week on client work. Students are authorized to allocate up to two of these sixteen hours per week on continuing legal education type programs and professional development. They are also required to spend up to four hours each week preparing their weekly journals, preparing for class and participating in walk-in legal assistance.<sup>131</sup> Each law firm usually serves three clients. Clients apply

---

130. Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996); see also Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 CLINICAL L. REV. 779 (2007).

131. Walk-in legal assistance is a program in the clinic whereby clients who are not selected for the formal clinic program can meet for one hour with myself and two students to answer questions they may have. This is more of a modeling experience with me providing the primary client counseling, although students are required to prepare for the meeting.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

to the clinic throughout the year by submitting a written application.<sup>132</sup> I group the clients into four sets of three and let students select their set of clients during orientation.<sup>133</sup>

The one semester structure requires the students to expeditiously acquire the necessary practical skills. Additionally, as the students are usually taking between six and nine additional credits, they are limited in the time they can spend on clinic work. I do not formally restrict their ability to work outside the clinic in other employment, although generally I require them to commit to at least one full day devoted to clinical work. These time constraints all work to require that an efficient drafting process be in place to facilitate delivery of client work.

### 2. Student Recognition of the “Craft” of Legal Drafting

The second preliminary issue requires that students recognize document drafting as a professional skill, or “craft,” that is acquired through both study and experience.<sup>134</sup> As indicated above, there are excellent resources to assist students.<sup>135</sup> Given the time constraints, it would be difficult to assign an entire book for students to absorb.<sup>136</sup> Furthermore, it is unclear if one book or article can impart the complexity of what students are about to undertake. I believe directed and focused readings can be effective in initiating this learning process. I assign as reading the first chapters and tables of contents from five books<sup>137</sup> which are kept on reserve and which can expose students to the issues and theories of document drafting.<sup>138</sup> Not including each book’s table of contents, this amounts to only forty-five total pages of reading, yet provides

---

132. See *Application for Small Business*, W. NEW ENG. COLL. SCH. OF LAW, LAW AND BUSINESS CENTER FOR ADVANCING ENTREPRENEURSHIP (June 2010), [http://www1.wne.edu/assets/108/Small\\_Business\\_Application\\_08\\_01\\_2011\\_final.1.pdf](http://www1.wne.edu/assets/108/Small_Business_Application_08_01_2011_final.1.pdf).

133. Thus far, I have been responsible for the client selection. In the future, I would like to involve the students in the client selection process. See generally Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLINICAL L. REV. 357 (2010).

134. Donald C. Langevoort, *Teaching Problem Solving: New Business Lawyers Need to Know How to Find the Deal: An Academic’s Perspective*, BUS. L. TODAY, July–Aug. 1999, at 33, 36 (“The idea that there is an ‘art’ to business lawyering is by no means revolutionary.”); Okamoto *supra* note 5 at 72–73 (“[C]orporate law scholars have begun to see the need to incorporate an understanding of the ‘craft’ of corporate lawyering into their teaching of the black letter law and economic theory.” (footnote omitted)).

135. See *supra* notes 30–32.

136. Sarah O’Rourke Schrup, *The Clincial Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs*, 14 CLINICAL L. REV. 301, 319 (2008) (“To the extent that a clinician even touches upon writing during the clinic’s classroom component, that instruction necessarily must be limited in order to accommodate the other topics that arise in a clinical setting such as social-justice issues, ethical and client-based consideration, issues of substantive law specific to clinical practice, and other practice skills.”).

137. See *supra* note 30.

138. I also provide a resource list of the certain law review articles in regards to the specific legal needs of entrepreneurs. *Braving the Waters: A Guide for Tennessee’s Aspiring Entrepreneurs*, 8 TRANSACTIONS: TENN. J. BUS. L. 243 (2007); Richard A. Mann et. al., *Starting From Scratch: A Lawyer’s Guide to Representing a Start-Up Company*, 56 ARK. L. REV. 773 (2004).

a variety of experts' positions and beliefs in regards to legal drafting. Furthermore, the various tables of contents provide a resource for specific future drafting projects students will encounter. This material is also incorporated into a one hour discussion during orientation. This admittedly "fire hose" technique is not ideal, but it does provide some exposure to the theory of drafting. Understanding that there is a body of scholarship and guidance regarding this issue can also alleviate the frustration for students when they begin drafting. Students can recognize that drafting is not an automatic process, but rather one they must spend part of their clinical experience (and professional careers) cultivating.

3. *Students Acquire Substantive Background Knowledge for the Specific Subject Matter*

Students will need to obtain appropriate substantive knowledge before they can draft client work product.<sup>139</sup> A clinical supervisor can facilitate students' acquisition of this knowledge. Generally speaking, upon entering the clinic, SBC students will not be able to advise a client as to choice-of-entity, prepare a service contract, or conduct a preliminary trademark availability search from taking a traditional business organization, contracts or trademark course, respectively. Doctrinal courses appropriately focus primarily on imparting the ability to perform legal analysis rather than the specific substantive content of the subject matter.<sup>140</sup> However, when clinical students have to provide legal advice to live clients, they must ascertain what the law currently is in that specific jurisdiction at that point in time.

Imparting substantive knowledge can begin during orientation as the students prepare for their initial client interviews. My limited goal is that in the initial client interview, the student will not have the "deer in the headlights" look when the client asks about forming an LLC, classifying someone as an independent contractor rather than an employee, or drafting a website disclaimer. My goal is to give the students the tools such that they can provide a general principle (e.g., "generally in Massachusetts it is difficult to classify anyone who performs services for your business as an independent contractor") together with the appropriate caveat that they will need to further review the law in regards to the client's particular situation before they can provide a definitive answer (e.g., "however, we'll need to gather more facts from you regarding what this person does for you and then further review the law before providing you any definitive advice"). That being said, the students also need to be prepared for the question that no one could have anticipated, (e.g., "I know I didn't mention this on my application, but in addition to my organic farming certification, I would also like to sell the produce from an old ice cream truck I just bought by driving through the local neighborhoods. Can I do that?"). In this situation, the student must respond to the client with appropriate follow-up fact-gathering

---

139. Okamoto, *supra* note 5, at 84 ("While participation within real practice settings provides the most effective learning environment, it should be preceded by an introduction to doctrinal knowledge.").

140. *See supra* note 8.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

questions rather than saying what is actually going through their minds (“I have no freakin’ idea; where is the professor?”).

Once we determine the specific area of law that will be relevant to the clients, I try to provide references to initial research material in the student manual and imbedded within internal form client memos.<sup>141</sup> The concern that this method becomes overly directive from a pedagogical standpoint is eliminated by the fact that after learning the basic principles using these resources, students quickly realize that each client will have a unique issue and application which requires original research. Therefore, students are also required to conduct original research and prepare internal memos addressing these client-specific issues.

For example, it is important for clients to use properly drafted employment applications. A form application can be the starting point. However, if the client is a graphic designer and wants to have applicants perform small design tasks as part of the application process, then this must be addressed. In addition to the employment law issues, there are also likely intellectual property issues regarding any work created during the interview. Students must spot these potential issues and then revise the standard application form accordingly. As another example, a client may need assistance in drafting a partnership agreement. Again, a standard agreement may be the starting point. But this client may also desire an ownership percentages that facilitates access to women or minority-owned business government contracts. Again, the impact of such ownership percentages in terms of corporate management as well as tax implications becomes this client’s unique situation which must be properly accounted for within the partnership agreement.

Taking these preliminary considerations into account, the drafting process can begin. Students will already have interviewed the clients and assessed and committed to fulfilling their legal needs in the form of a retainer agreement. The students and professor have established which documents will be needed for the client and prepared an outline of when first drafts should be completed. The students and professor have also assessed what additional legal research is required and have begun to explore potential resources. It is now time to begin the drafting process.

### *B. The Professor and Student Collaboratively Review and Select an Appropriate Drafting Method*

There are a variety of potential drafting methods. These include drafting from a blank page, using a third party commercial form, using an internal form, and using prior client work product.<sup>142</sup> The use of any form or prior work product is at first

---

141. My student manual, which is a compilation of student manuals I have received from other professors, is available upon request. Additionally, internal memoranda referenced in this article (e.g., Choice-of-entity Client Memorandum, Independent Contractor versus Employee Client Memorandum, Form Non-Disclosure Agreement) are also available upon request.

142. This article does not address drafting from the standpoint of required administrative agency forms, for example the IRS Form 1023 Application for Tax Exempt Status, a federal trademark application or most state incorporation requirements. It should be noted that there is also a practical skill required for this drafting, and seeing prior documents that have been rejected or accepted by an agency or finding

glance an anathema to non-supervisory teaching.<sup>143</sup> This problem is compounded by the fact that law students generally do not rewrite their own work effectively because “they concentrate on superficial ‘clean-up’ changes instead of substantive revisions.”<sup>144</sup> Deciding to what extent any precedent documents will be utilized encompasses the practical application of the directive versus non-directive approaches.<sup>145</sup>

However, the supervisor must also consider that the vast majority of drafting in real-world transactional practice builds off prior work product in one form or another.<sup>146</sup> Practicing attorneys Michael F. Schaff and Peter Greenbaum further provide excellent direction on using forms:

An attorney must not force the transaction into an existing form. A form agreement must be viewed as a resource or starting point, to be revised carefully and appropriately to address the transaction and issues at hand. That said, many inexperienced attorneys rely too heavily on a form and are afraid to depart from its language. Remember, the form being relied upon was used for a specific transaction, most likely with a different set of facts, and possibly prepared by a less experienced attorney.<sup>147</sup>

In his book advocating plain English drafting, Professor Wayne Schiess asserts that “[n]early all plain legal drafting results from converting an existing form into plain English.”<sup>148</sup> An SBC allows a student to learn the practical skill of developing good judgment in adopting a preexisting form in transactional practice. If students hope to become effective and efficient practitioners, they must get comfortable using

---

legal resources which provide completed agency forms can assist with this drafting process. *See, e.g.*, STEVEN H. BAZERMAN & JASON M. DRANGEL, *GUIDE TO REGISTERING TRADEMARKS* (1998); RICHARD C. ALLEN ET AL., *MASSACHUSETTS NONPROFIT ORGANIZATIONS* (Fredrick J. Marx ed., 3d ed. 2007).

143. *See supra* Part IV. *See also* McArdle, *supra* note 9, at 514 (“In my early years of teaching legal writing, I rarely offered my students examples of other practitioners’ writing. . . . At the heart of my concern, though, was the worry that students might too readily accept and imitate what was written in a particular work—even if it was a perfectly crafted specimen for the issue at hand. . . . The risk that students would imitate a writing slavishly, without considering variations in purpose, strategy, and audience that might make a good writing specimen in one rhetorical context a poor model to emulate in another, gave me and other colleagues some hesitation about using models of lawyers’ writing in this way.”); Campbell, *supra* note 9, at 667 (“Thus, some types of cases, such as those that primarily involve forms or only very short simple documents, may not provide sufficient complexity or difficulty to force students to practice developing their ideas on paper.”).

144. Patricia Grande Montana, *Better Revision: Encouraging Student Writers to See Through the Eyes of the Reader*, 14 *LEGAL WRITING J. LEGAL WRITING INST.* 291, 292 (2008).

145. Kowalski, *supra* note 33, at 327–29.

146. Michael F. Schaff & Peter Greenbaum, *Considerations for Drafting Legal Agreements*, *N.J. LAW.*, Apr. 2009, at 28 (2009) (“The use of forms can be an invaluable tool because they save time, and as a result money, since there is no need to begin from scratch.”).

147. *Id.* at 28–29.

148. SCHIESS, *supra* note 30, at 1. Professor Schiess’s exploration of the “realities of forms” also provides useful steps in converting forms into plain English and identifies the dangers of over reliance upon forms, which include outdated and excessively formal language and numerous drafting inconsistencies and foster an “unfortunate tendency toward haste and laziness.” *Id.* at 21–22.



## CLINICIANS, PRACTITIONERS, AND SCRIBES

forms. The use of forms also provides a great opportunity to discuss with students what value they provide as compared to all the recent do-it-yourself providers.<sup>149</sup>

Students are told from an early age that plagiarism is unacceptable and, in law school, a basis for expulsion.<sup>150</sup> As a result, there is often a resistance when, during the clinic orientation, I begin to explore the numerous form sources available and tell students these can be the starting point for their drafting.<sup>151</sup> Students are nervous to “copy” these forms, but for the wrong reasons.<sup>152</sup>

There are dangers of using forms,<sup>153</sup> but plagiarism is not one of them.<sup>154</sup> The greatest danger is that students use the forms as both the starting and ending point. Students need to quickly learn that transactional practice is not a fill-in-the-blanks exercise. Students need to understand that a significant part of the transactional lawyer’s craft is using forms efficiently. The craft involves tailoring the form to the specific needs of the client.<sup>155</sup> Ultimately, this can mean that for a certain document, a student may need to review five or six or more different forms, and then choose the best drafted.<sup>156</sup> Furthermore, the student may need to take certain aspects of one form and combine that with certain aspects of another. In many ways, this drafting process is the nuts and bolts of transactional practice and likely one of the aspects

---

149. *See supra* note 108. Furthermore, this also provides an opportunity to discuss with students the fact that many practicing attorneys recognize that they can spend significantly more billable time correcting client’s errors from do-it-yourself forms rather than when they are hired to do the original task.

150. Matthew C. Mirow, *Plagiarism: A Workshop for Law Students*, LEXIS-NEXIS LEGAL RESEARCH AND WRITING COURSE KIT (1996), <http://www.lwionline.org/publications/plagiarism/lawschool.pdf> (last visited Sept. 30, 2011).

151. *See Fox, supra* note 5, at 40 (“In contract drafting, plagiarism is a virtue. A lawyer drafting a contract should always try to start with a form designed for the kind of transaction involved, or from a contract previously used in a similar transaction.”).

152. One student was so uncomfortable with the concept, that despite giving him a form engagement letter to use, when I got his first draft he submitted a completely different document which he explained he thought was “better.” This again creates a great teachable moment to discuss that their future employers will generally not want total rewrites of office forms, but rather thoughtful modifications to the current form the firm has been using for years.

153. Kowalski *supra* note 33 at 328 (“Some concerns about using forms and checklists arise from the common experience that students—and even novice attorneys—sometimes lack the judgment to use forms effectively. In extreme cases, they may even abdicate their responsibilities as advocates, parroting the sample rather mindlessly in many places rather than critically evaluating the material to adapt and improve it for the client’s needs.”).

154. Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 *CATH. U. L. REV.* 777, 804 (2008) (citing K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, 32 *COLO. LAW.* 53, 53 (2003), who notes that practicing attorneys customarily borrow from the writing of others, especially for transactional documents and in fact, it is “fairly rare for an attorney to produce wholly original writing”).

155. *See supra* Part IV.

156. Campbell, *supra* note 9, at 689–90 (“Because a clinician is likely to have had more experience writing and reading legal documents of various types, she will have a greater repertoire of ‘stored problem representatives’ at her disposal. I think it is appropriate for clinicians to share these ‘stored problem representatives’ or ‘ideal texts’ with students.”).

critics say is missing from legal education. This type of drafting in an SBC provides numerous valuable teachable moments with students.

Drafting client contracts exposes student to many common drafting errors. For example, students quickly learn the age-old truth that, despite using a form, you never include a term in a document that you do not understand (for in most cases, the one term you do not understand is the only one the client will ask about).<sup>157</sup> Additionally, students also must spend time ensuring that all defined terms (capitalized) are properly used in the document. Furthermore, as the revisions continue, the students must ensure that all internal references are accurate despite sections coming in and out of the document or coming from multiple sources.

There are numerous types of precedent documents available for students to use. Efficiently and effectively selecting the appropriate form is part of the craft of being a transactional attorney. The clinical professor can guide the student through the process of finding the appropriate form to use as a starting point.

### *1. Drafting from the Blank Page*

Certain work product in a clinic does involve some original drafting (e.g., client specific legal research memorandum, reflective journals, emails to the professor, clients, and fellow students, a schedule for accomplishing the work, and client billing records). These documents are primarily work product that is internal to operations of the SBC. Conversely, as discussed above, preparing client work product from a blank page is often not practical or appropriate. However, it is possible to incorporate a “blank page” client document drafting exercise into the clinical experience.

For example, a newly formed LLC should have an operating agreement that, among other issues, addresses operational procedures, transfer of interests, and withdrawal or admission of partners. One potential drafting method would be to first have the students, many of whom will not know what an operating agreement is, draft a document from scratch and simply require them to address issues in the document that members of a new LLC should clarify before proceeding. That document can either be the starting point for further drafting of an operating agreement, or could then be compared with a sample operating agreement. Any SBC professor would likely concede that this drafting experience would indeed be valuable for the student. However, given the time required to have students draft a comprehensive operating agreement for an LLC, in most cases, such an exercise process would not be practical.

---

157. Of course, for every adage, there is an exception. For example, if we are drafting an LLC operating agreement, there will be partnership tax principles included which simply could not be absorbed by the students in one semester (arguably even if the class was nothing but a doctrinal partnership tax course). Thus far, that is the only time I tell students that during the client meeting to discuss the agreement, I will field any questions that come up regarding those partnership tax sections.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

### 2. Commercial Forms

Using a commercial form is usually most appropriate in situations where the clinic has not previously addressed an issue with a prior client, when significant time has passed since addressing the issue with a prior client, or when the student or professor is aware that there have been significant changes in the law. Transactional attorneys depend on a variety of commercial forms in drafting.<sup>158</sup> Standard sources for forms include general form books,<sup>159</sup> as well as form books based on specialized areas of law including bankruptcy,<sup>160</sup> real estate,<sup>161</sup> corporate work,<sup>162</sup> securities transactions,<sup>163</sup> and trademark.<sup>164</sup> In addition to practice area form books, there are also form books for particular states.<sup>165</sup> There are national CLE providers which provide conference material which includes numerous forms and practice aids.<sup>166</sup> Computerized legal information providers<sup>167</sup> maintain many of these treatises (and numerous others) in their respective forms libraries. In addition to these traditional sources, there are new companies that are focusing solely on providing forms to

- 
158. See, e.g., M.H. Hoeflich, *Law Blanks & Form Books: A Chapter in the Early History of Document Production*, 11 GREEN BAG 2d 189 (2008) (reviewing the history and prominence of form books and “legal blanks” in U.S. legal practice going back as early as 1812); Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 510 (1998) (noting that the American College of Real Estate Lawyers focuses “its activities narrowly . . . limiting its involvement to technical aspects of law,” such as “precision in statutory language or standardized legal forms”); Andrea M. Matwyshyn, *Technoconsen(t)sus*, 85 WASH. U. L. REV. 529, 573 (2007) (referencing that transactional attorneys often borrow forms from each other and use each others’ cumulative experience, particularly in the context of website user agreements, which are available online, and a transactional attorney will frequently review other attorneys’ work as a point of reference before drafting her own agreement); SCHIESS, *supra* note 30, at 21 (“Forms save time and, therefore, money, and so they are a necessity in any legal practice.”).
159. See JACOB RABKIN & MARK H. JOHNSON, *CURRENT LEGAL FORMS WITH TAX ANALYSIS: TRANSACTIONS IN TURBULENT TIMES* (2009); MARTIN D. FERN, *WARREN’S FORMS OF AGREEMENT: FERN’S DESK EDITION*, (1997).
160. See *BANKRUPTCY CODE, RULES & OFFICIAL FORMS* (West Publishing, 2010–2011 ed., 2009); WILLIAM L. NORTON, JR., *NORTON BANKRUPTCY LAW AND PRACTICE* (3d. ed. 2010).
161. See JAMES P. McANDREWS, *COMMERCIAL REAL ESTATE: LAW PRACTICE MANUAL WITH FORMS* (2d ed., 2009); *THE COMMERCIAL LEASE FORMBOOK: EXPERT TOOLS FOR DRAFTING AND NEGOTIATION* (Ira Meislik & Dennis M. Horn eds., 2d ed., 2010).
162. See WILLIAM MEADE FLETCHER, *FLETCHER CORPORATION FORMS ANNOTATED* (5th ed. 2011).
163. See 9 ARNOLD S. JACOBS, *MANUAL OF CORPORATE FORMS FOR SECURITIES PRACTICE* (2010) (providing forms that are used in corporate securities transactions).
164. See BAZERMAN & DRANGLE, *supra* note 142.
165. See 1 MICHAEL J. BOHNEN & DANA C. COGGINS, *MASSACHUSETTS CORPORATE FORMS WITH PRACTICE COMMENTARY* (rev. ed. 2000); 1 JOHN F. ADKINS ET AL., *DRAFTING COMMERCIAL DOCUMENTS IN MASSACHUSETTS* (David F. Hendren, ed., 2d Supp. 2009); 1 JOHN F. ADKINS ET AL., *DRAFTING EMPLOYMENT DOCUMENTS IN MASSACHUSETTS* (William B. Koffel, ed. 2002).
166. See, e.g., PRACTICING LAW INSTITUTE, *DRAFTING CORPORATE AGREEMENTS* (2007).
167. See generally WESTLAW, <http://www.westlaw.com>; LEXIS-NEXIS, <http://www.lexis.com>.

practicing lawyers<sup>168</sup> as well as providing do-it-yourself options for non-lawyers.<sup>169</sup> More recently, within academia, there are now organizations that provide registered members with access to forms and prior work product.<sup>170</sup> By searching public filings on the United States Securities and Exchange Commission (SEC) website, specifically Attachment 10 (recent agreements), you can obtain forms of recent actual transactions by some of the largest law firms in the world. Finally, students can simply Google the name of the document they are seeking and often pull up documents from a variety of other sources.<sup>171</sup>

When using commercial forms for drafting purposes, it is advisable to analyze several (i.e., at least three) form documents, even if an internal form is ultimately used. In my clinic, I require students to submit all forms utilized in their drafting. Students need to carefully read relevant provisions of the model document and understand them prior to using them in client work product. Understanding each provision and its purpose allows them to properly craft customized work product that meets the specific needs of a particular client.

### 3. *Internal Forms*

In addition to commercial forms, an SBC can determine that use of its own internal form(s) is appropriate and efficient. This is especially likely given the fact that SBC clinic clients often have unique needs.<sup>172</sup> This practice mirrors real world practice where a law firm's forms library can become one of its most valuable assets. It also provides an opportunity for students to see how an internal form and precedent work can progress over time. Students can be instructed that in using the internal forms, they are also required to note how the form can be improved. It provides an opportunity for discussion that once the clinical professor has used a form for a few semesters, it may be more difficult for her to see where the form can be improved and therefore the new students each semester have the opportunity to add significant value to the quality of the clinic materials. This process provides an opportunity for students to see how documents can be improved and also provides an opportunity to leave a legacy to future students and clients. Students realize that the benefits of their efforts will be realized not only by their current clients, but also by the students

---

168. See PRACTICAL LAW COMPANY, <http://us.practicallaw.com/>.

169. See FINDFORMS, [www.findforms.com/](http://www.findforms.com/); US LEGAL, [www.uslegalforms.com/](http://www.uslegalforms.com/); LEGALZOOM, <http://www.legalzoom.com/>; ROCKET LAWYER, [www.rocketlawyer.com/](http://www.rocketlawyer.com/); [www.oncle.com](http://www.oncle.com).

170. See generally *Centers and Clinics: Emory Exchange for Transactional Training Materials*, EMORY UNIV. SCHOOL OF LAW, <http://www.law.emory.edu/centers-clinics/center-for-transactional-law-practice/emory-exchange-for-transactional-training-materials.html> (last visited Sept. 30, 2011); *Welcome to Entrepreneurship Law*, ENTREPRENEURSHIP, <http://www.entrepreneurship.org/Entrepreneurship-Law.aspx> (last visited Sept. 30, 2011).

171. See, e.g., the variety of results of Google search for "partnership agreement." Of course, using these more random documents must be done with extreme caution.

172. In many ways, SBC clients present a "niche" practice. The reason their needs go unmet is often because it is not profitable for law firms to focus on them. That creates unique issues which the SBC must address.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

and clients in the years to come. This realization provides a catalyst and motivation for putting forth a greater effort in drafting.

Another potential use of the internal forms, which my clinic is exploring but not yet implementing, is the potential for having these forms (as improved over time) available online for alumni of the clinic to use in their practice. The concept would be that having participated in the clinic, they understand how and when to use forms and, therefore, the clinical professor can feel comfortable making these documents available to alumni for reference in their practice. Such an online, password-protected resource could also provide an opportunity and environment for these practitioners to comment on the documents and provide their feedback from practice.

The following provides examples of specific issues that would be appropriate for the use of an SBC internal form.<sup>173</sup>

### *i. Engagement Letter*

My first year teaching in the clinic, I had the students find three sample engagement letters and then draft a proposed engagement letter for the first of their three clients.<sup>174</sup> The students would generally find appropriate forms and get an effective first draft. However, clinical practice has numerous unique aspects not found in standard forms that need to be addressed in retainer letters. For example, it is important for our clinic that we limit our commitment to specific, discrete items because we do not act as general counsel to our clients, nor do we establish an ongoing relationship.<sup>175</sup> An additional unique term of the engagement letter reflects that it is students providing the work and therefore it will generally take longer to complete.

The relevance of these unique terms from a drafting perspective is that it is not likely the students will include these on the first draft thus requiring a significant first revision. Ultimately, the time involved in the numerous revisions resulted in engagement letters taking much longer to produce. After two semesters, I determined that a form engagement letter was appropriate. Having this first document utilized as an internal form within the first few weeks of class provides a good opportunity to discuss the drafting process. Furthermore, given that this first project will not involve significant additional legal research, it allows the students to quickly learn the clinic procedure for case management and revising documents.

I still require students to find three other form retainer letters from various forms libraries and see if our letter can be improved.<sup>176</sup> I encourage them to critically read

---

173. Clinicians who would like to review any of these referenced forms may contact the author directly.

174. Chavkin, *supra* note 9, at 1536 (“Although I have largely worked in clinics using form retainers, I recently abandoned that approach, opting instead for individual retainers drafted by the students for acceptance by the clients.”).

175. This is primarily because the clinic does not operate over the summer and the clinic provides a limited resource in the region which we want to be able to share with as many clients as possible. We do allow clients to reapply for the clinic and usually have one client each semester from the prior semester.

176. *See, e.g.*, NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 27:133 (2011); ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 20:52.50 (3d ed.

the current form letter and see if it adequately describes the engagement, is well written, and, if they were clients, whether they would understand the document. The students' hybrid status as laymen and soon-to-be lawyers makes their input on whether the letter will be understood by clients invaluable. Additionally, it is the first opportunity for students to see that their suggestions may be used to modify a clinic form. When a student makes that suggestion and sees their suggestion implemented, it gives the student confidence and puts in place a model for future document revisions. Even students who do not take that initial step of improving the form can be shown how one of their fellow students found an area for improvement which was implemented. That peer modeling process again sets the tone for the entire clinical experience that the students' input is valued, necessary, and, ultimately, a crucial part of the clinical and lawyering process.

This first document also gives students an opportunity to see how an internal office form can improve over time. Taking a form engagement letter from four years ago and comparing it with the current form shows students how a document can improve over time. It can also be a bit humbling for the professor, who has to explain why a document went out with what now appears to be somewhat significant warts and bruises.

*ii. Choice-of-Entity Memorandum*

There are numerous resources available to assist students in understanding the choice-of-entity issue.<sup>177</sup> However, these resources are often focused primarily on medium-to-large enterprises. The analysis for a microenterprise is often somewhat different than that of larger enterprises. For example, for a larger or well-financed venture, the initial formation and annual fees may be inconsequential, as would be the anticipated costs for having an additional tax return for a new entity. However, a necessity entrepreneur<sup>178</sup> starting a microenterprise will likely find that these fees constitute a significant percentage of their anticipated revenues in the first few years.<sup>179</sup> Additionally, these clients usually do not have significant personal assets (or

---

2011). See generally D. Christopher Wells, *Engagement Letters in Transactional Practice: A Reporter's Reflections*, 51 MERCER L. REV 41 (1999).

177. *Supra* note 54. See also, STANLEY KELLER ET AL., MASSACHUSETTS LIMITED LIABILITY COMPANY: FORMS AND PRACTICE MANUAL (2006); ALSON R. MARTIN, LIMITED LIABILITY COMPANY & PARTNERSHIP ANSWER BOOK (3d ed. 2007); GEORGE W. ANTHES ET AL., A PRACTICAL GUIDE TO MASSACHUSETTS LIMITED LIABILITY COMPANIES, (Peter M. Rosenblum ed., 2d ed. 2006); RICHARD W. SOUTHGATE ET AL., MASSACHUSETTS CORPORATION LAW AND PRACTICE (2006).

178. Necessity entrepreneurs are individuals who turn to small business or self-employment because they do not have opportunities in the salary section, e.g., individuals who lose their job or who have previously been incarcerated. See ROBERT W. FAIRLIE, EWING KAUFFMAN FOUND., KAUFFMAN INDEX OF ENTREPRENEURIAL ACTIVITY 1996–2008 (2009), [http://www.kauffman.org/uploadedFiles/kiea\\_042709.pdf](http://www.kauffman.org/uploadedFiles/kiea_042709.pdf).

179. In Massachusetts, the fee is \$500 per year. *Limited Liability Company Information*, COMMONWEALTH OF MASSACHUSETTS: CORPORATIONS DIVISION, <http://www.sec.state.ma.us/cor/corpweb/corllc/llcinf.htm> (last visited Sept. 30, 2010). For a client with few personal assets and revenue from \$25,000 to \$100,000, this cost may be disproportionate to the benefit received.



## CLINICIANS, PRACTITIONERS, AND SCRIBES

at least the assets they have are statutorily protected)<sup>180</sup> therefore; the benefits of entity protection are greatly reduced. Given the limited resources of the venture and the limited personal assets of the clients, a recommendation may focus more on the benefits of an appropriate commercial insurance policy and/or contract provisions rather than traditional entity protection.

Given these unique aspects of microenterprise representation, this may be an appropriate subject matter to draft an internal office form that specifically addresses both microenterprise needs and state-specific laws. The internal form can then be customized based on the client's specific situation. Clients are given these memoranda and then they follow up with meetings with students to discuss the content. This gives the clients the opportunity to digest the material and then ask questions.

These memoranda are also appropriate because the clients may not have access to legal services in the future. The information in the memorandum can be used in the future if the client again has limited access to legal resources. The reality of a client's limited access to legal resources also allows for a discussion with the student about one of the clinic's goals, which is increasing the client's legal and business acumen so that they will start their next venture from a greater position of knowledge and understanding and thereby hopefully have a greater chance of success. This also provides for a discussion of understanding the culture of entrepreneurship wherein entrepreneurs are greater risk takers (certainly greater than most lawyers and law students) and much less intimidated by fear of failure.<sup>181</sup>

An additional reason in favor of a choice-of-entity internal form memorandum rather than original drafting is that time spent by students researching these issues may be better spent in other endeavors that can add greater value to the client's venture.<sup>182</sup> Clients often feel that choice-of-entity is crucial to their venture and experience significant anxiety about the issue, sometimes resulting in a "legal paralysis." Rather than focusing on whether they have a sustainable business model, they are consumed with perceived legal issues which act as an impediment to their business development. A student drafting of a choice-of-entity memorandum either from a blank page or even a commercial form will require significant time for both learning the concepts and working on revisions. During my first year of running the clinic, such requirements often resulted in a choice-of-entity memorandum not getting out for six weeks or longer.

The significant time expended on this issue creates two problems. First, it leaves the client continuing to worry about the status of what they have deemed a crucial

---

180. For example in Massachusetts, up to \$500,000 of the value of a home is protected by the homestead act and retirement accounts, but not distributions, are specifically exempted from judgment collection assets. MASS. GEN. LAWS ANN. ch. 188, § 1 (2011).

181. Schwarcz, *supra* note 103 at 495. *See also* DONALD F. KURATKO & RICHARD M. HODGETTS, *ENTREPRENEURSHIP: THEORY PROCESS PRACTICE* 115–42 (Melissa Acuña et al. eds., 7th ed. 2007).

182. While there are potentially significant self-employment tax savings that can be recognized by operating as an entity and therefore reclassifying a "reasonable" portion of earnings as distributions or dividends, for relatively new start-ups or ventures with little revenues, this more sophisticated tax planning benefit will be offset by the more expensive accounting and tax preparation fees.

issue. Second, it removes time the students can spend on other issues that could create greater economic value for the client. For example, a client wanting to start a consulting business most likely will want a form service agreement to use with her customers. This contract, rather than a choice-of-entity decision for a client with little to no personal assets to protect, is the crucial document the client needs to begin generating revenues. In allocating clinic resources, that is where the students can truly add value, rather than educating a client on potentially theoretical issues that ultimately have little impact on the client's ability to generate revenue.

When it is appropriate to form an entity, the clinic can also utilize internal documents for establishing the entity. In addition to the certificate of organization and operating agreement (for a Massachusetts LLC), the clinic can also provide an entity operations memorandum explaining the important aspects of operating appropriately as an LLC.<sup>183</sup> The substance of this memorandum also provides an opportunity to discuss with students the counseling and advice attorneys add to the process versus online entity formation providers or do-it-yourself books.

*iii. Employee v. Independent Contractor*

Small businesses (as well as large businesses) often attempt to classify workers as independent contractors rather than employees.<sup>184</sup> Doing so directly reduces employer expenses (e.g., Federal Insurance Contributions Act (FICA) contributions, unemployment insurance, and worker's compensation insurance). However, misclassification can result in significant fines and penalties that could jeopardize the existence of the business. Misclassification of workers can create an unsustainable business model. There are resources available to educate students on the legal issues regarding worker misclassification.<sup>185</sup> However, the time necessary to fully comprehend the nuances of the numerous state and federal standards and appropriately counsel the client on these issues either orally or in writing would require significant investment of time studying these employment law issues, especially in regard to

---

183. For example, not comingling personal and business funds, signing all documents in the appropriate capacity, and ensuring that the entity is not undercapitalized or underinsured. This legal advice, again, highlights the value attorneys bring to this process rather than online entity formation companies which will caveat their services with the fact that it is not legal advice and that those with legal questions should seek legal counsel.

184. U.S. GOV'T ACCOUNTABILITY OFFICE, *EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION* (Aug. 10, 2009) <http://www.gao.gov/products/GAO-09-717> (last visited Oct. 1, 2011).

185. *Id.*; Marsha E. Hunter, *Contingent Workers and Independent Contractors in Massachusetts*, 45 Bos. B.J. 8 (2001); COMMONWEALTH OF MASS. DEP'T OF INDUS. ACCIDENTS, *EMPLOYER'S GUIDE TO THE MASSACHUSETTS WORKERS' COMPENSATION SYSTEM*, [www.mass.gov/Elwd/docs/dia/publications/er\\_guide\\_english.pdf](http://www.mass.gov/Elwd/docs/dia/publications/er_guide_english.pdf); MASS. DEP'T OF WORKFORCE DEV., *SIMPLIFYING THE UNEMPLOYMENT INSURANCE LAW: A GUIDE FOR EMPLOYERS*, [http://www.jolandars.com/bookkeeping/employee\\_and\\_subcontractor\\_information/MA-unemployment\\_insurance\\_guide\\_for\\_employers.pdf](http://www.jolandars.com/bookkeeping/employee_and_subcontractor_information/MA-unemployment_insurance_guide_for_employers.pdf); MASS. GEN. LAWS ANN. ch. 152, § 1 (2011) (defining Worker's Compensation); *See* BICKLEY, *supra* note 56.

## CLINICIANS, PRACTITIONERS, AND SCRIBES

state-specific issues.<sup>186</sup> Again, this presents an opportunity for the clinic to create its own internal form.

To place the students in a position to counsel the clients, students can review recommended resources on the issue, review the internal client memorandum, and apply those to the client's unique circumstances. It is worth noting that in Massachusetts, most likely the advice will be that the individual should be classified as an employee. While it is important for the client to be aware of this, the conclusion will ultimately add expense to the client's operations. By expediting this process for counseling the client as to the independent contractor versus employee issue, the students are again in a position to move to matters which can have a positive impact on the client's bottom line (e.g., customer contracting, capital raising, and licensing).

### *iv. Employee Handbook*

Educating clients as to the potential of incentivizing employees can also be a means of creating value.<sup>187</sup> Clients often come to the clinic wanting strict rules for what their employees can do in the workplace. This presents an opportunity for students to discuss with clients the value of also incentivizing. Our clinic had two clients who had janitorial and landscaping employees. Both of these industries have significant employee turnover. The clients were primarily concerned with addressing employee misconduct and termination of employment. In the process of drafting the employee handbook, we were also able to discuss with them the value of incentivizing employees by offering medical<sup>188</sup> or retirement benefits,<sup>189</sup> and the potential this provided for decreasing employee turnover and, ultimately, the possibility that this reduced turnover could translate into a competitive advantage.

Drafting a new employee handbook for each client would again take significant time for the students. Arguably, that one project could take a semester if not longer. Having an annotated model employee handbook within the clinic that can be adapted to a client's individual needs is the most efficient and effective way of satisfying the client's needs and not turning the entire clinical experience into a single drafting exercise.

---

186. For example, in Massachusetts, the definition of employee is different depending on whether the issue is FICA contributions, state and federal withholding, workers' compensation and unemployment insurance requirements, wage and hour requirements and immigration compliance. MASS. ATT'Y. GEN.: FAIR LABOR DIVISION, ADVISORY ON M.G.L. CH. 149, § 148B (2008); COMMONWEALTH OF MASS. DEP'T OF REVENUE, TIR 05-11: EFFECT OF NEW EMPLOYEE CLASSIFICATION UNDER M.G.L. CH. 149, § 149, 148B ON WITHHOLDING OF TAX ON WAGES UNDER M.G.L. CH. 62B (2005); Chaves v. King Arthur's Lounge, No. 07-2505, 2009 WL 3188948 (Mass. Super. Ct. Suffolk Co. July 30, 2009).

187. Gilson & Mnookin, *supra* note 99, at 9 ("Lawyers can often play a role in creating incentive structures that dampen the potential for opportunistic behavior.").

188. *NASRO Health Insurance Benefits: Commonwealth of Massachusetts Insurance Partnership Program for Small Businesses and Self Employed People Having Trouble Paying for Health Insurance*, NAT'L ASS'N OF SOCIALLY RESPONSIBLE ORGS., [http://www.nasro-co-op.com/health/ma/insurance\\_partnership.shtml](http://www.nasro-co-op.com/health/ma/insurance_partnership.shtml) (last visited Sept. 30, 2011).

189. *Small Business Plans—Easy, Low Cost Ways to Save for Retirement*, VANGUARD, <https://personal.vanguard.com/us/whatweoffer/smallbusiness/overview> (last visited Sept. 30, 2011).

*v. Contract “Boilerplate”*

While recognizing the danger of oversimplification, it is possible to say very generally that contracts in most cases will have two main parts: the business deal and the legal terms or boilerplate.<sup>190</sup> The clinic can compile boilerplate terms that are state-specific.<sup>191</sup> Therefore, the students can focus on helping the client draft the deal language and then also apply appropriate boilerplate as necessary. In conjunction with this drafting exercise, students will also have the ability to prepare a client memorandum explicitly explaining the terms of the agreement as it is applied to each unique client.

As opposed to the counseling that is related to choice-of-entity analysis or independent contractor analysis, both of which will likely add costs to the client’s operations either in the form of fees or compliance requirements, contract drafting facilitates the client getting to the marketplace and generating revenue, hopefully with the least amount of liability exposure. That being said, it is without question that the former issues need to be addressed and the client needs to be counseled as to their compliance requirements. However, for a clinic focused on economic development and empowering individuals, getting the client to market seems to be the most productive use of its time and resources. Internal memoranda for all of these issues facilitate students being able to counsel the client and help them get to an operational point in their business development.

*4. Prior Clinic Work Product*

For small law firms that do not have the resources to adequately maintain a forms library, the result is that the “most recent deal” becomes the form. The resulting problem is that a drafter (i.e., the new associate) can lose the unique provisions that were utilized three deals prior. This is also a danger in small business clinics. For that reason, internal forms are appropriate, as discussed above. However, there are certain unique documents and research issues that are not common enough to merit an internal form, but which could be maintained for future reference. Allowing students access to prior research allows them to benefit from the clinical expertise already developed and enhance that expertise with future in-depth research into the new issue. Additionally, students greatly appreciate the opportunity to see actual samples and client work product.<sup>192</sup>

The following provide examples of unique issues which my clinic has experienced that did not generate an internal form, but were useful for subsequent students in researching similar issues: employee confidentiality and conflict of interest policy; unrelated business income tax issues for tax-exempt organizations; cooperative

---

190. TINA L. STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE* (2008); TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2007).

191. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713 (1997).

192. See Durako et al., *supra* note 80, at 739–40 (noting that in their students’ surveys, “students unanimously commented favorably on the annotated sample memorandum” and “clamored for more samples”).

## CLINICIANS, PRACTITIONERS, AND SCRIBES

entities as a form of entity choice; ownership of limited liability entities by unauthorized immigrants; regulations pertaining to state contracting for adult placement services; information regarding both franchisee and franchisor requirements; FDA and state regulatory requirements for a variety of home-based businesses producing herbal treatments, sports bars, cookies, and delivery of produce; immigration issues relating to student work opportunities; and liability releases for a variety of activities.<sup>193</sup> In each of these situations, both the students and the clients benefit from the prior client work product.

### *C. Revisions and Supervisor Feedback*

A primary value of clinical education is that the “one-on-one [feedback] . . . can lead to ‘significant breakthroughs’ in students’ reasoning and writing.”<sup>194</sup> Feedback as a primary tool in helping students become better writers is widely recognized.<sup>195</sup> Oversight of client work product is mandatory.<sup>196</sup> Finding an efficient method to provide student feedback is crucial.

In my first semester teaching, a student handed me a first draft of a client memorandum during our weekly meeting. I read the first sentence of the memorandum and was surprised to find that it was grammatically incorrect to the point of being incoherent. My rookie-year reaction was to hand the document back to the student and explain that this document was not ready to be submitted for my review, and certainly not ready to be submitted to the client. The details of my response were quickly transmitted through the clinic, as well as to an associate dean. From that experience, I learned that I had failed to clearly establish expectations as to deliverable work product and that my feedback procedures needed to be formalized.

The general direction that I ask students to follow when preparing client work product is that any document submitted to me should be, in their current professional opinion, “client-ready.” I define this as meaning that the student would be comfortable giving this document directly to the client, watching the client read it (without being embarrassed), and be confident that the client could use the document to make important decisions based upon the advice contained within it. I explain to them that while there will undoubtedly be required revisions to the document, the “client-

---

193. For a brief discussion of the capability of an SBC to address such a variety of issues see *supra* note 50.

194. Sheila Rodriguez, *Using Feedback Theory to Help Novice Legal Writers Develop Expertise*, 86 U. DET. MERCY L. REV. 207, 210 (2009) (citing Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 262 (2004)). Professor Rodriguez’s article further demonstrates the collaboration potential between legal writing and clinical pedagogy in that her proposed feedback method is based on a process developed in the clinical arena. See *supra* note 79; Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143 (2006).

195. Campbell, *supra* note 9, at 660 n.27.

196. BEST PRACTICES, *supra* note 1, at 194–95 (“Principle: All student lawyer activities that are client- or outcome-significant are approved in advance by clinical faculty and either directly observed by clinical faculty or recorded for subsequent review.” The comments to this principle state that, at a minimum, the clinical faculty should review all correspondence and legal documents prepared by students.)

ready” standard should be their guiding principle in each draft they submit.<sup>197</sup> Additionally, students are instructed to use any precedent documents critically. Students must recognize that any precedent work should only be considered a first draft, subject to appropriate editing and revision like any other document.

I also instruct that both students in the two-person law firm are responsible for the document. I stress at orientation that the response to deficiencies in a document from either member of the law firm cannot be, “my partner did that one.” Both to encourage collaboration and based on the volume of work that must be accomplished in the semester, it is likely one student will take the lead on certain projects and the second student will take the lead on others. However, because they are jointly responsible for all client work product, they are required to peer review all documents before submitting for my review.<sup>198</sup> As part of the process approach, legal writing commentators have extolled the value of peer editing<sup>199</sup> and this document preparation method creates an environment which encourages and mandates this activity.

In an effort to mirror law firm practice and provide an efficient method for providing feedback, my initial comments to the student are facilitated by using a practice and document management software. Documents are created or uploaded to the client file. Once the document is in the file, I post revisions to the document using the “track changes” and “balloon” features in Microsoft Word.<sup>200</sup> Comments in early drafts are general, giving big picture suggestions for revisions and become more directive as the drafts progress. As the time left in the semester decreases, feedback will inevitably become more directive.<sup>201</sup> Optimally, the students review my revisions prior to our weekly meeting to discuss the document. For future drafts, students accept my changes and blackline their new revisions. This process repeats until the final client work product is complete. That work product is then sent to the client and a client meeting is scheduled to discuss the document and counsel the client.

This document revision process, especially initially, has the potential to discourage the students.<sup>202</sup> In the legal writing context, Professor Rodriguez noted that students can often feel a lack of control in the drafting process.<sup>203</sup> She notes the goal is to

---

197. Again, this is a general principle and if students want to include notes or comments to me in the document at the early drafting stage that is encouraged as well.

198. Kowalski, *supra* note 33, at 341 (“In their supervision, clinicians can help students learn to become more effective evaluators of their own writing by encouraging them to use exercises for self- and peer-critique.”).

199. See Durako et al., *supra* note 80, at 720–26.

200. See Sheila Blackford, *Can We Collaborate: What Today's Collaboration Tools Can Do for You and Your Clients*, 71 OR. ST. B. BULL. 34 (2010); Dennis Kennedy & Tom Mighell, *Internet-Based Document Management Systems*, 52 ADVOC. 18 (2010). Use of this tool also provides a good opportunity to discuss the dangers and professional responsibility issues related to metadata in documents. Helen W. Gunnarsson, *Is Your Metadata Showing? Avoiding Document-Sharing Disasters*, 98 ILL. B.J. 76 (2010).

201. Kowalski, *supra* note 33, at 345.

202. See Rodriguez, *supra* note 194, at 209–11 (“Just as the conference has the greatest potential to help students develop writing expertise, it can also serve as a crucible for ‘feedback failure.’”).

203. *Id.* at 209.



## CLINICIANS, PRACTITIONERS, AND SCRIBES

“avert a feedback failure ‘before the [student-teacher] relationship is irreparably damaged and before the learning process is irremediably disrupted.’”<sup>204</sup> There will likely be significant required revisions. Students are likely to react emotionally to having their work criticized.<sup>205</sup> Again, this drafting process began with the student and professor discussing appropriate precedent work to use for drafting, optimally reviewing various forms and/or prior client work product together. The student’s first work product will likely be at one end of a spectrum wherein they either chose to make only superficial changes to the precedent document<sup>206</sup> or they will chose to completely rewrite the precedent document.<sup>207</sup>

Taking these concerns into consideration, Professor Blaustone has proposed the following six step process for providing effective feedback:

Step One: The Feedback Recipient Identifies Strengths of the Performance.

Step Two: The Peers and/or Supervisory Respond Solely To Those Items Raised By The Feedback Recipient.

Step Three: The Peers and/or Supervisor Identify Other Strengths of the Performance.

Step Four: The Feedback Recipient Identifies Difficulties and/or Changes to be Made.

Step Five: The Peers and and/or Supervisor Respond to the Identified Difficulties.

Step Six: The Peers and/or Supervisor Indicate Difficulties.<sup>208</sup>

While strict adherence to the process must give way to the nuances of individual student needs as well as time constraints on the document production process, Professor Blaustone’s process provides excellent reference points for this crucial clinical experience. This balanced approach to assessment contrasts “the self-battering comments and denial/rationalizations of deficiencies that are commonplace in unstructured feedback discussions.”<sup>209</sup> Educating the student in this manner as to the

---

204. *Id.* at 211.

205. *Id.* at 215 (citing HELEN S. SHAPO ET AL., *WRITING ANALYSIS IN THE LAW* 184–85 (Teacher’s Manual, 5th ed. 2008) (describing difficult conferences with four types of students: “The Hostile Student;” “The Weeping Student;” “The Passive Student;” and “The student who wants you to do his work”)); *see also* Joshua Stein, *How Could Anyone Possibly Have Comments on My Masterpiece?*, 46 No. 4 PRAC. LAW. 11 (2000).

206. *See* Montana, *supra* note 144.

207. *See supra* note 152.

208. Blaustone *supra* note 194 at 154–59.

209. *Id.* at 156.

necessity, purpose, and structured intention of the feedback session should result in a positive clinical experience.

*D. Post Drafting: Client, Student, and Graduate Feedback*

The use of surveys to analyze the experience of students and clients can provide insights into which aspects are effective and the aspects which need to be reevaluated. The concept of using student surveys has been somewhat addressed in the legal academy with varying opinions as to its effectiveness.<sup>210</sup> However, this feedback process from students to the professor should be ongoing throughout the semester and culminate with a final written student survey. Student surveys can go beyond standard classroom assessment to include specific drafting questions such as:

1. Did your legal writing and drafting improve during the clinical experience?
2. Did you feel there was too much focus on writing in the class?
3. Did you receive proper direction on how to prepare documents?
4. Did the forms impede your creativity (i.e., did you feel “spoon fed” or like a scribe)?
5. Do you feel the documents you prepared added value to the client?
6. Do you feel more prepared to enter the legal profession?
7. Would you feel comfortable preparing a client contract or client advice memorandum?

There seems to have been fairly minimal coverage, at least in the clinical world, of the use of client surveys to assess clients’ perspectives of the clinical experience.<sup>211</sup> Conversely, the practicing bar, and its consultants, have been implementing and

---

210. Gerald F. Hess and Sophie M. Sparrow, *What Helps Law Professors Develop As Teachers?—An Empirical Study*, 14 WIDENER L. REV. 149, 169 (2008); Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 406–08 (1990) (Highlighting the difficulties associated with getting accurate feedback from student surveys). There is also the recently developed Law School Survey of Student Engagement, however that survey does not address specific issues relating to the acquisition of writing and drafting skills. See, LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT (2009), [http://lsse.iub.edu/pdf/MainSurveyInstrument\\_2009.pdf](http://lsse.iub.edu/pdf/MainSurveyInstrument_2009.pdf).

211. Melissa L. Breger et al., *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 321 (2003) (citing Martha E. Gaines, *I Do Make House Calls: Effective Legal Representation from Our Clients’ Perspective* (1993) (unpublished L.L.M. thesis, University of Wisconsin Law School (on file with the University of Wisconsin Memorial Library), and Katherine R. Kruse, *Engaged Lawyers and Satisfied Clients: Lessons Learned from the Gaines Thesis* (unpublished manuscript, William S. Boyd School of Law) (on file with the author)).

## CLINICIANS, PRACTITIONERS, AND SCRIBES

analyzing client surveys since at least the early 1990s.<sup>212</sup> Again, input from these stakeholders can be invaluable. Questions included in my client survey relative to drafting are:

1. Was the representation agreement helpful in detailing what the clinicians would accomplish?
2. On a scale of 1 to 10, with 1 being “Not Useful” and 10 being “Excellent,” how would you rate the services you received from the clinic?
3. Did you understand the documents that you received from the clinic or were they overly technical?
4. Were the documents and legal information you received helpful for your business?
5. Do you intend to use the documents that were prepared for you in your business? If not, why not?
6. If it was not helpful, how could it have been improved (please be as specific as possible)?

Finally, while there has been some work done looking at the attitudes of graduates,<sup>213</sup> most of the discussion on these surveys involve the results of the survey rather than the methodology or efficacy of the research method itself. Reaching out to graduates of the clinical program can assist in determining whether the transfer of drafting skills was successful. Direct questions as to their confidence level in drafting in the workplace can provide direct insight into the effectiveness of the program. At this point in my clinic’s development, this type of survey is still only aspirational, although I do reach out to former clinic students as much as possible to see whether they consider their clinical experience to have been useful in their current employment. Ultimately, surveys of students, clients, and graduates focused on their perceptions of the drafting process can allow the professor to return to the process and modify, supplement or re-evaluate as necessary.

## V. CONCLUSION

Law schools are increasing transactional [clinical] offerings. The unique requirements of drafting client-ready documents in an SBC require focused attention

---

212. 1 CAROLE BASRI & IRVING KAGAN, *CORPORATE LEGAL DEPARTMENTS* § 7:4 (2010); James A. Jarrell, *Planning For Your Future Using Client Surveys*, 30 *LAW. PRAC.* 35 (2004); Ronald F. Pol, *Seeing Through Your Clients’ Eyes: Six Steps Beyond Client Surveys*, 25 No. 5 *HEARSAY ACC DOCKET* 20 (2008), [http://www.teamfactors.com/documents/SS30\\_ClientsEyes-SixStepsBeyondClientSurveys\\_ACCDocket.pdf](http://www.teamfactors.com/documents/SS30_ClientsEyes-SixStepsBeyondClientSurveys_ACCDocket.pdf). *But see* Steven A. Meyerowitz, *Why You Should Avoid Client Surveys* *PA. LAW.*, Nov. 1994, at 17.

213. Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stamford Law Students and Graduates*, 40 *STAN. L. REV.* 1209, 1235 (1988).

on the drafting process. Clinical legal education pedagogy is not restrained by the dogma of non-directive supervision and supports the collaborative and partnership supervision that legal drafting requires. While legal writing pedagogy has historically been focused on appellate drafting, the new rhetoric theory writing process provides useful guidance in this unique drafting exercise. Educating students as to these tools as well as the value their drafting can bring to clients can create an exceptional learning environment. SBC legal practice constitutes a niche practice area with distinctive client needs. While some original drafting can occur for certain work product, an internal library of precedent work is needed to support all learning aspects of the clinic. Above all, the transactional clinic community must share, discuss, and critique appropriate implementation methods for serving both the clients and the students to the utmost of our ability.