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### Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report

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# Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report

Maureen E. Laflin\*

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## I. INTRODUCTION

A critical challenge confronts legal education today. The profession for which we train our students is at a crossroads. The direction the legal profession has taken over the past several decades has resulted in widespread distrust of lawyers and a general perception that the profession has lost its sense of purpose and social obligation. Among the general public, regard for lawyers is pitifully low, as many view the profession as self-serving, directionless, and in disarray.<sup>1</sup> Anti-lawyer rhetoric has become more prevalent and virulent than ever before.<sup>2</sup> Even members of the legal community look with dissatisfaction upon the current state of the profession.<sup>3</sup> Internal criticism ranges from general charges of lawyer incompetence<sup>4</sup> to complaints focused on the woeful research and writing skills

1. See, e.g., Robert A. Destro, *ABA and AALS Accreditation: What's "Religious Diversity" Got To Do with It?*, 78 MARQ. L. REV. 427, 439 n.57 (1995) ("There is a common perception, both among lawyers and the general public, that the legal profession has lost its bearings."); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 270 (1992) ("[T]here are serious problems in the legal profession today . . . Among the practicing bar, there is too much incompetence, a wide-spread lack of professionalism, and not enough of a sense of social obligation."); C. Garrison Lepow, *Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education*, 26 U. MICH. J.L. REFORM 69, 70 (1992) ("Many people perceive the work of lawyers as a powerful, prohibitively destructive force.").

2. See generally Kathleen Ridder, *Perceptions by the Public*, in THE MACCRATE REPORT, BUILDING THE EDUCATIONAL CONTINUUM, CONFERENCE PROCEEDINGS, 18, 18-19 (Joan S. Howland & William H. Lindberg eds., 1994) [hereinafter CONFERENCE PROCEEDINGS]; Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J., Sept. 1993, at 60, 60-65.

3. See, e.g., MARY ANN GLENDON, A NATION UNDER LAWYERS, HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); ANTHONY T. KRONMAN, THE LOST LAWYER, FAILING IDEALS OF THE LEGAL PROFESSION 2 (1993); Laser, *supra* note 1, at 270; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 63-74 (1992); Lawrence A. Dubin, *Professionalism Among Lawyers: The Law School's Role*, 68 MICH. BUS. LJ. 850 (1989); Sandra Day O'Connor, *Legal Education and Special Responsibility*, 53 FORDHAM L. REV. 659, 661-62 (1985); Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 381 (1980).

4. See Robert L. Clare, Jr., *Incompetency and the Responsibility of Courts and Law Schools*, 50 ST. JOHN'S L. REV. 463, 466 (1976); see also LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS & THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR 266 (1992) [hereinafter MACCRATE REPORT] ("If

of many lawyers.<sup>5</sup> Perhaps most disturbing, people outside as well as many inside the legal profession generally regard the moral character of lawyers with suspicion.<sup>6</sup> This profession into which many of us came out of a naive attraction to fairness and justice has sadly become but a caricature of those public virtues.

Public disdain for lawyers, of course, is nothing new. The current extent of anti-lawyer sentiment,<sup>7</sup> however, surpasses earlier times, as does the level of criticism and disaffection within the profession itself.<sup>8</sup>

From this unfortunate state of the legal profession, we can follow a variety of paths. Many disaffected lawyers have simply left the profession, opting for new career paths.<sup>9</sup> Others, apparently unmoved by the problems the profession faces, primarily concern themselves with billable hours and fees that can be charged to the client.<sup>10</sup> Still others stay with the profession while forging a new path aimed at reforming the practice of law according to its traditional vision as a public service profession.<sup>11</sup>

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professional competence is the goal, the fact is troubling that so many young lawyers are seen as lacking the required skills and values at the time the lawyer assumes full responsibility for handling a client's legal affairs.”).

5. See Lucia Ann Silecchia, *Designing and Teaching Advanced Legal Research and Writing Courses*, 33 DUQ. L. REV. 203, 206-07 & n.9 (1995) (citing numerous articles written on the bar's dissatisfaction with the research and writing skills of law school graduates).

6. See generally Lawrence J. Fox, *Money Didn't Buy Happiness*, 100 DICK. L. REV. 531 (1996) (discussing Americans' distrust of lawyers and steps that should be taken to dispel such beliefs); KRONMAN, *supra* note 3, at 1.

7. See Stephen Wizner, *What Is a Law School?*, 38 EMORY L.J. 701, 701 (1989) (“The public views lawyers—law school graduates—as a necessary evil, at best, and more often as greedy, sleazy technicians who prosper from the problems and misfortunes of others.”).

8. See James E. Brill, *The Secret of Success: Need Balanced Lives, Not Necessarily More Billable Hours*, 78 A.B.A. J., Oct. 1992, at 100. The Journal reports that:

Dissatisfaction abounds [among lawyers]. One survey of recent law school graduates found that only 63 percent would again choose to be lawyers and that 47 percent of the women and 42 percent overall were considering leaving the profession. Another study of lawyers of all ages indicated that only 31 percent were more than somewhat satisfied with the way their work lives meshed with their personal lives, and 59 percent did not predict any improvement.

*Id.* See also MACCRATE REPORT, *supra* note 4, at 220-21, 227-28 (citing several studies and articles on the number of lawyers who experience dissatisfaction with their jobs).

9. See generally Brill, *supra* note 8, at 100.

10. See John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 193 (1993) (“I constantly hear that the profession itself is in crisis in consequence of its transformation ‘from a profession to a business’ in the highly competitive environment of the last two decades.”) (emphasis added).

11. See Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89, 94 (1994) [hereinafter MacCrate, *Preparing Lawyers*] (“If the profession of law is to continue as a respected public calling, each generation of lawyers must earn the public's trust by acquiring the learning, the skills, and the values essential to fulfilling a lawyer's responsibilities to the justice system and to those whom the profession serves.”).

How those in the legal community choose to proceed from this juncture will determine the health and reputation of the profession as the twenty-first century begins. For legal educators, the path chosen is particularly critical, for it will be largely under our watch that the next generation of lawyers will develop their skills, attitudes, values, and sense of professional purpose.<sup>12</sup> As one author has written, “[W]hat we fail to instill in our law students we find lacking in our lawyers. The problems in the legal profession and the law schools are dynamically related to each other.”<sup>13</sup> The pressing question for legal educators, then, is not which path to follow, but how we shall go about identifying our roles and designing curricula which will help revitalize the profession and repair its reputation.<sup>14</sup>

One important step along this path of revitalization and repair is the report commonly known as the “MacCrate Report,” published in 1992 by a special ABA Task Force on Law Schools and the Profession. Formally titled “Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap,” the MacCrate Report identifies several skills and values that the Task Force regarded as central to the competent and responsible practice of law. It sets forth these core skills and values conceptually in a Statement of Fundamental Lawyering Skills and Professional Values (“SSV”).<sup>15</sup> The SSV discusses ten fundamental lawyering skills: (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication (oral

12. See Wizner, *supra* note 7, at 703 (“Lawyers are the product of law schools. If lawyers have a bad reputation, it is partially the fault of how and what they are taught.”).

13. *Id.* at 708.

14. See William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 226 (1996).

Given the absence of supervision for many new lawyers, and the absence of adequate in-house training for others, providing legal education designed to ensure that law school graduates are competent to practice law is not only a worthy goal, but an imperative.

....

What law schools can realistically aspire to accomplish in three years is to produce students who know basic legal doctrine, possess certain core lawyering skills, and have experience using this knowledge and skill to perform a reasonable range of lawyering tasks.

*Id.* at 226-27; Wizner, *supra* note 7, at 704 (asking the question, “What does law school teach its graduates and why is this training so susceptible to producing privately- rather than publicly-oriented lawyers?”).

15. See Michael Norwood, *Scenes from the Continuum: Sustaining the MacCrate Report’s Vision of Law School Education into the Twenty-First Century*, 30 WAKE FOREST L. REV. 293, 295 (1995) (“The SSV is the centerpiece of the MacCrate Report’s vision . . . . The SSV is . . . the Task Force’s most important contribution to the advancement of lawyers’ professional development.”).

and written); (6) counseling; (7) negotiation; (8) litigation and alternative dispute resolution procedures; (9) organization and management of legal work; and (10) recognizing and resolving ethical dilemmas.<sup>16</sup> It then identifies a set of four ideals said by the Task Force to represent the moral foundation of legal practice.<sup>17</sup> The Report suggests that every lawyer should aspire to the values of (1) providing competent representation to clients; (2) promoting justice, fairness, and morality within society; (3) maintaining and improving the legal profession; and (4) developing professionally as a lawyer.<sup>18</sup>

The MacCrate Task Force does not claim that these skills and values represent the final word, or even a fully inclusive set of the professional abilities and ideals that every lawyer needs to acquire.<sup>19</sup> Nor does it place on any one element of the legal community—practitioners, judges, educators—the full responsibility for imparting them.<sup>20</sup> The Task Force instead articulates a set of skills and values in aspirational terms, envisioning legal practice as “a respected, client-serving, problem-solving, public calling.”<sup>21</sup> It further recognizes that acquiring these skills and values must occur on a continuum, beginning prior to law school, fortified there, and continuing throughout a lawyer’s career.<sup>22</sup> Legal

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16. MACCRATE REPORT, *supra* note 4, at 138-207.

17. *Id.* at 207-21.

18. *Id.*

19. *Id.* at 123-24. The Report acknowledges that this is not “a comprehensive statement of skills and values that all members of the profession would—or could reasonably be expected to—accept as definitive.” *Id.* at 123. Instead the Task Force believes:

[T]here was considerable value in putting together the best comprehensive statement which the Task Force itself could develop, so as to begin a process through which, in the years ahead, discussion in all sectors of the profession could be focused on questions about the nature of the skills and values that are central to the role and functioning of lawyers in practice.

*Id.* at 124.

20. The Report recognizes that the responsibility for teaching professional skills and values needs to be shared between law schools and the practicing bar. *Id.* at 131, 234.

21. Robert MacCrate, “*The Lost Lawyer*” *Regained: The Abiding Values of the Legal Profession*, 100 DICK. L. REV. 587, 614 (1996) [hereinafter MacCrate, *The Lost Lawyer*]. The MacCrate Task Force was created to respond to a question raised in 1987 by Justice Rosalie Wahl, then-chair of the ABA Section of Legal Education and Admissions to the Bar. *Id.* Speaking at the ABA’s National Conference of Professional Skills and Legal Education in Albuquerque, New Mexico, Justice Wahl asked the audience to consider “what skills, what attitudes, character traits, and what qualities of mind are required of lawyers [today],” so as to preserve and reinvigorate the legal profession. *Id.* See also Robert MacCrate, *Lecture on Legal Education, Wake Forest School of Law*, 30 WAKE FOREST L. REV. 261, 262 (1995); Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573, 574 (1994) (envisioning that “good lawyering” in the 21st century will be defined as “a public calling which emphasizes a professional obligation to promote equality in the legal system.”).

22. MACCRATE REPORT, *supra* note 4, at 3 (“The skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer’s professional

educators, members of the legal profession,<sup>23</sup> the judiciary, and CLE providers<sup>24</sup> all must shoulder the responsibility for educating lawyers. Nevertheless, the Report emphasizes that law schools<sup>25</sup> should assess the degree to which their own curricula teach needed skills and values,<sup>26</sup> and how they can best help their students begin to acquire the skills and values important to law practice.<sup>27</sup>

Since its publication, much has been written about the MacCrate Report.<sup>28</sup> Little, however, has been written about using it to aid curriculum development, one of the proposed uses of the SSV.<sup>29</sup> This article will use the MacCrate Report for precisely that purpose. I propose that one way law schools can meet the growing interest in improving their graduates' ability to competently handle legal

career.”). *See also id.* at 4 (“It has long been apparent that American law schools cannot reasonably be expected to shoulder the task of converting even very able students into full-fledged lawyers licensed to handle legal matters.”).

23. *See* Peter G. Glenn, *Some Perspectives on In-House Skills Training as Part of the Continuum of Professional Education*, in CONFERENCE PROCEEDINGS, *supra* note 2, at 87 (discussing the resource constraints on in-house programs and what they can reasonably be expected to accomplish); John Claydon, *The MacCrate Report: In-House Training and the Legal Education Continuum*, in CONFERENCE PROCEEDINGS, *supra* note 2, at 92 (encouraging a collaborative effort to provide the necessary education and training).

24. *See generally* Victor J. Rubino & Richard D. Lee, *The Role of CLE in Implementing the Recommendations of the MacCrate Report*, in CONFERENCE PROCEEDINGS, *supra* note 2, at 99.

25. *See* Talbot “Sandy” D’Alemberte, *Keynote Address*, in CONFERENCE PROCEEDINGS, *supra* note 2, at 4, 17 (“The MacCrate Report asks much of all elements of the legal profession but, in my opinion, its most important message is to law schools. It asks us to do more than rely on Langdell’s methods . . . . It asks us to remember why Thomas Jefferson sought to establish legal education in a university setting.”).

26. MACCRATE REPORT, *supra* note 4, C.8, at 331.

27. *Id.* at 330-31, C.5.

28. *See, e.g.*, Trail & Underwood, *supra* note 14; Matthew J. Arnold, Comment, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 CAP. U. L. REV. 227, 246 (1995) (“Despite its lack of financial vision, and despite the absence of an ABA mandate, the MacCrate Report offers valuable guidance to legal education institutions.”); MacCrate, *Preparing Lawyers*, *supra* note 11, at 89; Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505 (1994); Jack Stark, *Dean Costonis on the MacCrate Report*, 44 J. LEGAL EDUC. 126 (1994); Costonis, *supra* note 10, at 194 (expressing concern that the Report will push law schools toward too great an emphasis on training lawyers for specific tasks and away from other important responsibilities such as providing a general intellectual background for the practice of law and the pursuit of important legal research goals).

29. MACCRATE REPORT, *supra* note 4, at 128 (suggesting that law schools use the SSV “as a focus for examining proposals to modify their curricula to teach skills and values more extensively or differently than they now do.”).

matters—and in particular satisfy the professional objectives of the MacCrate Report—is to develop a clinical appellate program.<sup>30</sup> I will use as a model the University of Idaho's Appellate Clinic.<sup>31</sup>

This Article will argue that the MacCrate Report's skills and values parallel clinical education's micro goal of teaching practical skills<sup>32</sup> and its macro goals of educating lawyers who understand the operation of legal institutions while stressing the importance of maintaining high standards of professional responsibility.<sup>33</sup> The MacCrate Report adds a new chapter to the ongoing dialogue over what it is that lawyers do and how law schools should prepare their students for the legal profession.<sup>34</sup> More than traditional law school courses,

30. For purposes of this Article, I will use the terms "clinical legal education" and "clinic" to refer to live-client, in-house clinics where students practice under the supervision of clinical faculty employed as full-time members of law school faculties.

31. This Article will not address the economics of implementing the MacCrate Report which has already been the subject of numerous articles. See, e.g., Costonis, *supra* note 10 (providing an extensive criticism of the cost of implementing the MacCrate Report recommendations); Mark Heyrman, *Regulating Law Schools: Should the ABA Accreditation Process Be Used to Speed the Implementation of the MacCrate Report Recommendations?*, 1 CLINICAL L. REV. 389, 392-93 (1994) (criticizing Costonis' estimates as exaggerated and suggesting possible additional sources of income but conceding that "[n]one of these sources appears likely to yield substantial additional sums in the near future."); Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 404 (1994) ("[T]he cost criticism of real-client clinical education is usually myopic."); Beverly Balos, *Conferring on the MacCrate Report: A Clinical Gaze*, 1 CLINICAL L. REV. 349, 350-54 (1994) (suggesting that the debate regarding the cost of clinical education should be shifted to look at the entire curriculum and how resources are currently allocated).

I will not address the expense involved in creating and operating an appellate clinic. No one disputes that clinical legal education, in particular an appellate clinic, is expensive in comparison to the cost of classroom instruction. See generally *Appellate Litigation Skills Training: The Role of the Law Schools, Report and Recommendations of the Committee on Appellate Skills Training, Appellate Judges' Conference Judicial Administration Division, American Bar Association*, 54 U. CIN. L. REV. 129, 153 (1985) [hereinafter Committee on Appellate Skills Training]; see also Marjorie Anne McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 289 (1990) (acknowledging the high cost of live-client clinics and suggesting as a cost-cutting measure, shifting some of the subjects currently taught in the clinical setting, such as lawyering skills, substantive law, and law office management, to larger classroom settings).

32. Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1317 (1947) [hereinafter Frank, *A Plea for Lawyer-Schools*]. Jerome Frank first urged educators to adopt a clinical law school to provide practical experience for law students.

33. See Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories about Lawyering*, 29 CLEV. ST. L. REV. 555, 556 (1980) [hereinafter *Legacy of Clinical Education*] (distinguishing between "micro theories, which focus on the role and behaviors of the individual lawyer, and macro theories, which focus on the lawyer's interaction with the legal system, and the impact of lawyers on the larger world").

34. See Balos, *supra* note 31, at 357 ("One goal of clinical education is to provide students with a rich experience of the integration of theory and practice at a time when the students can engage in self-reflection with the guidance of faculty.").



clinical education, and appellate clinics in particular, embraces the suggestions found in this new chapter. In ways that parallel the MacCrate Report's SSV nearly point-for-point, appellate clinics by design combine the theoretical and practical considerations the Report deems critical for the education of tomorrow's lawyers.<sup>35</sup>

While the MacCrate Report introduces its set of basic skills and values lexically under the limited conceptual framework of ten skills and four values,<sup>36</sup> this article will suggest that these professional objectives are best understood by reclassifying them into three general categories. The first three skills listed in the Report—problem solving, legal analysis and reasoning, and legal research—can generally be classified as *analytical skills*. Each goes to the centrality of rational analysis for the competent practice of law. Second, the Report highlights several *practical skills*: factual investigation, oral and written communication, counseling, negotiation, litigation and alternative dispute resolution procedures, and organization and management of legal work. These skills share the common orientation that efficient and effective legal practice requires communication and organizational skills, as well as at least a basic understanding of legal procedures and ethical considerations. Finally, the Report stresses certain *matters of ethical character*. The final skill identified in the SSV—the ability to recognize and resolve ethical dilemmas—assumes that every lawyer should possess at least a moderately fit moral character. This assumption likewise underlies the SSV's four values: providing competent representation; promoting justice, fairness, and morality; maintaining and improving the legal profession; and developing professionally as a lawyer. These values essentially impose upon all lawyers general moral obligations to one's clients, society, the legal profession, and oneself. Satisfying these obligations to any meaningful extent requires basic moral fitness of character.

Sections III, IV, and V of this article will assess the educational value of appellate clinics in light of the MacCrate Report's set of skills and values, employing the three-part general classification scheme suggested above. First, however, this article will provide a brief overview of the University of Idaho College of Law's Appellate Clinic.<sup>37</sup>

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35. See Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 868-69 (1996) [hereinafter Ronner, *In-House Appellate Litigation*] (discussing how in-house appellate clinics fuse theory and practice).

36. See *supra* notes 16-17 and accompanying text.

37. See also ASSOCIATION OF AMERICAN LAW SCHOOLS, SECTION ON CLINICAL LEGAL EDUCATION 1996 DIRECTORY (listing five law schools which run general appellate clinics and seventeen which operate criminal appellate clinics).

## II. THE UNIVERSITY OF IDAHO APPELLATE CLINIC

### A. *Creation of the University of Idaho Appellate Clinic*

Clinical appellate practice began at the University of Idaho College of Law in 1990, when the College received a federal grant<sup>38</sup> to expand its clinical offerings to include a federal litigation and appellate clinic. Under that grant, the Clinic assumed the representation of several death row inmates in federal habeas corpus and other post-conviction proceedings. The 1990 grant also enabled the Clinic to begin handling certain non-capital *pro se* appellate cases referred to it by the United States Court of Appeals for the Ninth Circuit.

A new federal grant in 1993 allowed the Idaho Appellate Clinic to continue and to expand with a greater emphasis on Native American cases. The expansion created the Native American Appellate Project, wherein Clinic students, under the supervision of clinical and non-clinical<sup>39</sup> faculty, represent Native Americans who have had difficulty obtaining representation at the appellate level. This expansion of the Appellate Clinic enhanced the substantive value of the clinical experience at Idaho while serving a serious unmet legal and social need.<sup>40</sup> Like most law school clinical programs, the Idaho Appellate Clinic seeks to satisfy the twin goals of providing students with meaningful real-life legal experience while providing quality legal representation to under-represented populations.

### B. *Operation of an Appellate Clinic*

#### 1. Case Selection

Proper case selection is critical to the operation of an appellate clinic. At the Idaho Clinic, appellate cases are screened and selected according to their educational value, student availability, the time constraints of the project,<sup>41</sup> the

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38. Title IX authorized the grant with the Higher Education Act, 20 U.S.C. § 1134 (Supp. 1996).

39. The professor who teaches American Indian Law devotes a portion of his time each semester to the Native American Appellate Project.

40. The University of Idaho College of Law, the only law school in the state, is located in Moscow, a rural farming and university community with a population of approximately 19,000. Moscow is situated between two Indian Reservations, the Coeur d'Alene Reservation to the north and the Nez Perce Reservation to the south.

41. Since the Idaho Clinic operates on the school calendar, efforts are made to coordinate due dates with the students' schedules. The Clinic also makes every effort to ensure that the students have adequate time to learn the background necessary to complete the projects and to write several drafts. The process of reviewing drafts of briefs and providing feedback typically becomes quite time consuming.

interests and expertise of the clinical faculty and the law faculty in general,<sup>42</sup> and the client's prospects for securing other legal representation.<sup>43</sup> The individual goals,<sup>44</sup> interests, and capabilities of the available students also factor into case selection. Efforts are made to match student interests with the substantive areas of law involved in the cases from which the Clinic chooses.<sup>45</sup>

The Idaho Clinic accepts both civil and criminal cases. The selection process requires careful screening aimed at finding cases that present an appropriate level of difficulty and complexity. The overriding goal is always to find cases which are manageable yet encourage students to challenge themselves. The cases must be intellectually stimulating enough to allow students to grapple with the legal and factual issues while they experiment with the best way to develop and present their arguments in light of the existing factual record and substantive law.

Intriguing factual and legal issues also motivate the faculty at large to assume an active advisory role and become invested in a case.<sup>46</sup> The Clinic's appellate cases currently come from several sources. The majority are federal *pro se* cases referred by the Ninth Circuit.<sup>47</sup> This arrangement came about on the initiative of the Ninth Circuit,<sup>48</sup> which continues to work closely with the Clinic in its case administration. The court preselects the cases to ensure that those referred will be at least arguably meritorious and raise challenging questions.<sup>49</sup> The supervising faculty for the Appellate Clinic then reviews the

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42. The students frequently rely on the faculty at large to provide technical expertise or assistance on cases, especially in the areas of constitutional, administrative, employment, criminal, and American Indian law. This allows the Appellate Clinic to accept a large array of cases.

43. Our clients are generally low income and cannot otherwise secure legal representation.

44. See Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 185-86 (1996).

45. For example, if a student has a strong interest in labor law and the Ninth Circuit has an educationally-sound labor law case, the Clinic will offer to represent the *pro se* appellant. Soundness is based upon the skills of the student, the complexity of the legal issues, and the expertise of the clinical faculty or the willingness of a non-clinical faculty member to assist with the substantive law.

46. Faculty who have worked with the students either at the briefing stage or in preparation for oral argument will most likely attend the oral argument. In at least one instance, a faculty member who worked extensively on an appellate case later used the fact pattern in his final exam. The following semester, the case was argued by law students before the Idaho Supreme Court. The argument took place in the law school courtroom, which was packed with faculty and students.

47. Approximately one third of all new appeals filed in the Ninth Circuit have at least one party who is unrepresented. See SUSAN V. GELMIS, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PRO BONO PROGRAM 2 (1996) (available from the Court or the University of Idaho Legal Aid Clinic) [hereinafter PRO BONO PROGRAM].

48. The University of Idaho is one of seven law schools which currently participates in the Ninth Circuit's revised pro bono program. The other schools are Lewis and Clark, University of Oregon, University of Southern California, Western State University, University of Washington, and University of Arizona.

49. See PRO BONO PROGRAM, *supra* note 47, at 2-3 (describing how the court selects cases

appellate cases to determine their appropriateness for the participating students. This procedure provides the necessary safeguards to ensure that the cases contain substantial issues of legal and educational value while matching the educational needs, interests, and abilities of the students.

In addition to the Ninth Circuit cases, the Idaho Clinic sometimes receives appellate cases from public defender organizations, by referral from other organizations, attorneys, or individuals, or by initiating an appeal from the general clinic's civil and criminal cases. These sources generate predominately state appellate cases.

## 2. Student Selection

The selection of students for an appellate clinic can be done in numerous ways. Some schools follow a first-come, first-served policy; others use a lottery or random selection method; still others employ a hybrid system combining random selection with a certain number of designated slots for recruited students.<sup>50</sup>

At the Idaho Clinic, the clinical faculty holds an informational meeting each spring for all interested students. The students are invited to apply for the clinic(s) of their choice.<sup>51</sup> Subsequently, the Appellate Clinic faculty supervisor interviews those students who have applied for a slot in the Appellate Clinic, and then consults with other faculty members about individual students. The Clinic generally selects students with a broad range of abilities. On average, eight students register for the Appellate Clinic per semester.<sup>52</sup> The number in any given semester depends on whether the appellate clinician has other supervisory roles or additional teaching responsibilities.<sup>53</sup>

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for the pro bono program).

50. See Schrag, *supra* note 44, at 210-11 (discussing student recruitment at the Center for Applied Legal Studies, Georgetown University).

51. The Legal Aid Clinic at the University of Idaho allows students to specialize in one of our three clinical components: General Civil and Criminal Clinic; Native American Public Defender Clinic; or Appellate Clinic; *see also infra* note 54.

52. See MACCRATE REPORT, *supra* note 4, at 250 ("The Task Force data reveal that live-client clinics have an average ratio of eight students to one full time faculty member (8:1)"); *see also* J. Thomas Sullivan, *Teaching Appellate Advocacy in an Appellate Clinical Law Program*, 22 SETON HALL L. REV. 1277, 1306 (1992) (suggesting a maximum of eight students per supervisor and noting more intensive supervision can be provided if enrollment is limited to six students per supervisor); Steven H. Goldblatt & Susan L. Siegal, *Training the Appellate Advocate, Strategies Firms Can Adopt from a Law-School Program*, 20 TRIAL, June 1984, at 56, 57 (reporting that the Georgetown University Law Center's Appellate Litigation Clinical Program has one or two professors, two graduate students, and twenty-four third year students).

53. Many agree that the low student/faculty ratios and other necessary resources associated with clinical education are expensive. *See, e.g.*, John Sonsteng, et al., *Learning by Doing: Preparing Law Students for the Practice of Law, the Legal Practicum*, 21 WM. MITCHELL L. REV.

Once accepted to the Clinic, a student's individual strengths and weaknesses are factored into case selection and assignments. Despite careful selection, the process of assessing student abilities sometimes results in incorrect assumptions. For this reason, assessment is an ongoing process. When assumptions prove later to have been misplaced, the supervisor must reassign projects as necessary either by adding additional or alternate work or by calling in additional recruits.<sup>54</sup>

### 3. Student Training

Students handling appellate cases receive the same training as all other clinical students at Idaho.<sup>55</sup> This includes a second-year pre-trial litigation course<sup>56</sup> and an intensive week-long trial advocacy training, which takes place the week before classes begin for third-year students.<sup>57</sup> These courses enhance the students' appreciation and knowledge of trial practice and set the stage for appellate instruction.

Throughout the school year, Appellate Clinic students attend a weekly plenary clinic seminar. The clinical faculty team teach the plenary sessions in order to take full advantage of the faculty's resources, insights, and skills. The issues covered during the plenary sessions tend to be topics of general applicability. Clinical faculty structure these large sessions to ensure that students are presented with a full panoply of lawyering experiences.

During the first few weeks of any given semester, the plenary class sessions commonly focus on how courts operate. Here the clinical faculty mix traditional classroom teaching with "field trips" to the courthouse and guest lectures from judges, other courtroom personnel, and practicing attorneys. For example, a local state court judge gives an overview each fall of "life in the courtroom."

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111, 114 (1995).

54. See Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653, 667-68 (1993) (discussing clinicians' assessment of students' strengths and weaknesses).

55. In addition to an Appellate Clinic, the University of Idaho operates a General Clinic wherein students represent indigent persons from the local community in civil and criminal misdemeanor matters. It also operates a Native American Public Defender Clinic wherein students serve as public defenders in criminal cases before the Nez Perce and Coeur d'Alene Indian Tribal Courts.

56. "Lawyering Process" teaches client representation skills in a classroom setting. Students receive instruction in interviewing, counseling, negotiation, discovery, pleadings, drafting, and client relations.

57. This training is conducted by several clinical faculty from the College of Law, as well as two to four other experienced attorneys. The training follows the National Institute of Trial Advocacy format of demonstration, discussion, performance, and critique, culminating in a mock jury trial. The training begins before other classes start in the fall, and is structured so that first year law students act as jurors and witnesses, exposing them to the trial process even before they have had their first law school class.

This overview includes an explanation on how he does jury selection, what he expects from lawyers who come before him, how cases are calendared, and the role of the clerk's office. Students also meet with the court clerks and learn the functions each fulfills.

Over the remainder of the year, the plenary sessions cover a wide range of topics. Some sessions are devoted to substantive issues; others are designed to impart specific basic lawyering skills; yet others amount to case review sessions where individual students present and discuss their cases. These seminars frequently focus on the ethical issues raised by Clinic cases. In addition to the plenary Clinic seminar, appellate students meet collectively at least twice a month to focus on appellate skills and to assist each other in editing and critiquing appellate briefs.

#### 4. Student Caseload and Responsibilities

Students register for the Appellate Clinic in two-semester blocks.<sup>58</sup> This allows sufficient time for most students to participate in at least one intensive writing and oral advocacy experience.<sup>59</sup> Some enthusiastic students have done more.<sup>60</sup>

Students in the Appellate Clinic work intensively on one or two substantial cases working individually or in pairs,<sup>61</sup> depending on the complexity and nature of the case and the abilities of the students. In this way, students can develop an in-depth understanding of a few areas of substantive law and the public policy

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58. For a discussion of some other appellate clinic programs, see Ronner, *In-House Appellate Litigation*, *supra* note 35 (describing St. Thomas University School of Law's two-semester appellate clinic); Amy D. Ronner, *Real Students, Real Appeals, Real Courts: The In-House Appellate Litigation Clinic at St. Thomas University School of Law*, II THE RECORD: J. APPELLATE PRAC. & ADVOC. SEC. FLA. B. 13 (1994) (describing the origins of St. Thomas University School of Law's Appellate Clinic); Sullivan, *supra* note 52, at 1306 (discussing Southern Methodist University's one semester appellate clinic program); Goldblatt & Siegal, *supra* note 52, at 51 (reviewing Georgetown's Appellate Clinic program).

59. See Sullivan, *supra* note 52, at 1291-95 (discussing appellate clinic caseloads and the issues of continuity and ability to expose students to the various phases of appellate work in one semester appellate clinics). While these issues are still present in a two semester clinic, they are much less significant.

60. For example, one student argued a case before the Idaho Court of Appeals, then briefed and argued a case before the Ninth Circuit, and served as co-counsel on an eight day trial from the general caseload. Another student wrote a brief to the United States Supreme Court in opposition to a petition for certiorari, briefed and returned after graduation to argue a case before the Idaho Supreme Court, and investigated, drafted, and filed a petition for post-conviction relief in a first degree murder case.

61. Working in pairs teaches team-working skills which at times is challenging and enriching. See David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 CLINICAL L. REV. 199 (1994) (discussing the advantages and disadvantages of pairing students).

issues surrounding them. When appellate students are between appellate projects, they often take on cases from the general civil and criminal clinic. This allows the students to round out their clinical legal experience.

The roles students assume as student appellate attorneys vary according to the complexity of the cases and the amount of time the cases require.<sup>62</sup> Students in consultation with their supervisor bear the responsibility for all aspects of appellate representation, including: developing a working, flexible schedule which builds in time for multiple drafts;<sup>63</sup> creating factual and procedural outlines from the record; preparing an outline of the arguments;<sup>64</sup> developing and ultimately limiting the issues;<sup>65</sup> submitting a first draft of their appellate brief as well as several additional drafts;<sup>66</sup> preparing the final draft;<sup>67</sup> preparing for and presenting oral argument;<sup>68</sup> and keeping track of their billable hours.<sup>69</sup> Students

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62. The role of student attorney and faculty consultant works if the project will support such a model. As the complexity of the case increases, more of a collaborative process is needed. Students take as much direct responsibility as they can. However, due to the nature of the cases and the fact that the cases may not be completed within the allocated semester or two, faculty members may take a more active role on the projects. See Campbell, *supra* note 54, at 656 (Georgetown University's Institute for Public Representation uses a collaborative approach because "the projects tend to be complex, involve important issues, and are unlikely to be completed within a single semester"). In contrast, the University of Idaho's clinical program spans two semesters which allows students to generally brief and argue an appellate case.

63. See MARY BARNARD RAY & JILL J. RAMSFIELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 248-49 (1987) (providing an example of how intern deadlines might be set). For a complete discussion of the timetable used by Georgetown University Law Center's Appellate Clinical Program, see Goldblatt & Siegal, *supra* note 52, at 61.

64. See Campbell, *supra* note 54, at 670-71 (discussing the function and the utility of an outline but acknowledging that many students resist making them).

65. See RUGGERO J. ALDISERT, *WINNING ON APPEAL, BETTER BRIEFS AND ORAL ARGUMENT* §§ 8.2-8.13, at 114-45 (1996) [hereinafter *WINNING ON APPEAL*].

66. See Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 *ARIZ. ST. L.J.* 277, 298 (1982) (multiple drafts allow students to incorporate the supervisor's suggestions for improvements); see RAY & RAMSFIELD, *supra* note 63, at 248-49 (providing an example of how intern deadlines might be set).

67. The number of drafts is dependent upon the abilities of the students and the complexity of the issues. I generally allow several weeks for drafting and redrafting and create a timetable for redrafts as the project unfolds. See also Goldblatt & Siegal, *supra* note 52, at 61-62 (providing a description of the Georgetown University Law Center's Appellate Litigation Clinical Program's timetable).

68. See Committee on Appellate Skills Training, *supra* note 31, at 140 (finding that "[t]he most important preparation for oral argument is to study the record and the relevant cases so thoroughly that the attorney is prepared to respond to any questions about either that may be posed by the judges").

69. See MACCRATE REPORT, *supra* note 4, at 202. Accurate time records are important in collecting attorney's fees and training students for private practice. Although the Idaho Clinic is not generally a fee-generating Clinic, the Clinic has received fees in several of its prisoner civil rights cases.

must adhere to the agreed-upon briefing schedule.<sup>70</sup> Nevertheless, the faculty supervisor must build flexibility into the schedule. Students, like many writers, also struggle with organization. For example, some students clarify their thoughts through “freewriting.”<sup>71</sup> These students generally require more time to complete a project.<sup>72</sup>

## 5. Faculty Supervision

The quality of any clinical experience turns significantly on the faculty supervisor’s<sup>73</sup> combined skills as a teacher<sup>74</sup> and as a practitioner.<sup>75</sup> In this respect, an appellate clinic is no different than any other clinical program.

A clinician lives with tension inherent in the clinical format—the need to balance the teacher’s educational focus against the lawyer’s professional obligation to competently serve his or her clients. That is, the clinician must ensure that the clinic provides quality representation to its clients while at the same time meeting its educational mission.<sup>76</sup> When these duties conflict, the

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70. At times students will ask for extensions and provide a variety of reasons. Frequently, the underlying reasons are fear and confusion. Requiring them to face their concerns and put something down on paper usually gives the supervisor and student a place to start the discussion. Students are also encouraged to brainstorm ideas with the faculty supervisor before the deadline.

71. Freewriting is a stream of consciousness writing by which the writer attempts to formulate and clarify his or her thoughts through the writing process.

72. See Campbell, *supra* note 54, at 671 & n.72. This is Campbell’s experience, and it has been true at the Idaho Clinic. The students frequently need to get their thoughts on paper and then create an outline. Once the faculty supervisor reviews the students’ rough drafts, the students and faculty generally meet and use a blackboard to create an outline of their argument. This process enables the students and supervisor to work as a team and to collectively discuss the issues and how to most persuasively structure the arguments.

73. See MACCRATE REPORT, *supra* note 4, at 245 (“law schools should assign primary responsibility for instruction in professional skills and values to permanent full-time faculty who can devote the time and expertise to teaching, and developing new methods of teaching skills to law students.”).

74. Committee on Appellate Skills Training, *supra* note 31, at 148 (suggesting that the most important qualification is that the person be able to teach).

75. See, e.g., Sullivan, *supra* note 52, at 1296 (maintaining that the supervisor’s qualifications should include experience as an appellate attorney and the background to supervise the caseload which the clinic may generate); CLINICAL LEGAL EDUCATION, REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) [hereinafter CRAMTON REPORT] (suggesting clinicians have prior legal experience in performing the lawyering tasks about which one will be expected to teach).

76. A potential conflict arises when the clinician does not believe that the student’s representation is adequate. See Campbell, *supra* note 54, at 655 (suggesting ways to reduce the conflict by adapting theories and techniques from the legal writing field including by “selecting an appropriate writing project, structuring the project, clearly identifying the purpose, audience and constraints, clearly communicating role expectations, and by giving helpful feedback”).



clinician must give priority to educational value, for the essential purpose of a law school clinic is to educate future lawyers.

The appellate clinician must fulfill a myriad of responsibilities in order to achieve the appropriate balance between his or her educational and legal obligations. Ensuring adequate legal representation of the clinic's clients requires that the faculty supervisor independently review each record on appeal and personally monitor case management and client contact.<sup>77</sup> The clinician must work closely with the students at the issue formulation stage, knowing that ultimately he or she bears responsibility for ensuring that all legal issues are identified, researched, and properly briefed. Every draft of every brief must be reviewed carefully to ensure that the arguments are theoretically sound and professionally argued. To the extent necessary, the faculty supervisor must be prepared to research and even rewrite entire sections of briefs if it becomes apparent that the student cannot produce a satisfactory product. Finally, the obligation to provide quality legal representation makes it incumbent upon the faculty supervisor to be present during oral argument<sup>78</sup> and to review the appellate decision to determine whether further action should be taken.<sup>79</sup>

The educational mission of an appellate clinic presents the faculty supervisor with an additional set of obligations. The supervisor must initially select and match cases with students.<sup>80</sup> Thereafter, the task of student supervision is continual and multifaceted. To ensure that the project and working relationship proceeds smoothly, the roles and responsibilities of the students and the supervisor must be clarified early.<sup>81</sup> The supervisor must also teach writing skills,<sup>82</sup> oversee and critique each student's brief writing and argument

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77. At the University of Idaho, the clinical faculty supervisor in conjunction with the clinic's office manager introduce students to a basic structure for managing and processing cases. See *infra* Section IV.E.

78. This is not only required in some states but also serves to protect the client's interest from error. Professor Sullivan suggests that in jurisdictions which allow argument to be split, the supervisor may elect to give the rebuttal. See Sullivan, *supra* note 52, at 1305. It has been the experience at the Idaho Clinic that with thorough preparation and numerous mock arguments, students are generally prepared to respond to the court's questions and are frequently better prepared than many practicing attorneys. This has also been the experience at Georgetown University's Appellate Litigation Clinical Program. See Campbell, *supra* note 54. See generally Goldblatt & Siegal, *supra* note 52, at 62 (discussing the importance of student preparation for oral argument).

79. See Sullivan, *supra* note 52, at 1305.

80. See generally Campbell, *supra* note 54, at 666-69 (discussing project selection).

81. Clarifying roles, responsibilities, and expectations up-front helps the student and the supervisor focus more on the task at hand, preparing the best and most persuasive arguments for our clients. See Campbell, *supra* note 54, at 677-78 ("defining the relative roles and responsibilities of the student attorney and the supervising [faculty] vis-a-vis the client will minimize conflicts between the pedagogic and advocacy roles of the clinician").

82. See Campbell, *supra* note 54, at 676 ("teaching students to write using the form of argument and style of writing expected by the legal audience is a skill that we should be teaching

preparation,<sup>83</sup> work with the students to develop self-critiquing techniques,<sup>84</sup> and, finally, assign grades.<sup>85</sup>

In addition to being an experienced practitioner and a good teacher,<sup>86</sup> a clinician should possess a variety of ancillary skills and character traits: an abiding interest in skills training;<sup>87</sup> a commitment to public service;<sup>88</sup> knowledge and an understanding of educational theory;<sup>89</sup> a spirit of creativity; a willingness to experiment; and an ability to work well with others. A clinician must have the inter-personal skills to work well with students,<sup>90</sup> as well as other clinical and non-clinical faculty members.<sup>91</sup> A clinician must also foster relations with the bench and bar, from whom the clinic will receive its referrals.<sup>92</sup> Additionally, the

in a clinic.”); *see also id.* at 676-77 n.97 (“students need to learn the rules and conventions first, and should deviate from the rules only when it serves the purpose of more effective advocacy.”); *cf.* Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 175 (1993) (“When writing is about inventing ideas rather than just retrieving them, instruction must focus on the process of formulating and solving problems.”).

83. At the end of every major project, students are required to complete a self-evaluation form. It is critical for students to reflect upon their experiences and to learn from the process. *See infra* notes 376-79 and accompanying text.

84. *See* Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967, 984-94 (1989) (identifying what constitutes good evaluation skills and providing techniques for teaching the skill of evaluation).

85. How students are graded and evaluated in in-house clinics is still debated. *See, e.g.*, Schrag, *supra* note 44, at 201-04 (discussing the pros and cons of letter grades and how and why Georgetown’s program assigns grades); Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349, 349 (1996) (explaining that providing letter grades is quite common in in-house clinics although not universally used); Leonard D. Pertnoy, *Skills Is Not a Dirty Word*, 59 MO. L. REV. 169, 184 (1994) (advocating that “skills courses should be graded” with the possible exception of externships); Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 40 (1993) (“Clinics are both graded and pass/fail. Students’ perception of the significance of the clinic can be affected by the lack of grades.”). At the Idaho Clinic, students are given letter grades. Regardless of whether one prefers pass/fail or letter grades, every clinical supervisor must evaluate the students for purposes of receiving credit.

86. *See* Laser, *supra* note 1, at 259 (citing DONALD SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* 17 (1987)) (“A student cannot be *taught* the art of lawyering but can be coached.”).

87. *See* MACCRATE REPORT, *supra* note 4, at 245.

88. *See* Talbott D’Alemberte, *Teaching about Justice and Social Contributions*, 40 CLEV. ST. L. REV. 363, 371-72 (1992) (encouraging law schools to consider public service experience in their faculty hiring decisions).

89. *See* MACCRATE REPORT, *supra* note 4, at 245.

90. *See id.* at 245 (clinical faculty must have patience, sensitivity, and “a willingness to be highly accessible to students”).

91. Appellate students often use the resources of the entire University. Supervisors must work with the other faculty members to promote and encourage their participation. *See supra* note 42 and accompanying text.

92. *See* Sullivan, *supra* note 52, at 1296-97 (advocating that the supervising faculty should be experienced not only in appellate practice, but also in the appellate courts of the jurisdiction(s) in which the program is located or will be practicing). While experience in the jurisdiction is helpful, it is knowledge which one may acquire. In my opinion, familiarity with the

supervisor should be able to analyze a problem and engender creativity<sup>93</sup> and ethical decision-making in students.<sup>94</sup> The supervisor, in sum, serves as a role model for students.<sup>95</sup>

## 6. Cross Supervision

In addition to their faculty supervisor, students in the Idaho Appellate Clinic learn from and use the resources of the entire law school<sup>96</sup> and of the University as a whole.<sup>97</sup> While using non-clinical resources has immense value, it also raises some concerns. Cross supervision may cause students to receive mixed messages which may confuse them as to whom they must please, creating the danger of ultimately immobilizing them. While this concern is real, the advantages of cross supervision are tremendous. Active involvement by non-clinical faculty allows a clinic to take on a broader range of cases. Clients and students benefit from the expertise brought to clinic cases by non-clinical faculty members.<sup>98</sup> Moreover, cross supervision exposes non-clinical faculty to their own law school's clinical programs, frequently resulting in a greater appreciation for the intellectual content of the clinical programs,<sup>99</sup> and forging new bonds between clinicians and other law faculty.

jurisdiction is less critical than appellate and teaching experience.

93. See Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1094 (1986) [hereinafter Phelps, *New Legal Rhetoric*] ("Writing is a disciplined creative activity that can be analyzed and described; writing can be taught.")

94. See Menkel-Meadow, *supra* note 33, at 567 which states:

In the interpersonal process school of clinical education, the questions asked are not only what will work best for this lawyer with this client, but also how should the attorney act with her clients and adversaries, and what are the implications for such theories of interaction for the legal profession at large. In short, when analyzing the means used by lawyers in interactions with others, we must inevitably come to grips with what ends will be served as individual attorney interactions aggregate and proliferate out into the larger system. Clinicians, by being in a position to critically observe a large and yet controlled number of interactions, have an ideal vantage point for reflection on the dynamics of the lawyering process and its implications for the legal system.

*Id.*; see also *infra* Section V.

95. See Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 3 (1991) [hereinafter Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*].

96. See *supra* note 42.

97. At the Idaho Clinic, students have sought technical assistance from the University's psychology, English, philosophy, and medical faculties. For example, one of the University's medical faculty helped students read and interpret a lengthy coroner's report and the accompanying medical records.

98. See Sullivan, *supra* note 52, at 1299 (using additional law faculty resources brings a national perspective to the issue and allows students to draw upon a large range of intellectual resources).

99. See *id.*

### III. ANALYTICAL SKILLS

Traditional legal education in the United States is analytically oriented. American law schools have typically seen their principal function in terms of teaching analytical skills, substantive law, and legal research methods.<sup>100</sup> Increasingly, critics both within and outside the legal profession have charged that this traditional model is overly narrow, and, through its neglect of more practical lawyering skills, has contributed to the inadequate skill levels of many practicing attorneys.<sup>101</sup> Whatever the merit of these charges, critics of legal education must recognize the critical importance of the traditional focus of law schools on analytical skills. The MacCrate Report avoids this mistake and reinforces the importance of analytical training by placing three central analytical aspects of law practice at the top of its list of essential lawyering skills. These three—problem solving, legal analysis and reasoning, and legal research—each figure importantly in the operation of an appellate clinic.

#### A. *Problem Solving*

The MacCrate Report describes the skill of legal problem solving as follows: “[A] lawyer should be familiar with the skills and concepts involved in problem solving: identifying and diagnosing a problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan, and keeping the planning process open to new information and ideas.”<sup>102</sup> One of the Report’s commentary sections elaborates on this description by adding the conceptual skills of creativity<sup>103</sup> and sound judgment.<sup>104</sup>

Appellate students use all of these skills. In an appellate clinic, the students generally have no involvement at the trial court level. They take their cases with issues predetermined and imperfections inset. Often, a student’s initial task becomes identifying the true nature of the issue or problem underlying the appeal and determining whether it has been preserved.<sup>105</sup> In this respect, clinical

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100. See MACCRATE REPORT, *supra* note 4, at 233; Trail & Underwood, *supra* note 14, at 237.

101. See *supra* notes 4, 5, and 14 and accompanying text.

102. MACCRATE REPORT, *supra* note 4, at 142, § 1. See also Schrag, *supra* note 44, at 180.

103. MACCRATE REPORT, *supra* note 4, at 150.

104. *Id.*

105. See ALDISERT, *supra* note 65, § 5.1, at 55-57.

appellate advocacy mirrors courtroom appellate procedure.<sup>106</sup> Students learn, generally quite quickly, how to distinguish issues that can be raised from those that should not.<sup>107</sup>

Most of the Ninth Circuit cases handled by the Idaho Appellate Clinic come from *pro se* litigants who have spent years formulating their issues and arguing them, usually unsuccessfully, at the trial level. While these cases have already been “briefed” by the clients, the briefs frequently ramble through numerous issues, many of which are not meritorious. At the same time, these briefs often ignore some viable issues. Due to a lack of legal training, *pro se* litigants frequently do not understand all of their legal rights.<sup>108</sup> Thus, appellate interns must fuse the clients’ insights<sup>109</sup> together with their own independent analyses.<sup>110</sup> For *pro se* litigants, the appellate level often provides the first context in which someone with legal training assesses the merits of their case.

The appellate process requires students to consider and discuss alternative solutions and strategies with their clients.<sup>111</sup> A noted author on the topic has written that assisting clients in the decision-making process requires the lawyer to develop “the best data base from which to choose and assess the available alternatives.”<sup>112</sup> Additionally, “the lawyer will present the possible legal and economic consequences of each alternative, while the client will present and assess the personal and social consequences of each alternative.”<sup>113</sup> Clinical appellate students often find themselves immersed in this aspect of legal problem solving. For a client who won at the trial court level but who has a questionable chance of prevailing on appeal, the best solution may be settlement. Convincing the client to settle, however, may prove difficult and require a good deal of gentle persuasion. Similarly, if the record is not fully developed, or if a particular issue has not been raised, the student will need to discuss what needs to be done with the client.

Other problem solving skills fostered in an appellate clinic include developing and implementing plans of action,<sup>114</sup> and learning to work with experts and under the supervision of senior professionals,<sup>115</sup> here, faculty

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106. See *id.* §§ 8.1-8.13, at 113-45 (noting that identifying, limiting, and refining issues is one of the most critical aspects of appellate practice).

107. See Committee on Appellate Skills Training, *supra* note 31, at 139.

108. See MACCRATE REPORT, *supra* note 4, at 142, § 1.1(a)(ii) - (iii). *Pro se* prisoners can recognize that they have been wronged but are less adept at linking the wrongful action to an actionable claim.

109. See *id.* at 142, § 1.1(c)-(e).

110. See *id.* at 143-44, § 1.2.

111. See *id.*

112. Menkel-Meadow, *supra* note 33, at 561.

113. See *id.*

114. See MACCRATE REPORT, *supra* note 4, at 144-46, §§ 1.3 & 1.4.

115. See *id.* at 145-46, § 1.4(a).

members. Students learn not only to identify issues, but to assess their own strengths and weaknesses, and to seek out whatever help they need.<sup>116</sup> Clinical faculty members train students in the procedures of the appropriate courts and ensure their competence in the relevant substantive areas of law. Students also have sought technical assistance from the wider university community.<sup>117</sup> Thus, as suggested by the MacCrate Report, appellate interns learn to seek “advice and assistance from more experienced lawyers,”<sup>118</sup> non-legal experts,<sup>119</sup> and their own clients.<sup>120</sup>

The MacCrate Report also lists creating optimal timetables as a critical problem solving skill.<sup>121</sup> Real clients introduce complexity and uncertainty into one’s legal training. Best laid plans aside, lawyering is full of unpredictable surprises and is guaranteed to create havoc upon timetables.<sup>122</sup> Since most students have little to no prior contact with real legal practice, it is incumbent on the faculty supervisor to mentor and guide them.<sup>123</sup> Something can always be expected to go wrong and time must be allocated for unforeseeable mishaps.

An appellate clinic also develops students’ creativity.<sup>124</sup> One author suggests that lawyers should think of themselves as storytellers<sup>125</sup> who create a legal story which identifies a client’s problem and suggests a solution.<sup>126</sup> This type of problem solving requires one to generate creative options for resolving the issue.<sup>127</sup>

In a clinical setting, students possess substantial freedom to be creative and to experiment<sup>128</sup> with the comfort of a safety net, their faculty supervisor.<sup>129</sup> The

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116. *See id.* at 151 (one must have “a realistic view of one’s own abilities and limitations”). This is true not only for the student but also the supervising faculty.

117. *See supra* note 97.

118. MACCRATE REPORT, *supra* note 4, at 146, § 1.4(a)(i)(C).

119. *See id.* at 146, § 1.4(a)(ii).

120. *See id.* at 146, § 1.4(a)(iv).

121. *Id.* at 147, § 1.4(b).

122. *See Hoffman, supra* note 66, at 291; *Laser, supra* note 1, at 253-55 (explaining that real legal problems contain uncertainty, uniqueness, and value conflicts).

123. *See Frank W. Munger, Clinical Legal Education: The Case against Separatism*, 29 CLEV. ST. L. REV. 715, 726 (1980) (“Students have no model for sequencing steps in the handling of a case or for integrating facts, law, personal doubts, client pressures and values.”).

124. *See MACCRATE REPORT, supra* note 4, at 150.

125. *See Sandra Craig McKenzie, Storytelling: A Different Voice for Legal Education*, 41 KAN. L. REV. 251, 251 (1992).

126. *Id.* at 253.

127. *See id.* at 252.

128. *See J. Michael Norwood, Requiring a Live Client, In-House Clinical Course: A Report on the University of New Mexico Law School Experience*, 19 N.M. L. REV. 265, 269 (1989) (clinics are a “laboratory in which to safely experiment”).

129. *See Sullivan, supra* note 52, at 1289 (“The only two features that really distinguish appellate clinical practice from post-graduate practice are the absence of fee setting and collection

students must exercise sound judgment in identifying and conveying to the court which issues deserve serious consideration. While they work under the close supervision of the faculty supervisor, appellate students are encouraged “to exercise judgment in an independent manner”<sup>130</sup> and not simply adopt the view of the supervisor<sup>131</sup> or client. Clients frequently want certain issues raised which have little merit.<sup>132</sup> Students must balance the desires of the client against the reality of the case<sup>133</sup> and point out to the court the most compelling issues without waiving less meritorious ones raised earlier by the client.<sup>134</sup>

### B. *Legal Analysis and Reasoning*

The MacCrate Report states that problem solving and legal analysis are the “conceptual foundations for virtually all aspects of legal practice.”<sup>135</sup> According to the MacCrate Report, the skill of legal analysis and reasoning requires that “a lawyer . . . be familiar with the skills and concepts involved in identifying legal issues, formulating legal theories, elaborating and enhancing the theories, and evaluating and criticizing the theories.”<sup>136</sup>

Legal educators and practitioners agree that legal analysis is and should be taught in law schools.<sup>137</sup> Appellate clinics contribute significantly to the

as a component of the attorney/client relationship, and the availability of experienced supervision of the process in every case.”); *see also* Norwood, *supra* note 128, at 269 n.14 (“The cardinal safety rules for a clinic should always be: 1) Don’t do harm to clients; and 2) Don’t do harm to students.”).

130. MACCRATE REPORT, *supra* note 4, at 151.

131. Students should be encouraged to evaluate the supervisor’s suggestions and not to adopt them as the definitive word for purposes of pleasing the supervisor.

132. This experience is not unique to students. *See* ALDISERT, *supra* note 65, § 1.2, at 8 (“Many lawyers are no longer able to control, or even moderate, the demands of emotion-laden clients.”).

133. *See* Ronner, *supra* note 35, at 873 (“students doing appellate work . . . sometimes collide with serious communication barriers and out of that impact, realize how difficult it really is to convey to a client the limitations of what can be accomplished on appeal”).

134. This is done in various ways. When deciding which issues to brief for the Ninth Circuit, the students write in their supplemental brief that they are solely supplementing the client’s *pro se* brief and do not waive any additional issues raised in the *pro se* opening brief. Other ways to telescope significant issues are by placing the strongest issues first, and dedicating more space in the brief to those arguments likely to be successful. Less significant issues can be addressed briefly. *See* ALDISERT, *supra* note 65, § 8.10, at 138-41.

135. MACCRATE REPORT, *supra* note 4, at 135.

136. *Id.* at 151.

137. *See, e.g.,* Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 478-81, 500 (1993); H. Russell Cort & Jack L. Sammons, *The Search for “Good Lawyering”: A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397, 415 (1980); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 910 (1933) [hereinafter Frank, *Why Not a Clinical Lawyer-School*].

development of this skill. Through real-life appellate practice, students can markedly develop their ability to reason persuasively.<sup>138</sup> Appellate advocacy requires students to break down complex ideas, see relationships (factual and legal), understand cause and effect, make logical inferences, and thereby come to a more sophisticated understanding of legal method. Since appellate students are forced to confront problems on appeal that do not come packaged with neatly balanced equities and legal authorities, they must research existing law and determine how to extend, distinguish, limit, or argue to overturn precedent,<sup>139</sup> both binding and persuasive.<sup>140</sup> In order to do this, the students need to understand the structure of the law.<sup>141</sup> Moreover, because of the live client context, real world limits and expectations are placed on their analyses.

The appellate clinic experience differs fundamentally from the simulated appellate experience of most students.<sup>142</sup> Simulated exercises, such as moot court, give students an appellate experience that is neatly packaged with predictable educational content. Live client appellate clinics on the other hand, typically provide cases with ill-defined substantive boundaries and chaotic procedural backgrounds. No author of a simulated problem can develop a scenario that matches the factual and procedural detail present in a real case.<sup>143</sup> Favorable facts, moreover, are seldom equally divided in real life cases the way they are in most simulated efforts.<sup>144</sup>

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138. See Trail & Underwood, *supra* note 14, at 236.

139. See MACCRATE REPORT, *supra* note 4, at 153-54, § 2.4(a).

140. See ALDISERT, *supra* note 65, §§ 7.3-7.4, at 106-12 (discussing the importance of evaluating authorities and providing a citation evaluation chart). For an in-depth discussion on the role of precedent, see CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 33-48 (2d ed. 1994).

141. See George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 353 (1987) ("The problem is that lawyers cannot write clearly unless they can think clearly, unless they can recognize and construct a convincing legal argument—unless, in other words, they understand the structure of the law.").

142. The Committee on Appellate Skills Training found that moot court programs inadequately taught appellate advocacy skills for several reasons:

First and foremost, these programs treat appellate litigation as involving only two aspects—writing a brief and making an oral argument. They ignore all of the other important ingredients of appellate litigation . . . . Second, and just as fundamental, because they lack a realistic appeal record they do not aid in the development of the skill that is unique to appellate litigation: building a case out of a record. Third, as a result of the first two defects, the issues argued in these programs are usually abstract legal questions without factual content upon which most appeals are decided.

Committee on Appellate Skills Training, *supra* note 31, at 142.

143. See, e.g., Ann Juergens, *Using the MacCrate Report to Strengthen Live-Client Clinics*, 1 CLINICAL L. REV. 411, 416-18 (1994) (discussing simulation versus live-client clinics); HOFFMAN, *supra* note 66, at 291 ("simulation cannot approximate the greater factual richness and uncertainty introduced by real cases.").

144. See, e.g., Sullivan, *supra* note 52, at 1288 (stating that clinical students must face problems that do not provide balanced facts and authorities as do simulated problems); Campbell, *supra* note 54, at 662 ("a clinic has many advantages over both the classroom and simulations for



Appellate students must prepare briefs from often voluminous records containing multiple potential issues, many of them hidden. They must synthesize the record,<sup>145</sup> develop a theme,<sup>146</sup> and determine which facts are relevant.<sup>147</sup> In the process, they become skilled at handling a set record marred by limitations and errors,<sup>148</sup> adverse facts,<sup>149</sup> and hostile case law.<sup>150</sup> They also work within a context that allows them to appreciate, at a more serious level than the traditional classroom context, how, in law, facts and issues are inextricably connected.<sup>151</sup>

The author of a brief is a storyteller<sup>152</sup> who must create a picture of the case which is so intriguing that it persuades the judge to adopt the client's position.<sup>153</sup> Appellate student interns begin to find their storytelling voices as they experiment with how to present their cases in the most logical and persuasive ways possible. Sometimes this requires arguing alternative theories,<sup>154</sup> further

teaching advanced legal writing. Students can apply what they have learned in legal research and writing classes to circumstances where the facts are not always clear, the law is not predigested, real people must be interacted with and ethical questions are bound to arise.”).

145. See MACCRATE REPORT, *supra* note 4, at 151-52, § 2.1(a).

146. See ALDISERT, *supra* note 65, § 8.11, at 141 (“The theme is the unifying focus of your brief.”). Aldisert provides guidance on how to choose a theme. *Id.* at 141-42.

147. See MACCRATE REPORT, *supra* note 4, at 151-52, § 2.1(a). It is not uncommon for *pro se* litigants to rely upon hearsay or other inadmissible evidence. At the appellate stage, they continue to argue their “evidence.” Appellate students who assume the representation of such clients must sort through the record to determine what facts are relevant and admissible.

148. See Sullivan, *supra* note 52, at 1289. Students need to learn to separate themselves from the case. Some have difficulty not taking responsibility for a poorly developed record even though they had no involvement at the trial level. They must realize that frequently their goal is to obtain a remand to the trial court where the record can be more fully developed.

149. See MACCRATE REPORT, *supra* note 4, at 151-52, § 2.1(a) (discussing analyzing the facts). See Campbell, *supra* note 54, at 661 (“in clinical work, students . . . have the opportunity to see first hand how the facts shape the arguments that can be made. They must consider how to present facts to favor the client without being unfair or misleading. They struggle with how to deal with adverse facts.”).

150. See Sullivan, *supra* note 52, at 1289.

151. See MACCRATE REPORT, *supra* note 4, at 151-52, § 2.1(a)–(c) (addressing the interconnectedness between facts and law). § 2.1(a)(iv) states, “Identify inconsistencies between facts and evaluate the possible significance of each inconsistency.” *Id.* This particularly comes into play in appeals from the grant of summary judgment. Students must determine whether a material issue of fact exists. This will then serve as the key theme for the brief. See also Committee on Appellate Skills Training, *supra* note 31, at 139-40 (“The key is to be able to use the facts of the case as established in the statement of facts to show how the court can do justice between the parties in accordance with the applicable law.”).

152. See McKenzie, *supra* note 125, at 251.

153. See ALDISERT, *supra* note 65, § 2.1, at 17 (“The key word is persuasion. If a brief does not persuade, it fails.”).

154. See MACCRATE REPORT, *supra* note 4, at 153, § 2.3(b); ALDISERT, *supra* note 65, §§ 12.5-12.6, at 223-26.

challenging the students to decide how to order and arrange their arguments.<sup>155</sup> Moreover, consistent with the call of many contemporary rhetoricians to direct one's writing to the prospective audience,<sup>156</sup> appellate student storytellers must craft their arguments toward a specific judicial audience. At the Idaho Appellate Clinic, students research the predispositions of the relevant judges. They do this through electronic searches, discussions with their supervisor, and by reading and studying the judges' prior decisions and writings.<sup>157</sup> The Clinic maintains a manual on Ninth Circuit judges which contains brief biographical sketches and specific comments from prior students who have argued before the court.

Students consult with other faculty,<sup>158</sup> lawyers,<sup>159</sup> and judges<sup>160</sup> throughout the appellate process. This allows the students to critically examine their arguments,<sup>161</sup> evaluate potential flaws,<sup>162</sup> and identify and assess other possible legal theories.<sup>163</sup>

### C. Legal Research

The MacCrate Report characterizes the skill of legal research as follows: “[A] lawyer should have a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design.”<sup>164</sup>

The MacCrate Report emphasizes that no one can seriously doubt “that the ability to do legal research is one of the skills that any competent legal practitioner must possess.”<sup>165</sup> Touting the importance of legal research skills,

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155. See MACCRATE REPORT, *supra* note 4, at 153, § 2.3(c)(ii) (“[a]nalyzing whether the arguments will be more persuasive if presented cumulatively, individually, or in various combinations[.]”); ALDISERT, *supra* note 65, §§ 8.10, 12.2, at 141-43, 216-17 (stating that if the arguments are not factually or procedurally interdependent, the arguments should begin with the strongest, most persuasive argument available; if they are interdependent, it is best to chronologically or procedurally arrange the issues).

156. See *infra* notes 253, 256-57, 261-62, and accompanying text.

157. See MACCRATE REPORT, *supra* note 4, at 154, § 2.4(b).

158. See *supra* note 97.

159. Students have sought assistance from ACLU and Legal Services attorneys on social security and prisoner civil rights cases. The private bar has served as resources on criminal and post conviction matters.

160. In a recent case, *Boykin v. Bennett*, No. 95-17168 (9th Cir. 1995), the Ninth Circuit appointed the Idaho Clinic as counsel to brief the scope of the notice district courts must give to prisoner *pro se* litigants under *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988). In preparing their argument, students consulted federal magistrate and district court judges in order to assess the feasibility of their argument.

161. See MACCRATE REPORT, *supra* note 4, at 154-55, § 2.5(a).

162. See *id.* at 155, § 2.5(b)(ii).

163. See *id.* at 155, § 2.5(c).

164. *Id.* at 157.

165. *Id.* at 163.

the Report stresses that it involves far more than simply “a mechanical examination of texts.”<sup>166</sup> Rather, the Report suggests that effective legal research requires a comprehensive understanding of law as a process, “an understanding of the nature of legal remedies and the processes for seeking these remedies.”<sup>167</sup>

Students in traditional law classes typically learn legal rules through the Socratic casebook method. Seldom do these classes afford students an opportunity to apply the ideas they learn.<sup>168</sup> Clinical courses, to the contrary, provide a rich opportunity to not only see the law in action, but to help chart its future direction. Just like the legal practitioners they will soon become, clinic students take the law and apply it to the facts before them in actual cases involving real life consequences.

At the University of Idaho, one of the early Clinic plenary class sessions covers the organization and structure of the federal and state courts.<sup>169</sup> Clinic faculty chart out the appellate process under both the state and federal systems. At the beginning of their two semesters, appellate students receive an appellate handbook<sup>170</sup> and the Ninth Circuit’s Appellate Rules.<sup>171</sup> They are also required to purchase a text on the appellate process.<sup>172</sup>

The very nature of appellate work makes it incumbent upon the students to hone their research skills.<sup>173</sup> Depending upon the issues on appeal, the students

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166. MACCRATE REPORT, *supra* note 4, at 163.

167. *Id.*

168. There is a growing body of scholarship advocating that traditional classroom teachers move more toward the problem method of teaching and away from the Langdellian appellate case analysis approach. *See, e.g.,* MACCRATE REPORT, *supra* note 4, at 156 (criticizing the traditional case-method approach to teaching legal analysis); John S. Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report’s Recommendations for Curricular Reform*, 1 CLINICAL L. REV. 363, 383-86 (1994); Myron Moskowitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 249-51 (1992); Stephen Nathanson, *Developing Legal Problem-Solving Skills*, 44 J. LEGAL EDUC. 215 (1994); Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984).

169. *See* MACCRATE REPORT, *supra* note 4, at 157, § 3.1(a)(i)(A).

170. The handbook serves as one source of information about the appellate process in Idaho and the Ninth Circuit. Each year at least one Idaho appellate judge speaks to the class. The judges generally share information and insight which are not readily available from any published source. These bits of insight are compiled and contained in the handbook. It gives the students a resource which they can supplement in the future.

171. *See* MACCRATE REPORT, *supra* note 4, at 158, § 3.1(a)(iv). Students work with procedural and substantive rules. Students learn to check procedural rules which govern their briefs. These rules dictate page limits, due dates, citation form, format, etc. and must be factored into the implementation of a plan.

172. *See generally* ALDISERT, *supra* note 65.

173. *See* Thomas A. Woxland, *Why Can’t Johnny Research? or It All Started with Christopher Columbus Langdell*, 81 L. LIBR. J. 451, 451 (1989) (“Legal research is not an unimportant skill. It is not something one can get along without: no attorney can go through life only arguing the equities; sooner or later he or she has to find the law.”).

must consult a variety of primary and secondary sources.<sup>174</sup> Often, merely determining how to access the sources poses a significant challenge.<sup>175</sup> The students also must assume responsibility for weighing the authorities.<sup>176</sup> Several cases that have gone through the Idaho Appellate Clinic have involved challenges to federal and state statutes,<sup>177</sup> as well as administrative regulations.<sup>178</sup> One case, for example, concerned the propriety of a particular criminal jury instruction. While preparing their brief, the student interns learned that a committee charged with drafting Idaho's first set of criminal jury instructions was considering the very issue involved in their case. One of the students wrote the chair of the committee, apprising him of the pending case and articulating their position. The student subsequently appeared before the committee to discuss the proposed jury instruction.

Although all first year law students at the University of Idaho are required to take Legal Research and Writing,<sup>179</sup> the skills imparted in that class are not strongly reinforced in the rest of the curriculum.<sup>180</sup> The Appellate Clinic serves in many ways as the College of Law's advanced legal writing course.<sup>181</sup> For many students, the Clinic provides the first test of the quality of their research skills in a real world context.<sup>182</sup> Unlike many other writing courses, however, the goal of the Appellate Clinic is not simply to provide a good research experience. Here there is no place to hide. The consequences of incomplete research is not simply reflected in one's final grade.<sup>183</sup> It impacts the client's case and may be an embarrassing topic of discussion for the unprepared student during oral argument.

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174. See MACCRATE REPORT, *supra* note 4, at 159-63, § 3.2 and 3.3.

175. *Id.* at 160, § 3.2(d). See also Lucia Ann Silecchia, *supra* note 5, at 204 ("While undoubtedly, analytical ability is also of paramount importance, knowing how to locate the correct law to analyze, and being equipped with the skills to convey that analysis effectively to others, are prerequisites for functioning as an effective attorney.").

176. See MACCRATE REPORT, *supra* note 4, at 159, § 3.2(b)(A). See also Fajans & Falk, *supra* note 82, at 168 (advocating that students should learn close reading techniques).

177. See MACCRATE REPORT, *supra* note 4, at 157-58, § 3.1(a)(ii).

178. See *id.* at 158, § 3.1(a)(iii).

179. See generally Philip C. Kissam, *Thinking (by Writing) about Legal Writing*, 40 VAND. L. REV. 135, 139-40 (1987) (emphasizing that most first year legal research and writing courses focus on acquiring research techniques and using basic legal forms, but not on writing per se).

180. See Woxland, *supra* note 173, at 455 ("Once the first-year program is finished, the research skills—such as they are—of the vast majority of students . . . are left to atrophy until the new lawyers begin professional practice.").

181. This paper originated from a paper I gave to the Legal Writing Institute in the summer of 1994 on "Teaching Advanced Legal Writing Through an Appellate Clinic."

182. See Kissam, *supra* note 179, at 171-72, (concludes his article lauding legal clinics as places where "effective critical writing" can occur).

183. See Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 13 (1993) ("When the situation is not merely hypothetical, the student comes face to face with consequence.").

The Appellate Clinic also gives many students their first encounter with legal issues for which there are no clear answers.<sup>184</sup> The lack of answers can be frustrating. Sometimes appellate students find it to be nearly debilitating if there are no cases directly on point.<sup>185</sup> Yet seldom are real-life appellate cases so easily resolved. Appellate students must be good artisans.<sup>186</sup> They must combine the facts in their case with relevant case law, molding them together into their own story, their theory of the case.<sup>187</sup>

Additionally, appellate students must devise and implement a “coherent and effective research design.”<sup>188</sup> They must also research all potential issues and then limit them.<sup>189</sup> This process entails researching the law, scrutinizing the record, and consulting with others.<sup>190</sup> Students must estimate the amount of time each step of the process will take. In consultation with their supervisor, they must assess the degree of thoroughness required. Some students want to trace every issue back to *Marbury v. Madison*,<sup>191</sup> while others stop at the surface. The trick is calibrating the depth of research necessary. Additionally, they must be prepared to update their research before filing their briefs and before oral argument.<sup>192</sup>

In these several respects, appellate clinics put reality into a student’s legal research. Students are well aware that the research they conduct is not merely in fulfillment of an academic exercise. The solution to someone’s legal problem rests on their ability to find the law.

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184. See Laser, *supra* note 1, at 252 (problem solving requires more than knowledge of legal doctrine, skills, and values, it “requires knowing an additional body of knowledge, the art of lawyering”).

185. See DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER 5 (1987) (asserting that questions that fall outside the categories of existing theory and technique require lawyers to improvise and be creative).

186. See Laser, *supra* note 1, at 244 (describing the “art of lawyering” as “the additional body of knowledge needed when applying legal doctrine, skills, and values in the real world of practice”).

187. See Kissam, *supra* note 179, at 152-57 (distinguishing “critical reading” which involves drawing inferences, interpreting and evaluating from “instructional reading”).

188. MACCRATE REPORT, *supra* note 4, at 160, § 3.3. For an excellent guide to research, see CHRISTOPHER G. WREN & JILL ROBINSON WREN, THE LEGAL RESEARCH MANUAL, A GAME PLAN FOR LEGAL RESEARCH AND ANALYSIS (2d. ed. 1986).

189. See MACCRATE REPORT, *supra* note 4, at 151-52, 160, §§ 2.1, 3.3(a); ALDISERT, *supra* note 65, §§ 8.2-8.6, at 114-21.

190. See MACCRATE REPORT, *supra* note 4, at 160-62, § 3.3(b) & (c). Appellate students consult with clinical and non-clinical law faculty, professors throughout the university, and other attorneys. See *supra* notes 42, 97, 160.

191. 5 U.S. 137 (1803).

192. See ALDISERT, *supra* note 65, § 15.4.5, at 315-16; FED. R. APP. P. 28(j).

## IV. PRACTICAL SKILLS

Traditional law school courses predominately use the casebook method of instruction. Students learn to “think like lawyers” through appellate case study. The traditional courses expose students to analytical skills while placing minimal emphasis on the more practical lawyering skills involved in law practice. Across the country, state bars and law students are demanding a greater focus on practical skills training.<sup>193</sup> For when students do not acquire practical skills until after they graduate from law school, they are forced to develop them at the expense of their clients and employers.

The call for more practical skills training is nothing new. Over a half century ago, the Legal Realists lamented about how poorly American law schools prepared their graduates for the actual practice of law.<sup>194</sup> Jerome Frank, in particular, led the call for making legal education more clinically focused. Frank considered legal practice to be a difficult and challenging enterprise.<sup>195</sup> Analogizing it to the study of horticulture, architecture, and medicine,<sup>196</sup> he argued that learning to become a lawyer, as opposed to simply learning the law, requires hands-on clinical experience.<sup>197</sup> Studying law using the “pseudo-scientific” Langdellian case method, he claimed, no more prepares one to become a good lawyer than does the study of cut flowers or stuffed dogs make one a good botanist or dog-breeder.<sup>198</sup>

Today, many have come to agree with Frank that law schools have an obligation to do more than teach students to “think like lawyers,” only to send them elsewhere after graduation to learn how to practice law. The interests, hopes, and fears of real clients should not be placed under the guardianship of unsupervised neophytes who may know a good deal about law, but precious little about lawyering. Moreover, the economics of legal practice prevent many firms from dedicating the time and resources necessary to train new associates in the way the MacCrate Report envisions.<sup>199</sup> Some of the practical training simply

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193. See Laser, *supra* note 1, at 269.

194. See Frank, *A Plea for Lawyer-Schools*, *supra* note 32, at 1304; Jerome Frank, *What Constitutes a Good Legal Education*, 19 A.B.A. J. 723 (1933); Jerome Frank, *Why Not a Clinical Lawyer-School?*, *supra* note 137, at 910; Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935); Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1922).

195. See JEROME FRANK, COURTS ON TRIAL, MYTH AND REALITY IN AMERICAN JUSTICE 229 (2d ed. 1963) [hereinafter FRANK, COURTS ON TRIAL].

196. See *id.* at 227, 229.

197. See *id.* at 229-30. See Frank, *Why Not a Clinical Lawyer-School?*, *supra* note 137, at 917.

198. See FRANK, COURTS ON TRIAL, *supra* note 195, at 227.

199. See Glenn, *supra* note 23, at 87 (estimating that “fewer than 20-25% of the nation’s lawyers work in settings in which their employers conduct formal training programs”).

must occur during law school.<sup>200</sup> According to the MacCrate Report, there are several required practical skills. Following is a brief description of each.

### A. *Factual Investigation*

The MacCrate Report begins its discussion of practical skills with the skill of factual investigation: “[A] lawyer should be familiar with the skills, concepts, and processes involved in determining whether factual investigation is needed, planning an investigation, implementing an investigative strategy, organizing information in an accessible form, deciding whether to conclude the investigation, and evaluating the information that has been gathered.”<sup>201</sup>

Factual investigation in the traditional sense is one of the skills least emphasized in an appellate clinic. Appellate students begin with the assumption that all factual investigation is complete and the record is set. This assumption, however, is not always true. Students must learn how to read a complete factual record, searching inquisitively for new issues which may form the basis for either a remand or post-conviction action.<sup>202</sup> They must learn to weave the facts and the law into a theme<sup>203</sup> with the power of persuading an appellate court to accept their client’s perspective.

The “Statement of the Issues” section of an appellate brief provides the context for presenting the theme in a clear and logical fashion.<sup>204</sup> Formulating convincing and artful issue statements often requires years of practice.<sup>205</sup> An appellate clinic is an important forum for introducing this critical skill.<sup>206</sup>

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200. *ABF Examines Attitudes on Skills*, SYLLABUS (A.B.A. Sec. of Legal Educ. and Admissions to the Bar), Spring 1992, at 8 (noting that the majority of lawyers believed that law school failed to teach them essential lawyering skills in negotiation, counseling, drafting, and conducting litigation).

201. MACCRATE REPORT, *supra* note 4, at 163.

202. One appellate student discovered in the process of preparing a brief on direct appeal in a criminal matter that the underlying warrant was dated the day after the search. Trial counsel neither noticed nor raised this issue before allowing his client to plead guilty to first degree murder. The appellate student investigated the matter further and found numerous problems which culminated in the Clinic filing a petition for post-conviction relief on behalf of the prisoner. The Idaho Supreme Court ruled in our client’s favor and found that the unsigned warrant was invalid. *See State v. Mathews*, 934 P.2d 931 (Idaho 1997).

203. *See ALDISERT*, *supra* note 65, §§ 8.11, 12.1, at 141-42, 211-16.

204. *See* FED. R. APP. P. 28(a)(3).

205. *See* Committee on Appellate Skills Training, *supra* note 31, at 139 (noting that preparing a statement of issues requires “complete knowledge of the record and the applicable law, the ability to identify the facts in the case that are likely to be determinative, and the ability to relate them with a clarity of expression”).

206. *See id.*

Briefs also must contain a "Statement of the Facts"<sup>207</sup> which is accurate, complete, truthful (by not ignoring unflattering facts),<sup>208</sup> and non-argumentative. It must provide accurate references to the transcript and the record.<sup>209</sup> Preparing a Statement of the Facts helps significantly in developing a student's skills related to factual investigation, insofar as it requires the preparation of a concise narrative addressing only those facts which are relevant to the questions presented on appeal.<sup>210</sup>

Appellate students generally have no involvement at the trial level; therefore, they inherit the record on appeal with all its imperfections. Accepting the record as is and not taking it out of context to argue a particular point is difficult for many students. Naturally, they want to make the most persuasive arguments possible. This at times tempts students to create or read into the record favorable facts which may not exist.<sup>211</sup> Some students cannot separate themselves from the record which they inherited. This creates a tension between students' desire to help their clients and the realization that they are bound by the record and the law.<sup>212</sup> Thus, in several respects, the ability to accurately read a

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207. See FED. R. APP. P. 28(a)(4).

208. Students must learn to be scrupulously accurate. Just one misstatement or overstatement of fact which comes to the court's attention, most often by the opposing party's attorney, will color the court's opinion of the lawyer and the client. See, e.g., *David v. United States*, 820 F.2d 1038, 1044 (9th Cir. 1987) ("[T]he briefs before us contain vindictive falsehoods which are unbecoming to the quality of lawyering we could expect before this court . . . . If attorneys insist upon approaching this court through the woods of obfuscation, they should beware of the sanction wolf."); *Hickman v. Fraternal Order of Eagles*, 758 P.2d 704, 705 n.1 (Idaho 1988) ("Counsel for appellant damages both his credibility and his client's position when he fails to state the facts to this Court with the utmost candor.").

209. Under the Ninth Circuit's rules, failure to support each assertion with references to the page or document number of the pleading in the record can result in sanctions. 9th Cir. R. 28-2, Circuit Advisory Committee Note; see *Mitchel v. General Elec. Co.*, 689 F.2d 877, 878 (9th Cir. 1982). The Ninth Circuit will not search the record for references to support a claim as to what happened in the tribunal below and may refuse to consider an argument where such references are not included in the brief. See *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923 (9th Cir. 1988) (holding Fed. R. App. P. 28(a)(4) violated where unintelligible argument contained two pages of testimony; argument deemed waived if party provides insufficient information to permit an intelligent disposition of the issue); *Mitchel*, 689 F.2d at 878-79 (explaining case will be dismissed if party simply has general reference to record arguing that disputed facts existed without support for such argument or lists 100 citations to the record without explanation). The Ninth Circuit will also sanction advocates for misstating the record. See *David*, 820 F.2d at 1044 (warning attorneys that statement of facts unsupported by correct references to the record will result in sanctions).

210. See FED. R. APP. P. 28(a)(4) (stating, in part, that "[t]here shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record").

211. See *Campbell*, *supra* note 54, at 661.

212. See *Mary Ellen Gale, Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 308 (1980) ("Perhaps the most elusive quality of good professional writing is its resolution of the demands of a professional ethic and the demands of a particular client. The law may be stretched, but how far? The fact may be dressed up, but how much?").



fixed record and to create a theme which is plausible and realistic in light of that record becomes a skill taught in an appellate clinic.

### B. *Communication*

Another practical skill listed in the MacCrate Report is “communication.”<sup>213</sup> “Lawyers employ communicative skills—including both written and oral forms of communication—in a wide variety of ways and in a wide range of contexts.”<sup>214</sup>

The MacCrate Report recognizes that written communication differs from oral communication in that “there are a number of substantive, technical, and strategic considerations that must be taken into account when drafting . . . certain . . . forms of legal writing.”<sup>215</sup> Neither students’ exposure to brief writing during their first year in law school nor their participation in moot court competitions adequately trains them in the art of appellate advocacy.<sup>216</sup> For those schools that have students write appellate briefs in their first year, the record on appeal usually consists of a hypothetical ten to fifteen page opinion and a summary record from a trial or intermediate court. At the end of the oral argument, students are generally graded, frequently on a pass/fail basis, and for most students this ends their exposure to appellate litigation unless they participate in the student-run moot court programs.

More law students participate in appellate moot court competitions than any other student-run law school activity, including law review.<sup>217</sup> For all their positive aspects, the competitions do not in actuality simulate or even serve as an adequate substitute for live client appellate training.<sup>218</sup> Moot court programs do not have as a principal goal the training of law students to be effective appellate litigators.<sup>219</sup> The issues in most moot court problems are straightforward, limited, and unrepresentative of actual appellate practice.

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213. MACCRATE REPORT, *supra* note 4, at 172.

214. *Id.*

215. *Id.* at 176.

216. See Committee on Appellate Skills Training, *supra* note 31, at 142 (criticizing these programs for failing to teach essential appellate advocacy skills and stating that “they may be more harmful than helpful because with their appellate format they create the illusion that appellate skills are being taught when in fact much of what they are learning in some respects is inconsistent with the skills necessary to be an effective appellate litigator”).

217. See *id.* at 132-33.

218. See *id.* at 144 (claiming that a moot court program in fact “bears little or no relationship to the realities of the appellate process or appellate practice”).

219. See *id.* at 132, 142.

In contrast to both legal research and writing<sup>220</sup> and moot court programs, appellate clinics constitute a forum where students must work with a complete record and all its limitations. They must inventory all the potential issues on appeal, investigate and research the viability of each issue, discuss the merits of each with the client, and ultimately select those issues which more probably than not will attract the interest and generate the serious consideration of the appellate court.<sup>221</sup> An appellate clinic, therefore, can have the effect of significantly enhancing a student's written and oral communication skills. Each student who completes two semesters in the Idaho Appellate Clinic is generally able to participate in at least one intensive writing and oral advocacy experience.<sup>222</sup>

## 1. Written Communication

Much has been written about the need to make law students better legal writers.<sup>223</sup> One recent survey reports that only eighteen percent of lawyers believe that they learned effective written communication skills while in law school.<sup>224</sup> This finding confirms one of the central conclusions in the 1979 Cramton Committee Report,<sup>225</sup> the most significant forerunner to the MacCrate Report. The Cramton Report advised that law schools needed to do a better job teaching effective written communication skills.<sup>226</sup> The MacCrate Report's

220. See Silecchia, *supra* note 5, at 206 n. 7 (providing a list of articles discussing first-year research and writing programs).

221. See ALDISERT, *supra* note 65, §§ 8.1-8.13, at 113-46.

222. Cf. *supra* note 58 (examining other appellate clinic programs around the country).

223. See Arnold, *supra* note 28, at 228-29, 237 (1995) ("Law is writing . . . Lawyers are also members of the writing profession."); Garth & Martin, *supra* note 137, at 472-74, 478-79, 508 (arguing that oral and written communication are the most important skills necessary for beginning lawyers); William L. Prosser, *English as She Is Wrote*, ADVOCACY AND THE KING'S ENGLISH 737, 738 (George Rossman ed., 1960) (calling law "one of the principal literary professions. One might hazard the supposition that the average lawyer in the course of a lifetime does more writing than a novelist.").

224. ABF Examines Attitudes on Skills, SYLLABUS, *supra* note 200, at 8.

225. CRAMTON REPORT, *supra* note 75. This report came to be known as the "Cramton Report" in recognition of Dean Roger C. Cramton, Chairperson of the Task Force that produced it.

226. The Cramton Report concluded that:

Given the central importance of effective writing to a wide range of lawyer work, the Task Force believes that too few students receive rigorous training and experience in legal writing during their three years of law study. Despite legal writing courses, seminars and other upperclass "writing" courses, and despite the growing number of courses based on real or simulated lawyer work that include opportunity to do specialized legal writing such as pleadings, opinion letters, briefs, contracts or wills, and legislation, many students, probably most students, receive very little opportunity to write with close supervision and critique as a continuing part of their law school experience. Most of the writing that law students do is examination writing, done under extreme time pressure without either a chance for self-criticism and self-editing or

similar finding suggests that law schools have accomplished little in this regard over the past two decades.

Angela Campbell has argued that clinical offerings should be structured so that they focus on teaching advanced legal writing.<sup>227</sup> This suggestion combines two of the principal areas of current curricular reform: the need for law students to acquire practical experience and their equally practical need to improve their writing.

Perhaps more than any other law school forum, appellate clinics combine the persistent need for law graduates to possess better writing skills with an emphasis on acquiring real life skills training. In the setting of an appellate clinic, where the true measure of a student's performance comes not in a grade but in an impact on the life of a real person, effective writing skills are absolutely essential. It is not uncommon for students in the Idaho Appellate Clinic to know that the quality of the appellate brief they write may affect another person's life dramatically, by, for example, determining whether that person will receive a kidney transplant<sup>228</sup> or gain freedom from incarceration.<sup>229</sup> Where real lives sway in the balance, it becomes far more than an academic exercise for students to develop the ability to reason persuasively on paper.<sup>230</sup>

The MacCrate Report's call for lawyers to develop more "effective methods of communication"<sup>231</sup> thus lies at the heart of the appellate clinical experience. According to the MacCrate Report, effective communication requires one to organize the presentation,<sup>232</sup> to express "ideas or views with precision, clarity, logic, and economy,"<sup>233</sup> to "[c]hoos[e] appropriate terms, phrases, and images,"<sup>234</sup> to use grammatically correct English,<sup>235</sup> to attend to details,<sup>236</sup> and

constructive criticism from the instructor. It offers neither the opportunity to write to the student's own standards nor the possibility of learning much from the experience. The situation may, in fact, reinforce bad habits and poor standards rather than foster improved skills.

*Id.* at 15.

227. See Campbell, *supra* note 54, at 654.

228. See Rendon v. Paskett, 894 P.2d 775 (Idaho Ct. App. 1995).

229. See State v. Mathews, 934 P.2d 931 (Idaho 1997).

230. See Trail & Underwood, *supra* note 14, at 236.

231. MACCRATE REPORT, *supra* note 4, at 173-75, § 5.2.

232. See *id.* at 173, § 5.2(a)(i)(A).

233. *Id.* at 173, § 5.2(a)(i)(B). See Gopen, *supra* note 141, at 335 ("Lawyers need to be able to articulate clearly the steps and connections in a logical argument. Lawyers need to be able to maintain clarity of expression, even in the face of complexity of thought.")

234. MACCRATE REPORT, *supra* note 4, at 173, § 5.2(a)(i)(C).

235. See *id.* at 174, § 5.2(a)(i)(D); Gopen, *supra* note 141, at 351 (arguing that the main problem with legal writing is the "widespread absence of effective programs for teaching the art and craft of clear writing to law students and lawyers").

236. See MACCRATE REPORT, *supra* note 4, at 174, § 5.2(a)(i)(E). See Campbell, *supra* note 54, at 685-86 (attending to details is done during the polishing stage of writing).

to reason<sup>237</sup> and effectively use factual material.<sup>238</sup> Appellate clinics reinforce all of these aspects of communication. In addition, students learn proper Bluebook citation format,<sup>239</sup> how to make accurate references to transcripts and records,<sup>240</sup> and how to assess the culture of the court to which they are writing.<sup>241</sup>

Appellate students' writing frequently goes beyond the brief. The students must correspond with their clients, the opposing party, and the court. They also draft settlement documents, motions, and affidavits. Throughout, students in the Idaho Appellate Clinic are encouraged to write in "plain English"<sup>242</sup> and move away from "legalese."<sup>243</sup> Readers prefer plain English.<sup>244</sup>

Theories about writing have changed in recent years. The traditional model focused on writing as a product, while new approaches view it as a process.<sup>245</sup> Professor Teresa Phelps suggests that writing teachers should look to the ideas and concepts found in the so-called "new rhetoric."<sup>246</sup> Advocates of the new rhetoric believe that writers find what they are trying to say through the process of writing itself.<sup>247</sup> They see writing as a "recursive rather than a linear

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237. See MACCRATE REPORT, *supra* note 4, at 174, § 5.2(b)(ii).

238. See *id.* at § 5.2(b)(i).

239. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Harvard Law Review Ass'n, et al., 16th ed. 1996); see also ULRICH, KESSLER, & ANGER, P.C., ET AL., FEDERAL APPELLATE PRACTICE GUIDE NINTH CIRCUIT § 6.30, at 6-38 (1994) [hereinafter FEDERAL APPELLATE PRACTICE] (mandating citation in appellate procedure conform to the Bluebook system of citation).

240. See *supra* notes 208-09.

241. See *supra* notes 157, 170 and accompanying text.

242. See generally RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 1 (3d ed. 1994).

243. See Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 531 (1985) (arguing that legalese can cause comprehension difficulties).

244. See, e.g., RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING, STRUCTURE, STRATEGY, AND STYLE 185 (2d ed. 1994); Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOYOLA L.A. L. REV. 301, 301 (1987) (reporting that appellate judges and their research attorneys found passages written in legalese as "substantively weaker and less persuasive than the plain English versions," and noting that readers infer that "the attorneys who wrote in legalese possessed less professional prestige than those who wrote in plain English.").

245. See Campbell, *supra* note 54, at 663.

246. Phelps, *New Legal Rhetoric*, *supra* note 93, at 1094-95. See also Campbell, *supra* note 54, at 663 (describing "new rhetoric" as a school of thought, developed in the late 1970s and early 1980s, which emphasizes the process of writing rather than the product).

247. See Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION AND COMM. 76, 85 (1982).

process.”<sup>248</sup> A writer who approaches writing under this recursive paradigm shifts back and forth between planning, drafting, and revising,<sup>249</sup> and views writing as a fluid, continually creative process.<sup>250</sup>

An appellate clinic provides a perfect forum to discuss the “new rhetoric”<sup>251</sup> and to wrestle with what it means for legal practice. Adherents of the “new rhetoric” believe that a good writer will identify the purpose of the document,<sup>252</sup> the audience,<sup>253</sup> and any constraints at the beginning of a writing project.<sup>254</sup> In appellate practice, the purpose of a brief is to persuade;<sup>255</sup> the audience<sup>256</sup> is the

248. *Id.* at 86. See also Fajans & Falk, *supra* note 82, at 174-75 (describing the shift from the current-traditional approach to the new rhetoric as one from a focus on the written product to the process of generating that product).

249. See Teresa Godwin Phelps, *Writing Strategies for Practicing Attorneys*, 23 GONZ. L. REV. 155, 160 (1988) (describing revising as “re-seeing” the problem).

250. See Joseph Kimble, *On Legal-Writing Programs*, 2 PERSP. 43, 44 (1994) (“And why all this emphasis on writing? Because writing is thinking. Thinking on paper. Thinking made visible.”).

251. See Campbell, *supra* note 54, at 672 (suggesting that at the beginning of a project students “write a short statement identifying the purpose of the writing, the intended audience and any applicable constraints”). This approach allows the teacher to get a feel for the students’ abilities and to determine whether the students understand the rhetorical situation at the outset. See *id.* See also Phelps, *New Legal Rhetoric*, *supra* note 93, at 1093 (describing the current-traditional paradigm’s emphasis on the composed product and the new rhetoric’s focus on the composing process).

252. See MACCRATE REPORT, *supra* note 4, at 175, § 5.2(c) (“tailoring the nature, form, or content of the written or oral communication to suit [t]he particular purpose of the communication.”).

253. See *id.* at 173, 175, §§ 5.1 & 5.2(c)(ii). See also NEUMANN, *supra* note 244, at 51 (identifying the typical reader as one who: 1) wants exactly the material needed for making a decision; 2) is busy and does not want to read a document twice; 3) is aggressively skeptical and will look for gaps or weaknesses; 4) is disgusted by sloppiness, imprecision, and inaccuracy; and 5) “is conservative about matters of grammar, style, citation form, and document format”).

254. See Campbell, *supra* note 54 at 671-77. See also VEDA R. CHARROW & MYRA K. ERHARDT, *CLEAR AND EFFECTIVE LEGAL WRITING* 25-69 (1986) (discussing how to determine the purpose of the document, identifying the audience, and detecting any constraints).

255. See ALDISERT *supra* note 65, § 2.1, at 17 (noting that briefs are to persuade and educate). Briefs are written to “persuade a court, and not to impress a client . . . [p]ersuasion is the only test that counts.” *Id.* “The only measure of their success is the extent to which they persuade the judge to accept the brief’s conclusion.” *Id.* § 2.2, at 20. The argument section of the brief must demonstrate persuasive writing. For information on developing persuasive arguments see NEUMANN, *supra* note 244, at 253-70.

256. See Gopen, *supra* note 141, at 343 (“The writing process is not to be separated from the thinking process; it *is* a thinking process . . . They get all the relevant information down on the paper; they refer to all the possible issues and suggest a number of different approaches and counter approaches; and all the while they have no perception of how a reader not already knee-deep in the case will be able to wade through it all.”). Keying students into the audience should be nothing new to them. As George Gopen pointed out, “bright undergraduates spend the first half of any course figuring out what that particular [professor] wants and the second half of the course producing it.” *Id.* at 359.

judge (and possibly their law clerk);<sup>257</sup> and the constraints are procedural,<sup>258</sup> substantive,<sup>259</sup> and court related.<sup>260</sup> Clinic students are often tempted with confusing the purpose and the audience<sup>261</sup> because they can become obsessed with pleasing a faculty member instead of the real audience, the court.<sup>262</sup>

In addition to the mechanics of writing, students in an appellate clinic struggle with real world limits on their writing, including personal reactions to cases and time constraints. Students commonly find themselves facing personal ethical dilemmas, as the clients they represent stir negative feelings and emotions grounded in long standing biases, prejudices, likes, dislikes, and cultural upbringing.<sup>263</sup> Time pressures further pose real constraints on students, just as they do on practitioners. Together with their supervisor, appellate students need to work with opposing counsel and the court to establish workable timetables.<sup>264</sup> The students must allow adequate time to produce clear,<sup>265</sup> persuasive, and

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257. See ALDISERT *supra* note 65, § 2.1, at 17 (“Briefs are written for one audience and one audience only—judges and their law clerks.”).

258. Students must check each appellate court’s procedural rules to locate “constraints.” With respect to briefs, constraints include such things as page limitations, due dates, Bluebook form, and format.

259. In contrast to many other writings, appellate briefs are “limited to a small number of available relevant arguments.” ALDISERT, *supra* note 65, § 2.1, at 18.

260. See MACCRATE REPORT, *supra* note 4, at 173, § 5.1(b) (noting that lawyers must anticipate the “concerns, assumptions, expectations, and objectives of particular individuals in a given situation”). See also ALDISERT, *supra* note 65, §§ 2.1, 2.5 at 18, 24-25 (stressing that lawyers should become familiar with the environment under which most briefs are read, including the fact that “astronomical caseloads require judges to read large numbers of briefs while simultaneously performing other judicial functions demanding equal priority”).

261. See Phelps, *New Legal Rhetoric*, *supra* note 93, at 1098 (asserting that the lack of a sense of audience and purpose in a legal document are the primary cause of ineffective legal writing).

262. See ALDISERT, *supra* note 65, § 2.1, at 17.

263. See MACCRATE REPORT, *supra* note 4, at 173-4, §§ 5.1(a) & 5.2(a)(iii). See also *infra* notes 273, 339 and accompanying text.

264. Since the appellate clinic operates on the school calendar, efforts are made to coordinate due dates with student schedules. The Ninth Circuit pro bono coordinator and the clerk of the Idaho Supreme Court work to accommodate the clinic’s scheduling needs.

265. See Arnold, *supra* note 28, at 239 (claiming that survival in today’s competitive legal market requires the ability to write clearly).

logical briefs.<sup>266</sup> This requires sufficient time to reflect on the three rhetorical questions of audience, purpose, and constraints, as well as the impact each will have on the writing process.<sup>267</sup>

## 2. Oral Communication

Oral argument is usually the highlight of the appellate students' clinical experience. Prior to presenting oral argument, students at the Idaho Clinic present their argument several times to the Appellate Clinic faculty supervisor. They also give a minimum of three mock arguments before other faculty members and at least one mock argument before their peers. Every effort is made to get the students into the courtroom before the day of argument to hear other cases. This introduces them to the physical setting and to the judges before whom they will argue.

In preparing for oral argument, the students again must answer the questions of sound rhetoric—what is the purpose, who is the audience, and what are the constraints, i.e., the rules and conventions of the relevant court.<sup>268</sup> They must master the facts in the record as well as become intimately familiar with the body of applicable case law. Sometimes they even find it crucial to know who authored the decisions.<sup>269</sup>

Appellate students thus receive extensive training and experience in effective writing and oral advocacy. As stressed in the MacCrate Report, these practical skills are central to law practice.

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266. Every effort is made to insure that the students have adequate time to learn the background necessary to complete the project and to write several drafts. The process of reviewing and providing feedback is very time consuming as is learning the procedural and substantive law of the case. For example, students handling post conviction cases must not only understand the criminal and appellate processes, they also must learn the law governing post conviction actions and the law relating to the specific issues raised.

267. See Arnold, *supra* note 28, at 236 ("Good writing takes time; it entails thoughtful reflection and extensive editing and revision.").

268. For example, the Ninth Circuit normally gives the parties fifteen minutes per side. U.S. CT. APP. NINTH CIR. R. 27-6. Idaho Appellate Courts grant thirty minutes to each side. IDAHO APP.R. 37. However, the Idaho Court of Appeals does not count questions in their timing while the Idaho Supreme Court does. *See id.*

269. In a recent oral argument before the Ninth Circuit Court of Appeals, the students faced three judges, each of whom had authored one of the significant decisions upon which the case hinged. Each judge held significantly different views on the pertinent issue before the court, prisoner civil rights litigation. One of the first questions came from a member of the panel asking the student to explain why the court should not follow his "well-reasoned decision" which was adverse to her client. The student tried to persuade the panel to follow another member of the panel's decision which was more favorable to her client and at the same time not offend the other panel members. The student walked a fine line which only exists in real life appellate practice.

### C. Counseling

The MacCrate Report identifies the skills associated with counseling as follows:

In order to counsel a client effectively, a lawyer should be familiar with at least the skills, concepts, and processes involved in establishing a proper counseling relationship with a client, gathering information relevant to the decision to be made by the client, analyzing the decision to be made by the client, counseling the client about the decision, and implementing the client's decision.<sup>270</sup>

The Report goes on to emphasize that the role of attorney-counselor requires an "understanding of the various ethical rules and professional values" which define the relationship between lawyer and client.<sup>271</sup> Lawyers must be ever-mindful that the client has ultimate decision-making authority.<sup>272</sup> Determining how far to push a client in an effort to persuade him or her that certain actions are necessary to safeguard his or her own best interests is a special talent that can at most be introduced, not perfected, in law school.<sup>273</sup> Determining when to withdraw from representation falls under this skill.<sup>274</sup> While appellate clinics certainly do not make one a master at these problematic aspects of legal counseling, they at least introduce students to them in a relatively safe and supervised context.

In order to adequately counsel clients, lawyers must gather the relevant facts and research the applicable law. Throughout this process, they must ascertain their clients' perspectives, while remaining ever attentive to their own personal values, biases, predilections, and emotional responses.<sup>275</sup> Student appellate interns must do the same. In the clinic setting, students encounter, most likely for the first time, the need to take into consideration a client's perspective<sup>276</sup>

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270. MACCRATE REPORT, *supra* note 4, at 176. See also Schrag, *supra* note 44, at 180.

271. MACCRATE REPORT, *supra* note 4, at 177, § 6.1(a).

272. See *id.* at 177, § 6.1(a)(i).

273. See *id.* at 177, § 6.1(a)(ii); Joan L. O'Sullivan, et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 114-41 (1996) (discussing the exceptions to client-centered decisionmaking and the fuzzy line between strong but ethical counseling and unacceptable coercion).

274. MACCRATE REPORT, *supra* note 4, at 177, § 6.1(a)(iii)(B)(II). In criminal cases, the students must decide whether to file an *Anders* brief. See *Anders v. California*, 386 U.S. 738 (1967). In that case, the United States Supreme Court established the proper procedure for attorneys to follow when they find that the record in a criminal appeal indicates a lack of meritorious issues. *Id.* at 744. Lawyers in such a situation must submit a brief setting forth any information that may be helpful to the client's appeal before withdrawing from the case. *Id.*

275. See MACCRATE REPORT, *supra* note 4, at 178-79, § 6.2(c)(iii). See also O'Sullivan, *supra* note 273, at 114-53.

276. See MACCRATE REPORT, *supra* note 4, at 178, § 6.2(c)(i). See also O'Sullivan, *supra*



while telescoping for the court those issues the intern believes hold the greatest merit.<sup>277</sup>

One author analogizes the lawyer/client relationship to that of doctor/patient. He suggests that if part of the lawyer's role is to help the client make decisions, then the doctrine of informed consent as applied in medicine extends by analogy to the legal setting.<sup>278</sup> Appellate students often find this aspect of client counseling to be very challenging. They must explore the extent of their own role in the decision-making process while they are learning to communicate with and educate their clients so as to facilitate the making of informed decisions. While many students find this a daunting process, the experience gives them a valuable look at the allocation of decision-making responsibility between lawyer and client.<sup>279</sup>

Appellate students also learn, sometimes with trepidation, to counsel and advocate for "difficult" or "challenging" clients, a skill which cannot be taught through simulation.<sup>280</sup> Clients may place too much confidence in their own legal research or in the counseling they received earlier from a friendly jail house lawyer.<sup>281</sup> They may be unrealistic in their expectations. Many are educationally disadvantaged<sup>282</sup> or physically impaired.<sup>283</sup> Students must use terms and

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note 273, at 132-41.

277. When the Idaho Clinic agrees to represent someone before the Ninth Circuit, the students and the supervisor select which issues to re-brief. The Clinic makes clear both in the brief and at oral argument that our role is to supplement the pro se litigant's brief and not to waive the other issues. This is particularly helpful if the client does not want the Clinic to waive an argument which we believe is without merit.

278. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 49-67 (1979).

279. See MACCRATE REPORT, *supra* note 4, at 176-78, § 6.1. See also Menkel-Meadow, *supra* note 33, at 564 (suggesting that if it is true that clients who participate in their cases are more likely to achieve better results, then reflecting on the allocation of decision-making between lawyer and client has instrumental and practical value).

280. See Tarr, *supra* note 85, at 35-36.

281. Clients of the Idaho Clinic have sent pages of legal research identifying the issues from their perspective. Their insights are valuable since the appellate students generally had no involvement with the trial stage. There is also a downside. Litigants become tied to their perspective and are displeased at times to learn that some of their arguments have no legal basis.

282. We had a client with an extremely low I.Q. who relied almost exclusively on his brother-in-law for information. After discussing our concerns about client confidences with our client, we decided that the brother-in-law had to be part of all conversations. This was done to ensure that the client understood his legal rights and responsibilities and could adequately evaluate his options. See MACCRATE REPORT, *supra* note 4, at 180-83, § 6.4(b) (understanding one's legal rights and responsibilities), § 6.4(c) (explaining options), & § 6.5 (ascertaining and implementing the client's decision).

283. One of the Idaho Clinic's clients was mute and deaf with a first grade education and a limited use of sign language. Every time the Clinic sent him a letter, he would come in, unannounced, and want to converse about his case. Suffice to say, this posed real problems for the students and supervisor.

vocabulary which their clients can understand<sup>284</sup> so that they can meaningfully assist them in evaluating their legal rights.<sup>285</sup>

At the Idaho Clinic, faculty encourage the students to visit and become acquainted with their clients. If the clients live in the area, office visits are arranged. In prisoner civil rights actions and criminal appeals, the students usually visit their clients in prison.<sup>286</sup> When face to face meetings are not possible, such as when a prisoner is incarcerated outside Idaho, the students communicate with him or her over the telephone and through the mail.

Real clients motivate students to do their best because they know that the problems are real and the consequences to the clients are significant.<sup>287</sup> As one student wrote in her evaluation:

It is incredible the effect (sic) this has on your work. These are real people with real lives that you could really screw up if you don't do your very best work. I will work as hard as I can if I know that if I cover all my bases and do thorough and competent work, my client will be the better for it.<sup>288</sup>

Another student wrote the following about visiting her client in the penitentiary after he had pled guilty to first degree murder:

We [she and her co-counsel] had talked a lot about what he would be like, and I had come to the conclusion that he probably wouldn't talk to us much if at all. I was very nervous and very anxious when we went in to meet him. I was so pleasantly surprised when he made us feel so warmly received. He was suddenly there, sitting in front of me, relying so much on what I could do my best to research and put down on paper for him. This real, feeling, and obviously nervous man was in need of my clumsy approach to research and writing. I was instantly hooked. I knew from that moment on that I was going to do my best no matter how difficult it got for me. I now had a real person I

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284. See MACCRATE REPORT, *supra* note 4, at 180, § 6.4(a).

285. See *id.* at 180-82, § 6.4.

286. Students have benefitted from visiting the penitentiary. One student wrote in her evaluation, "The most memorable event in this case was going to Boise to meet [my client] . . . It also helped clear up some of the emotional questions which were still lingering after seeing the pictures [of the victim]." This student represented a man who pled guilty to first degree murder, admitting that he shot his wife, and who had just days before her death obtained a protection order against her husband. The students on the case had to wrestle with all the issues of representing the guilty knowing that if they prevailed on the petition for post-conviction relief that the State could not establish a case for first degree murder.

287. Several people have written about how live clients with real problems motivate students to learn and to do their best. See, e.g., Campbell, *supra* note 54, at 658-60; Hoffman, *supra* note 66, at 291; Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 287 (1981).

288. A copy of the evaluation is on file with the author.

was fighting for. This man was to be locked up in prison for the rest of his natural life because of overlooked and undisclosed evidence. I now had a task of a different dimension, and I vowed to give it my all.<sup>289</sup>

In clinical appellate practice, the stakes are high.<sup>290</sup> An appellate brief is all that stands between freedom and prison for the clients of many appellate interns.<sup>291</sup> A student's failure to follow through has real consequences for the client, as well as for the student and his or her supervisor. As students select the issues to be presented, they shape the case on appeal. As they write their briefs, they shape another person's future. If they do not do their jobs well, they cannot give their client another chance.

#### D. *Negotiation, Litigation, and Alternative Dispute Resolution*

The MacCrate Report emphasizes that true skill in legal counseling requires a working knowledge and understanding of the various methods and techniques of resolving disputes. In this regard, the Report's focus extends from negotiation to litigation and alternative dispute resolution. According to the Task Force, negotiation is a process skill that includes a wide range of responsibilities: "In order to negotiate effectively, a lawyer should be familiar with the skills, concepts, and processes involved in preparing for a negotiation, conducting a negotiation, counseling a client about the terms obtained from the other side in a negotiation, and implementing the client's decision."<sup>292</sup>

The Report goes on to describe the counseling skills associated with litigation and alternative dispute resolution as follows:

In order to effectively employ, or to advise a client about, the options of litigation or alternative dispute resolution, a lawyer should have an understanding of the potential functions and consequences of these courses of action in relation to the client's situation and objectives . . . and should have a working knowledge of the fundamentals of trial-court litigation, appellate litigation, advocacy in administrative and executive forums, and alternative dispute resolution.<sup>293</sup>

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289. A copy of the evaluation is on file with the author.

290. See Campbell, *supra* note 54, at 659-60 (asserting that clinical students place greater importance on their writing because they have more at stake).

291. See ALDISERT, *supra* note 65, § 2.4, at 22 ("What you write, in most cases, is your client's last opportunity to claim or defend.").

292. MACCRATE REPORT, *supra* note 4, at 185, § 7.

293. *Id.* at 191, § 8.

The MacCrate Task Force viewed it as critical that practicing lawyers should be skilled at choosing between the various forms and methods of representing clients in contested matters.<sup>294</sup> The Report did not suggest that every lawyer should be a general practitioner. It did, however, see it as incumbent upon all lawyers to possess a “working knowledge” of all available forms of dispute resolution. Without an understanding of the fundamentals of trial court litigation,<sup>295</sup> appellate practice, administrative procedures, alternative dispute resolution, and negotiation, an attorney cannot effectively advise and counsel his or her clients on how to proceed in a contested situation.

Appellate clinics provide one of the best law school forums for introducing students to this panoply of dispute resolution and settlement methods. Obviously, the centerpiece of an appellate clinic is appellate practice. At the Idaho Clinic, however, the students’ education and training significantly touches most of the other dispute resolution methods listed in the MacCrate Report. The students learn the basics of litigation at the trial court level by taking a pretrial litigation course,<sup>296</sup> through participating in a week of intensive trial advocacy training,<sup>297</sup> and by attending joint meetings throughout the year with students from the General Clinic, which handles civil and criminal misdemeanor matters.<sup>298</sup> The appellate students further learn what to do and not to do at the trial court level by reviewing the records on appeal in the cases they handle. In addition, appellate students work on at least one General Clinic case during their two semesters in clinic so as to broaden their experience and to fill the time gaps that fall in between appellate projects.<sup>299</sup>

The types of cases handled by the appellate students at Idaho expose them to civil, criminal, and administrative forums.<sup>300</sup> Moreover, due to the interest and expertise of the Appellate Clinic faculty supervisor, the student interns are exposed to other dispute resolution forums at all levels—administrative, trial, and appellate.<sup>301</sup>

Alternative dispute resolution (“ADR”) is becoming increasingly more common at the appellate level.<sup>302</sup> Both the Ninth Circuit Court of Appeals and

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294. *See id.*

295. *See id.* at 191-94, § 8.

296. *See supra* notes 56, 57, and accompanying text.

297. *See id.*

298. *See infra* Section II B.3.

299. Students’ exposure to non-appellate cases is predominately student-driven. Several students in 1994 tried an eight-day child custody matter after they finished their oral arguments in early spring.

300. *See* MACCRATE REPORT, *supra* note 4, at 195-96, § 8.3. Our students have handled several social security appeals at the Ninth Circuit level.

301. *See id.* at 196-98, § 8.4.

302. *See, e.g.,* J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 463 (1994) (describing California’s Third District Court of Appeal’s settlement program

the Idaho Supreme Court have formal alternative dispute resolution mechanisms.<sup>303</sup> Idaho students have successfully resolved several appellate cases using these processes. In so doing, the students have been introduced to the full set of negotiation skills identified in the MacCrate Report. They have prepared themselves and their clients for the process, determined the “settling point,”<sup>304</sup> developed a bargaining framework,<sup>305</sup> devised an appropriate negotiating plan,<sup>306</sup> and have conducted actual negotiation sessions.<sup>307</sup> Students have counseled their clients throughout the negotiation sessions about the terms, their implementation, and alternative options if the terms appear unacceptable.<sup>308</sup> Students have also had to counsel their clients about the consequences of not accepting a particular resolution.<sup>309</sup>

Some teachers of ADR criticize the MacCrate Report for emphasizing litigation too much and ADR too little.<sup>310</sup> The Idaho clinic stresses identifying the most appropriate method of dispute resolution, whether appeal, litigation, or mediation.

### E. *Organization and Management of Legal Work*

The MacCrate Report describes the skills of organization and management of legal work as follows: “In order to organize and manage legal work effectively, a lawyer should be familiar with the skills, concepts, and processes

and its success rate); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 *FORDHAM L. REV.* 1, 9 (1990); Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 *YALE L.J.* 755, 761 (1986).

303. Rule 33 of the Federal Rules of Appellate Procedure authorizes the circuit courts of appeal to direct the parties to attend a pre-briefing conference to consider any matter that may aid in the resolution of the case, including simplifying the issues on appeal and possibly settling the case. *FED. R. APP. P.* 33. See also *FEDERAL APPELLATE PRACTICE*, *supra* note 239, §§ 6.20, 8.2, at 6-27, 8-4 (describing the Ninth Circuit’s settlement program); *IDAHO APP. R.* 49 (providing for voluntary participation in appellate settlement conferences).

304. See *MACCRATE REPORT*, *supra* note 4, at 185-86, § 7.1(c)-(d).

305. See *id.* at 186-87, § 7.1(e).

306. See *id.* at 187-88, § 7.1(f).

307. See *id.* at 188-89, § 7.2.

308. See *id.* at 189, § 7.3.

309. In one case, the students investigated and researched their client’s case and determined that it was extremely weak. The opposing party agreed to pay a nuisance amount to settle the case and the client refused. The students decided, after consulting with their client, their supervisor, and the faculty member who taught in the area, that the client did not have a colorable claim and that they had no choice but to withdraw.

310. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 *WASH. L. REV.* 593 (1994).

required for efficient management, including appropriate allocation of time, effort and resources; timely performance and completion of work; cooperation among co-workers; and orderly administration of the office."<sup>311</sup>

At the beginning of each semester, clinical faculty members at Idaho ask the student interns to identify their individual goals and expectations.<sup>312</sup> This ensures that the students think about and articulate what they hope to gain from the clinic experience. It also gives them a voice in formulating and designing their work while also providing an opportunity for clinical faculty to learn about the students' other obligations.

Time commitments have to be discussed and monitored throughout the semester.<sup>313</sup> Faculty monitor students' commitments so that the students are neither overloaded nor under challenged. Faculty must ensure that adequate time is allocated to each stage of the appellate process and that deadlines are met.<sup>314</sup>

Clinic meetings as well as weekly individual meetings stress the importance of maintaining communication with one's clients.<sup>315</sup> Due to the intense level of supervision and frequent communications between faculty and interns, the students sometimes lose sight of the fact that the client, not the faculty supervisor, is the pivotal person. This problem arises most frequently at the issue selection stage. *Pro se* litigants, untrained in the law, raise numerous issues of questionable merit while they ignore other strong issues. Once the students have critically assessed the issues and discussed them with their faculty supervisor, they have a tendency to forget that they must include their clients in this process. This often becomes a tricky and formidable task, but one which must be done. Due to the close work environment and the pairing of students into work teams, appellate clinic students at Idaho have to develop effective methods of working with others.<sup>316</sup>

The appellate students generally work in pairs.<sup>317</sup> In addition, all appellate interns meet collectively at least twice a month to focus on specific appellate skills and to assist each other in editing and critiquing drafts of briefs. The students occasionally ask non-clinical faculty to read and comment on drafts of

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311. MACCRATE REPORT, *supra* note 4, at 199, § 9.

312. *See id.* at 199-200, § 9.1. *See* Schrag, *supra* note 44, at 185-86 (discussing students' goals).

313. *See* MACCRATE REPORT, *supra* note 4, at 200-01, §§ 9.2 & 9.3.

314. *See supra* notes 62, 66-67, 69, 121-22, 264, and accompanying text.

315. *See* MACCRATE REPORT, *supra* note 4, at 200, § 9.3(b) (discussing the need to regularly communicate with clients).

316. *See id.* at 201, § 9.4.

317. *See* Chavkin, *supra* note 61, at 204 (addressing the advantages of pairing students).

their briefs as well. This collaborative process serves the clients well, teaches teamwork, and helps students learn to ask for and accept constructive feedback.<sup>318</sup>

Idaho appellate interns also gain experience pertinent to operating and administering an orderly law office. All students work a designated number of office hours. Working largely under the direction of the Clinic's office manager, they learn professional telephone use, office procedures, file organization and maintenance, how to calendar events, and how to use a tickler system. Due to the office manager's proximity to the student work station, she can observe students' administrative and interpersonal skills, providing such input as necessary to the clinic's faculty supervisor.

An appellate clinic, therefore, can provide a meaningful introduction to the various skills and responsibilities that accompany the effective organization and management of legal work. In this regard, as with the several other practical skills set forth in the MacCrate Report, appellate clinics give students a solid foundation for their professional development. Combined with their reinforcement of the analytical skills stressed in the first two years of law school, appellate clinics bridge the traditional law school experience of law from a casebook with the law practice experience of lawyering as a multifaceted art.

## V. MATTERS OF ETHICAL CHARACTER

### A. *Law as a Profession of Common Values*

Beyond becoming skilled in legal analysis and the various practical aspects of lawyering, the MacCrate Report further emphasizes that good lawyering has a lot to do with ethics and values. It is no exaggeration to say that ethical considerations pervade the entire SSV. Most directly, however, the Report addresses ethics in its tenth skill and across its four values. The Task Force used the following language in stating that lawyers should be skilled in recognizing and resolving ethical dilemmas: "In order to represent a client consistently with applicable ethical standards, a lawyer should be familiar with the skills, concepts, and processes necessary to recognize and resolve ethical dilemmas."<sup>319</sup> The Report elaborates on this statement by suggesting that lawyers should be adept at identifying ethical dilemmas,<sup>320</sup> properly diagnosing ethical problems,<sup>321</sup>

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318. See MACCRATE REPORT, *supra* note 4, at 201, § 9.4.

319. *Id.* at 203, § 10.

320. *Id.* at 206, § 10.3.

321. *Id.* § 10.3(c)(i).

researching the applicable ethical rules and principles,<sup>322</sup> and identifying solutions.<sup>323</sup>

Additionally, the Report identifies four values toward which all lawyers should aspire: providing competent representation to clients;<sup>324</sup> promoting justice, fairness, and morality within society;<sup>325</sup> striving to improve the profession;<sup>326</sup> and developing professionally as a lawyer.<sup>327</sup> With these four values, the Report endorses a vision of good lawyering that suggests lawyers owe duties of care and responsibility to their clients, society, the legal profession, and themselves.<sup>328</sup>

Some have criticized the values section of the MacCrate Report as superficial.<sup>329</sup> It may be. But despite its imperfections, the Report does emphasize the importance of ethics and values in the practice of law. It attempts to refocus the profession toward its public service role and directly challenges legal educators to take seriously their responsibility to train students in the values of the profession along with the skills of legal practice.

The MacCrate Task Force realized that competence in the law is not simply a matter of attaining proficiency in specific skills. In the words of the Report's namesake, "The Task Force recognized that lawyering skills alone will neither sustain a true profession, nor, without ideals, promote cohesion and pride in a profession among its members. A profession, to endure, must be supported by a common body of values to which its members aspire . . . ."<sup>330</sup>

To a great extent, the aspirational vision expressed in the MacCrate Report rests on the assumption that good lawyering requires a basic moral fitness of character. This consideration comes through poignantly both in the tenth skill and in the four values found in the SSV. Recognizing and taking care to resolve ethical dilemmas, as called for by the Task Force, requires a certain moral fitness of character. Moreover, the unifying consideration for the values listed in the Report is again that of moral fitness—that a good lawyer strives to fulfill the various professional obligations to client, society, profession, and self.

Law schools are not regarded by many as institutions of moral education. Yet many do see clinical education as an exception. In this regard, appellate clinics are particularly valuable. Nearly every student who has proceeded through the Idaho Appellate Clinic has grown ethically—both as a person and

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322. *Id.* § 10.3(c)(ii).

323. MACCRATE REPORT, *supra* note 4, at 206, § 10.3(c)(iii).

324. *Id.* at 207-10.

325. *Id.* at 213-15.

326. *Id.* at 216-17.

327. *Id.* at 218-21.

328. *See* MacCrate, *The Lost Lawyer*, *supra* note 21, at 616.

329. *See* Pierre Schalg, *Values*, 6 YALE J. L. & HUMAN. 219, 229-31 (1994).

330. MacCrate, *The Lost Lawyer*, *supra* note 21, at 615.



in the professional sense—through the experience of representing a formerly *pro se* litigant on appeal. This growth has come about through facing ethical issues directly and also, more generally, by developing a broader perspective on law as a public service profession.

### B. *Recognizing and Resolving Ethical Dilemmas*

Much has been written about how clinics are especially suited for teaching professional responsibility<sup>331</sup> and ethical decision-making.<sup>332</sup> Appellate student interns at Idaho deal with ethical issues throughout the year. At clinic orientation each fall, students hear a lecture on ethical issues and receive an office manual that in part focuses on the subject. Clinical faculty reinforce the importance of being attentive to ethical issues at one of the first large group clinic meetings. Subsequent clinic meetings address case specific ethical issues as they arise.

Real cases often present ethical dilemmas; and real cases are what clinic students handle. They experience first hand the tensions that sometimes arise in legal practice between furthering a client's goals and acting ethically according to the rules of professional responsibility.<sup>333</sup> They also encounter and must resolve conflicts that arise when a client's desired action falls within the bounds of those professional rules but stands at odds with their own moral values. The clinical faculty must be ready and able to mentor and guide the students through the various personal and professional issues that the real life experience of their internship presents.

Over the years, students in the Idaho Appellate Clinic have wrestled with a variety of ethical issues arising under the rules of professional responsibility. In one Ninth Circuit case, two students struggled over how far to push a client into accepting a proposed settlement. The appellee, a major corporation, had terminated the Clinic's client for poor work performance and spotty attendance. After reviewing the record on appeal, the students and their faculty supervisor concluded that the case lacked any real issues that could be briefed and argued

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331. See, e.g., Ronner, *In-House Appellate Litigation*, *supra* note 35, at 874-81; Robert A. Solomon, *Teaching Morality*, 40 CLEV. ST. L.R. 507 (1992). But see Robert Condlin, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER, LAWYERS' ROLES AND LAWYERS' ETHICS* 317, 326-27 (David Luban ed., 1984); Robert L. Doyel, *The Clinical Lawyer School: Has Jerome Frank Prevailed?*, 18 NEW ENG. L. REV. 577, 596 (1983).

332. See Joy, *supra* note 31, at 406 (claiming that "a rule oriented approach to teaching professional responsibility is perhaps the least effective way of teaching values or teaching professional responsibility."); see also O'Sullivan, et al., *supra* note 273, at 110 (discussing ethical decisions facing students and teachers); Schrag, *supra* note 44, at 184 (describing challenging ethical dilemmas students face in law school clinics).

333. See Joy, *supra* note 31, at 406 ("It is impossible to practice law without being confronted with professional responsibilities issues. Conflict of interest, client confidentiality, wrongfully withholding discoverable material, the pressure to permit a client to commit perjury, are all issues students confront in a real-client clinic.").

in good faith.<sup>334</sup> Appellee offered a nuisance value settlement. The Clinic students advised the client that his case lacked merit, that the settlement offer was very fair, and that the Clinic was reluctant to continue representation if the case did not settle. The client nevertheless rejected the offer.<sup>335</sup> Having been unable to persuade their client to accept the settlement, the students decided they had no choice but to withdraw as counsel.

Ethical decisionmaking encompasses far more, however, than reading the rules of professional responsibility.<sup>336</sup> It goes to the very core of how lawyers practice law. As suggested by the MacCrate Report, a good lawyer is not one who merely tries to do his or her best in representing clients, but one who also cares about justice, who embraces lawyering as an honorable profession, and who strives to grow professionally. In a clinical setting, students confront and discuss the emotional aspects of lawyering<sup>337</sup> and reflect on how their actions will affect their client, the opposing party, and the legal system.

Appellate student interns must learn to deal with their own emotions<sup>338</sup> and the ethical issues their feelings, likes, and dislikes may raise.<sup>339</sup> Sometimes it becomes necessary to confront their own prejudices and preconceptions,<sup>340</sup> a confrontation which at times is difficult to face. The emotional aspects of a case provide material for clinic meeting discussions that is far more powerful than any hypothetical case could possibly present. Students must ask soul searching questions about what they are doing,<sup>341</sup> why are they doing it, and how their

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334. See MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.1 (1995) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . .”).

335. See *id.*; MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.2 (a) (“A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.”).

336. See generally O’Sullivan, et al., *supra* note 273 (discussing ethical dilemmas facing students and teachers).

337. See *supra* note 275 and accompanying text.

338. See Robert Rader, *Confessions of Guilt: A Clinic Student’s Reflection on Representing Indigent Criminal Defendants*, 1 CLINICAL L. REV. 299 (1994) (reviewing a student’s personal decision to participate in the clinic, emotional reactions to it, the clients, and the adversarial system).

339. See MACCRATE REPORT, *supra* note 4, at 174, § 5.2(a)(iii) (addressing lawyers’ need to attend to emotional or interpersonal factors that may affect communication). See also Campbell, *supra* note 54, at 662 (describing how clinics provide a forum for students to deal with their emotions and to see the role emotions play in the development of legal arguments); Laser, *supra* note 1, at 265 (noting that in real cases students face ethical issues in their emotional context).

340. See *supra* note 286 and *infra* note 341.

341. One appellate student at Idaho wrote in her self-evaluation:

I think the most difficult part of this case was when [we] stumbled across the pictures of the crime scene. We had no idea that these were in the file, let alone in our house. It was about 10:30 at night and we were both tired (of course). It must have been shortly before we were going to Boise to meet [our client] because we wanted to see if we could find anything with his picture on it. We didn’t know what he looked like

personal biases and cultural backgrounds affect their ability to adequately represent their clients.<sup>342</sup> Thus, students and faculty work together through the ethical issues and begin to formulate the values which will guide the students in practice.<sup>343</sup>

### C. *Promoting Justice and Lawyering as a Public Service Profession*

The values section of the MacCrate Report reinforces the work of clinicians and the experiences students have in a live-client clinic setting. For most law students, law school is an intellectual endeavor devoid of the emotional side of lawyering. Students read cases about faceless people in order to learn to “think

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and were curious. While looking through the boxes I came across the packet of pictures. We thought they might be of [our client], I guess. I certainly had no suspicion that they would be of [the decedent]. Obviously, the pictures are very graphic. We both started crying when we saw what [she] looked like. I couldn't even look at most of the pictures. We didn't say much to each other that night—we both just went to our rooms. I don't even remember whether I went to bed that night. I just kept asking myself what it was that I was doing. . . . I felt as though I was helping to get some sort of monster out of prison. I almost felt evil myself, like I was doing something wrong. Through the entire course of the case I felt nothing like this. I was so confused and upset. So many hours had been spent on the facts and the legal issues that I had never really confronted the personal and emotional aspects of the case. Images of [the decedent's] shoes neatly arranged, blankets nicely stacked, and pictures her kids had colored kept intruding upon my thoughts. I actually prayed that I was not doing anything wrong by working on the case. I believe now that finding those pictures, as awful as it was, taught me some valuable things about myself and about my future career. I seriously struggled for several days, trying to find justification for what emotionally felt wrong. I knew, on an intellectual level, that I was protecting all of our rights by fighting for [my client]. I knew that he deserved the best defense we had to offer. On an emotional level, however, I felt I was doing something wrong.

A copy of the evaluation is on file with the author.

342. See MACCRATE REPORT, *supra* note 4, at 173, § 5.1(a). Ronner, *In-House Appellate Litigation*, *supra* note 35, at 873, (noting that some students have difficulty handling appeals for clients convicted of heinous offenses); see generally Schrag, *supra* note 44, at 182 (discussing cross-cultural awareness as a goal for some clinics).

343. See Wizner, *supra* note 7, at 714 (noting that law schools have the dual responsibilities to “both train students in the technical aspects of law and instill in them the responsibilities of the profession”).

like a lawyer.”<sup>344</sup> The Clinic paints a face on the cases.<sup>345</sup> Student interns confront non-textbook cases and take on the challenge of competently and ethically serving clients.

As teachers of future lawyers, clinical faculty must impart a sound vision of lawyering as a profession. This goes beyond skills training. Clinical faculty must model good lawyering<sup>346</sup> as they introduce their students to the public service aspect of the profession.<sup>347</sup> Robert MacCrate’s vision of the profession as “a client-serving, problem-solving public calling”<sup>348</sup> echoes Roscoe Pound’s nearly century old definition of professionalism as “pursuing a learned art as a common calling in the spirit of public service.”<sup>349</sup> In 1986, the American Bar Association Commission on Professionalism adopted this definition, concluding that, “The practice of law ‘in the spirit of a public service’ can and ought to be the hallmark of the legal profession.”<sup>350</sup> Similarly, the preamble to the Model Rules of Professional Conduct encourages every lawyer to think of him or herself as “a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>351</sup>

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344. See Michael Meltner, *Feeling Like a Lawyer*, 33 J. LEGAL EDUC. 624, 624 (1983) (claiming that educating students to “think like a lawyer” without considering the emotional content of lawyering can too easily result in the students developing into lawyers who are “controlling, cool, dispassionate, unfeeling [and] arrogant”).

345. See Ann Shalleck, *Constructions of the Client within Legal Education*, 45 STAN. L. REV. 1731, 1732-41 (1993) (discussing how clinics challenge the facelessness of traditional legal education, offering instead a “client-centered” approach to legal education).

346. See Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, *supra* note 95, at 3.

347. See Menkel-Meadow, *Legacy of Clinical Education*, *supra* note 33, at 567 (arguing that clinicians not only exert substantial influence over the ethical and professional development of their interns, but “by being in a position to critically observe a large and yet controlled number of interactions, have an ideal vantage point for reflection on the dynamics of the lawyering process and its implications for the legal system”).

348. See MacCrate, *The Lost Lawyer*, *supra* note 21, at 614.

349. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) (arguing that lawyering is “no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.”).

350. American Bar Association Commission on Professionalism, . . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 261 (1986); see generally MACCRATE REPORT, *supra* note 4, at 214-15 (discussing model values of the legal profession).

351. MODEL RULES OF PROFESSIONAL CONDUCT 5 (1995).

To speak of lawyering as a public service profession is to suggest that law is an integral part of civilized society. Law helps facilitate interactions across individuals and social institutions.<sup>352</sup> It permits peaceful resolution of conflict from the neighborhood to the national level.

To teach law from the perspective that lawyering is a public service profession requires treating knowledge of law practice as having equal importance to knowledge of substantive law in the abstract. Educating students about law practice initiates them into a fraternity that is far larger than its formal membership. Every member of a society plays a role in the society's legal life. The role of lawyers in the United States is one of trust, as officers and guardians of the law.<sup>353</sup> It is this concept of lawyering as a public service profession that underlies clinical legal education.

Additionally, many clinics have a strong social justice component.<sup>354</sup> Clinical faculty often believe that an important part of their job is to convey "a commitment to equal systemic access and ultimately equal justice."<sup>355</sup> Accordingly, they often purposefully engage their students in discussions about the inadequacy of legal representation for low income persons and the value of pro bono work.

While such dialogues may lie outside the scope of traditional legal education, they are hardly radical or new. The American Bar Association's Model Rule 6.1 encourages lawyers to perform pro bono services.<sup>356</sup> And the MacCrate Report stresses that lawyers are obligated to "Ensure that Adequate Legal Services are Provided to Those Who Cannot Afford to Pay for Them . . . [and] to Enhance the Capacity of Law and Legal Institutions to Do Justice."<sup>357</sup>

352. See Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 CLEV. ST. L. REV. 387, 393 (1992) ("The traditional curriculum fails to send students messages about the practice of law, as if practice were not important. It obfuscates the reality that law is about interactions among individuals in families, in neighborhoods, workplaces, schools, and communities; between groups of people, and between people and institutions, like corporations, churches and governments.").

353. See Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1695-96 (1993) (arguing that law schools should introduce students to the idea of "lawyer as a guardian of a fair and equitable legal system").

354. See Tarr, *supra* note 85, at 35-36 (discussing the role politics and social agendas have played over the years in clinics); Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469, 469 (1992) ("To many people, the relationship between clinical programs and the justice mission of American law schools is so clear as to be self-evident.").

355. Wizner, *supra* note 7, at 714.

356. MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 351, at 88-91 (advocating that every lawyer give at least fifty hours of pro bono legal services per year).

357. MACCRATE REPORT, *supra* note 4, at 213. See Schrag, *supra* note 44, at 182-84 (discussing teaching values and challenging students to consider how social class and education give them power and whether these privileges also impose on them an obligation to perform public service work). *But cf.* Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism"*,

As with most clinics originating with federal funds,<sup>358</sup> the Idaho Clinic only accepts low income clients who have had difficulty obtaining legal representation. Exposure to low income clients raises students' consciousness about the adequacy of legal services and the plight of the poor. It also challenges them to see life from a very different world view. Most law students at Idaho come from middle class backgrounds and have little prior experience with low income persons. Few have interacted regularly with felons. Yet since the majority of the cases handled by the Appellate Clinic are prisoner civil rights cases filed initially by the incarcerated litigants *pro se*, the students find themselves doubly challenged to get out of their own perspectives. The cases require them to at least try to see the world from the vantage point of relatively uneducated persons hailing from disadvantaged backgrounds who may well see crime "not as a possibility but as *the* possibility."<sup>359</sup> As one client wrote in his civil rights complaint, "Prior to the above incident, I have incarcerated myself numerous times . . . ."<sup>360</sup>

This cultural challenge causes the students to stretch themselves. It is also one of the primary reasons Idaho appellate students make every effort to visit their clients. For most students, these visits take them inside a penitentiary for the first time. Most have never spoken before to a person convicted of committing a major crime. Here they not only converse face-to-face with such a person, but they do so as that person's legal ally. Some students walk away from these visits as changed persons.

Some years ago, a politically conservative young law student, married to a police officer, represented a death row inmate in his efforts to have visitation with his new wife (the previous semester the Clinic had facilitated his marriage to his long term girlfriend). Mid-semester, the student and her faculty supervisor went to Idaho's maximum security prison to meet the client. Visitation with death row inmates is limited. A thick metal and plexiglass wall separates the client from his visitors. A speaker system is required for communication; a thin slot between the plexiglass and the metal allows legal papers to pass through. About halfway through the meeting, the student reached through the paper slot to touch the inmate's hand. When asked about this later, the student said through her tears that his humanness struck her and she felt he was probably starved for human contact.

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41 EMORY L.J. 403, 428-31 (1992) (advocating that a lawyer's responsibility for the adequate distribution of legal services is not a personal responsibility but creates an "enabling" responsibility to foster wider distribution of legal services which may be fulfilled by payment of a tax or special fee).

358. See 20 U.S.C. § 1134(u) (Supp. 1996); 34 C.F.R. § 639.11(b) (1996) (giving priority to low income persons who have difficulty gaining access to legal services).

359. JAMES BALDWIN, *THE FIRE NEXT TIME* 21 (1963).

360. A copy of the complaint is on file with the author.

In addition to providing critical skills and value training for law students, appellate clinics materially benefit the legal profession in other more material ways. Clinical representation of *pro se* litigants with potentially meritorious cases enables appellate courts to decide fully briefed cases. Appellate clinics also participate in the development of new law,<sup>361</sup> sometimes bringing recognition to the institution and the individual students in published opinions.<sup>362</sup>

Although appellate clinics cannot rid the world of discrimination and bias, they give students an opportunity to work with clients who often come from socio-economic cultural settings very different from their own typically middle to upper middle class backgrounds. The Clinic is a forum where students' biases and prejudices frequently surface and serve as a basis for fruitful discussions.<sup>363</sup> Whether we want to admit it or not, discrimination is still pervasive within American society, within the legal profession,<sup>364</sup> and within law schools.<sup>365</sup> Clinical offerings, including appellate clinics, provide the most meaningful experience most law students will have to encounter and reflect upon issues of fairness, diversity, and social justice.

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361. See *Vignolo v. Miller*, 120 F.3d 1075, 1075 (9th Cir. 1997) (applying the doctrine of "unconstitutional conditions" in a prison environment). See also *Smith v. Noonan*, 992 F.2d 987 (9th Cir. 1993); *Mendoza v. Blodgett*, 960 F.2d 1425 (9th Cir. 1992) (defining the due process rights of prisoners under the Washington Administrative Code). In a recent Idaho Clinic case, the Idaho Supreme Court held that the lack of a judicial signature on a warrant will invalidate the search if the defect is discovered and not corrected. *State v. Mathews*, 934 P.2d 931 (Idaho 1997).

362. The University of Idaho's state appellate work has always resulted in published opinions and several of the Ninth Circuit cases have also resulted in published opinions. In three published Ninth Circuit decisions, the Court complimented the students' performance in the decision. *Mendoza*, 960 F.2d at 1433 n.7; *Noonan*, 992 F.2d at 987 n.1. Similarly, in two recent unpublished Ninth Circuit cases, the court complimented the students' work. See *Curnow v. WSP Medical Staff*, 110 F.3d 67, 67 n.1 (9th Cir. 1997); *Whitfield v. Fresno County Detention Facility*, 110 F.3d 72, 72 n.1 (9th Cir. 1997).

363. MACCRATE REPORT, *supra* note 4, at 216. See generally Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1512 (1991) (arguing that matters of racial justice, both past and present, are an indispensable part of minimal cultural literacy for American lawyers and legal scholars).

364. See, e.g., MACCRATE REPORT, *supra* note 4, at 217; Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 847-65 (1995) (discussing the demographic openings for women and persons of color in the legal profession and how race and gender influence career choice); MacCrate, *The Lost Lawyer*, *supra* note 21, at 601 (discussing the opening of the legal profession to women and minorities and concluding, "[t]he goal of equal opportunity within the profession is still a long way from realization"); Mairi N. Morrison, *May It Please Whose Court?: How Moot Court Perpetrates Gender Bias in the "Real World" of Practice*, 6 UCLA WOMEN'S L.J. 49, 52 n.7 (1995) (providing a fairly comprehensive overview of some of the literature on this topic).

365. See, e.g., Lani Guinier, et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Morrison, *supra* note 364, at 78; Robert F. Seibel, *Do Deans Discriminate?: An Examination of Lower Salaries Paid to Women Clinical Teachers*, 6 UCLA WOMEN'S L.J. 541 (1996).

### D. *Developing as a Lawyer*

Numerous studies and symposia over the years have emphasized the need to improve lawyer competence.<sup>366</sup> As I have suggested throughout this Article, lawyer competence—both in the sense of basic skills and of ethically fit character—is the centerpiece of the MacCrate Report and of the clinical appellate experience. Most law students enroll in the Clinic with minimal practical experience, lacking the ability to competently represent anyone.<sup>367</sup> Through hard work and faculty guidance, they begin to develop the rudimentary skills and values necessary for competent and ethical representation.

Along the way toward gaining basic lawyering competence, students in an appellate clinic inevitably grow in their sense of confidence. Many students find law school demoralizing. The tense atmosphere of the typical law school classroom chips away at the self-confidence of all but the most self-assured and brightest students.<sup>368</sup> For many, appellate courts are distant, looming, mysterious realms which somehow issue edicts in the form of the cold, impersonal opinions reprinted in their casebooks. The students see themselves as no match for such an imposing process. Perhaps the most rewarding aspect of teaching in an appellate clinic is that of watching students evolve and grow as they confront the process through their brief writing and oral arguments. Careful guidance and a supportive attitude from their faculty supervisor usually

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366. See, e.g., CRAMTON REPORT, *supra* note 75; REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS OF THE ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (1979); *The American Bar Association's National Conference on Professional Skills and Legal Education*, 19 N. M. L. REV. 1 (1989); Robert Dinerstein, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508 (1992); Lawrence M. Grosberg, *Introduction: Defining Clinical Scholarship*, 35 N.Y.L. SCH. L. REV. 1 (1990).

367. See Elliot M. Burg, *Clinic in the Classroom: A Step Toward Cooperation*, 37 J. LEGAL EDUC. 232, 247-48 (1987) ("The vast majority of students I have supervised over the years have come to their clinical work with only the barest understanding of what lawyering entails, little inclination toward self-reflection, limited client-centered skills, and a tendency to be overwhelmed by facts.").

368. Much has been written about the physical and psychological effects of law school. See, e.g., G. Andrew H. Benjamin, et al., *The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 225 (detailing empirical study of emotional stress in law students and lawyers); B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 660-64 (1991) (calling for generalized courses in problem solving in order to reduce stress); Guinier, et al., *supra* note 365, at 4, 42 (reporting that many women at the University of Pennsylvania College of Law found the Socratic method used in large law school classes to be alienating, with some women reporting that they felt as if their voices had been "stolen" from them in their first year of law school); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121 (1994); Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968) (detailing the social and psychological characteristics relating to student expectations and preconceptions).



translates into an impressive growth of confidence in student interns.<sup>369</sup> Several times appellate courts have verbally complimented students from the Idaho Appellate Clinic. The Ninth Circuit has praised the performance of several students in its opinions.<sup>370</sup> Several students have received letters from courts commending them on their performance. These external recognitions bolster the students' confidence in themselves and in their ability to competently and persuasively handle complex legal issues.

Appellate clinics further foster the MacCrate Report's value of professional self-development<sup>371</sup> in other ways. Students come to recognize their own limitations<sup>372</sup> and their need to ask for help.<sup>373</sup> They also seek out and take advantage of opportunities to improve their knowledge and skills.<sup>374</sup>

The evaluation process used in the Idaho Appellate Clinic works to ensure that the students develop a lasting framework for dealing with the crucial task of client representation.<sup>375</sup> Students learn how to critically assess their own performance<sup>376</sup> and to respond to constructive feedback from supervisors, office staff, peers, and an array of faculty in a non-defensive manner.<sup>377</sup>

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369. Several of the highlights in my experience at the Idaho Clinic include: one very average student threw himself head long into his brief and at the end beaming with pride, said, "This is my work. Sure you helped guide me but I wrote it." Another student who came to my office several times in tears overwhelmed with the project and overcome with her own self-doubts, at the end exclaimed, "I know more about a particular evidentiary issue than Professor [X] who teaches it."

370. See *supra* note 362.

371. See MACCRATE REPORT, *supra* note 4, at 218-19.

372. See MACCRATE REPORT, *supra* note 4, at 208-09, § 1.2(d) (addressing problems which impede or impair one's ability to provide competent representation); *id.* at 208, § 1.1(c) (stressing the need to "[d]evelop [ ] a realistic sense of the limits of the lawyer's own skills and knowledge"); *id.* at 209-10, § 1.3(a)(ii)(B) (discussing the importance of advising the client of one's limits and how one intends to overcome those limits).

373. See *supra* notes 116, 318, and accompanying text.

374. See *supra* notes 42, 97, 159. Students also attend relevant CLE programs. In the fall of 1996, fourteen clinic students attended a CLE on Appellate Advocacy in the 1990's.

375. See Jonathan Ben-Asher & Mary Marsh Zulack, *Litigation and Non-Litigation Clinics with Real Clients: How Do Clinicians Ever Know What Goes On in Client Interviews, and What Could They Do If They Did Know?*, outline contained in the AALS Conference on Clinical Legal Education, 27, 28 (June 4-8, 1994); Laser, *supra* note 1, at 255-68 (suggesting that learning the "art of lawyering" is best done in a "reflective practicum," such as live-client clinics).

376. See MACCRATE REPORT, *supra* note 4, at 218-19 § 4.

377. Few students complain about the lack of feedback. Pamela Samuelson, who teaches legal writing tells her students:

It is unlikely that anyone will ever have read your papers with as much care as I do. Whatever else you may feel about getting my comments, you are unlikely to feel neglected. However good your paper is, you are likely to get extensive comments from me. It is important that even the best students know how much further they could develop their analyses. The extensiveness of my comments should be taken not as a sign of my displeasure, but as a sign of how engaged I've become in your work and as

The Idaho Clinic provides feedback through a variety of means with the objective of encouraging students to not only improve their work, but to develop a self-reflective mode of operation.<sup>378</sup> One method the Appellate Clinic uses is a self-evaluation process, where students critique their own final oral and written work. Following each critical juncture in the appellate process (e.g., brief writing and oral argument), a student answers a series of written questions eliciting a self-evaluation of his or her performance. The clinical supervisor completes the same evaluation form. The supervisor and the appellate student intern then meet to discuss the performance.<sup>379</sup> The objective of this evaluation method is to instill in the students an attitude of reflective self-critique, leading them into a career of continuous professional growth. Moreover, self-reflection encourages them to understand the specific skills they have developed in completing an assignment, and to extrapolate from their experience the valuable skills involved for use in other applications.<sup>380</sup>

## VI. CONCLUSION

Appellate clinics alone cannot resurrect the legal profession's good name or instill ethical values in law students. They are, however, a good starting point. Clinical settings in general give law students the opportunity to truly face

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an indicator of how rich are the opportunities for further exploration.

Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. PITT. L. REV. 149, 168 (1984).

378. See MACCRATE REPORT, *supra* note 4, at 218-19, § 4.1(a); Tarr, *supra* note 85, at 969-83 (arguing that assessment skills are critical for students after they graduate from law school).

379. See Phelps, *New Legal Rhetoric*, *supra* note 93, at 1096.

Evaluation, however, is not merely a search for an error-free document, as it tended to be under the current-traditional paradigm. A written product is good because it achieves what the writer set out to do. The document produces the action or change the writer intended, and it is appropriate for its particular audience. A document, therefore, could be free of technical errors and still not be good because it uses language inappropriate to influence its reader to act in a certain way.

*Id.*

380. See MACCRATE REPORT, *supra* note 4, at 219, § 4.1(a)(ii); Ronner, *In-House Appellate Litigation*, *supra* note 35, at 867-68 (“[A]ppellate work, by its very nature, encourages self-consciousness—so much that the whole process of working on an appeal transforms itself into a doingness theory where the participants emerge with general propositions not just about the appellate process, but about practice and life itself.”); Committee on Appellate Skills Training, *supra* note 31, at 140 (summing up the essential appellate skills, noted that the “benefits of the development of writing and oral argument skills in preparation for appellate litigation are not limited to that one type of practice. The ability to write and argue clearly and precisely are skills necessary to any lawyering function and thus have a broader impact than simply improving appellate litigation”); see also SCHÖN, *supra* note 185, at 26-36 (emphasizing the advantage of teaching through “reflection-in-action”).

lawyering as a profession, as *the profession* they will soon be entering. Appellate clinics in particular teach a broad array of skills and challenge students to evaluate their own goals—both professional and personal.

It was out of a concern over the professional and personal well-being of lawyers—over their professional competence, ethical fitness, and personal dissatisfaction—that the MacCrate Task Force was formed in 1989. The Report it issued some three years later challenges law schools and the legal profession in general to improve the competency and overall professional fitness of the practicing bar. The skills and values set forth in the Report constitute a noble vision of professionalism toward which all lawyers should aspire, a vision that rekindles Roscoe Pound's concept of lawyering as a public service profession.<sup>381</sup>

As emphasized in the MacCrate Report, much of the responsibility for revitalizing lawyer professionalism must fall on legal educators.<sup>382</sup> Law schools must instill in their students the value of professionalism in its truest sense.<sup>383</sup> Law schools have proven to be very capable of teaching analytical skills. It is now time to go beyond educating students in the "law" as if it were an abstract science rather than, as Judge Frank once put it, "a miserably ambiguous word."<sup>384</sup> We in legal education must prepare our graduates to be "lawyers" in the fullest professional sense. This means lawyers who are not only skilled analytically and practically, but lawyers who understand and care about the values of the profession and their responsibilities to their clients, society, the profession, and themselves.<sup>385</sup>

Appellate clinics are uniquely designed to lay the foundation for this concept of professionalism. Appellate clinics introduce in a meaningful way all the skills and values thought by the MacCrate Task Force to be central to the competent and ethical practice of law. In an appellate clinic, law students learn to apply in a real life context the analytical skills they encountered previously in their textbooks. In addition, students come to appreciate the breadth and the importance of the various practical skills they will need to acquire in order to apply their analytical skills in the actual practice of law. Moreover, for most students, an appellate clinic either solidifies or lays the foundation for ethical

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381. See *supra* note 349 and accompanying text.

382. See D'Alamberte, *supra* note 25, at 5.

383. See *id.*

384. See FRANK, *COURTS ON TRIAL*, *supra* note 195, at 228.

385. Numerous articles have been written about lawyers' quality of life issues. See, e.g., Fox, *supra* note 6, at 544 (addressing quality of life issues in legal practice and suggesting more firms adopt sabbatical programs to help lawyers "recharge their batteries"); Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621 (1994) (focusing on the culture-clash between the practice of law as a business and quality of life issues and advocating limited and flexible work hours, alternative billing practices, and a move toward a more humane practice of law in the 21st century).

lawyering. Live client cases raise actual ethical concerns and force students to look at their cultural and professional values. Applying legal theory in the real world pushes them to develop more than a technical understanding of law, such that they come to see the human side of lawyering practice.<sup>386</sup>

If we in the legal profession, particularly we in legal education, put our minds to it, the profession of law can be revitalized in the twenty-first century. The MacCrate Report signifies an important chapter in this revitalization. For legal educators the challenge is to restructure the law school curriculum to meet the real demands of lawyering as a profession. This is not to say that law schools should simply become trade schools. Rather, it is an acknowledgment that lawyering is an art that cannot be learned entirely out of a book. A full legal education requires a healthy blend of theoretical and practical learning. Appellate clinics provide that mix, and thereby contribute importantly to the revitalization of the profession by helping set a firm foundation for good lawyers.

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386. See Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 429-30 (1970) ("If those who control legal education believe that students should develop human relations skills in law school, then the legal clinic is the single best vehicle for doing so.").

