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Learning business law by doing it

Real transactions in law school clinics

By Eric J. Gouvin

Some say you can only learn to be a lawyer by practicing it — for real. That's what business law clinics in law schools are all about.

In the past 10 years, an innovative approach to teaching business law has been gaining momentum in law schools across North America — clinical education for aspiring business lawyers. From small cities like Ithaca, N.Y., and Springfield, Mass., to large metropolitan areas like Chicago, Washington and Philadelphia, law schools are recognizing that clinical education, long an important tool for training litigators, can be adapted for the transactional setting with impressive results.

Since the issuance of the MacCrate Report in 1992, law schools and law firms have debated how best to prepare students to practice law. Many in legal academia believed the report's emphasis on skills training clashed with law schools' emphasis on theory and doctrine. Some law professors suggested that real skills training could only take place in law firms as part of a structured apprenticeship program.

Firms responded by noting that they lacked the pedagogical expertise and resources to run rigorous training programs, especially given the economic pressures of modern law practice. In short, the academy and the bar could not reach a consensus on how to educate new lawyers. One thing that both law professors and lawyers agreed on, however, was that actually *practicing* law is a lot different from *reading about* practicing law.

The disconnect between law school and practice seemed especially severe in the business law area. Responding to this dilemma, a number of law schools developed a new generation of clinical programs as a way for law students to truly appreciate the role of the business lawyer.

While some of these programs predate the MacCrate Report (for instance, George Washington University School of Law's clinic was founded in 1977 and the University of Pennsylvania's in 1981), most of the 20 or so small business clinics have been founded in the past 10 years, with more being formed each year, such as the current pilot program at Michigan State University/ Detroit College of Law.

The pedagogical models for business clinics vary widely from school to school, but a typical business clinic course consists of several components, including representing clients, meeting with a clinic supervisor, participating in classroom instruction, and maintaining a journal. Obviously, the most important part of the mix is the representation of clients since performing legal services for a real client is the hallmark of clinical education.

Client contact, together with all the trappings of the attorney-client relationship, sets clinical instruction apart from classroom instruction. Clinic students take responsibility for all aspects of representing their clients including scheduling meetings, drafting legal documents, consulting on the phone, maintaining files, and keeping clients abreast of their work and progress.

Students who have participated in small business clinics agree that representing a real client instead of a simulated or hypothetical one makes all the difference. "Experiencing the challenges and joys of working with a client is what makes lawyering real," says Aimee Munnings, who participated in the Small Business Clinic at Western New England College School of Law in Springfield, Mass., "That's what made the clinic so valuable for me."

One of the benefits of client contact is the effect it has on changing the perspective of the law students to make them appreciate that, from the client's view, the world does not revolve around the legal issues. The clinic forces law students to understand their clients' *business* needs. In many cases, clients find the law to be an obstacle to what they want to do; in the clinic students are pushed to find ways to help the clients overcome that obstacle.

In the parlance of legal educators, the interactions with clients provide many "teachable moments" that highlight the challenge of integrating classroom theory with law practice. The learning process begins with an initial client interview. Often students are videotaped as they work through their first client meeting so they can review the interaction with the instructor afterwards. Although most students initially feel they did a good job with the interview, after going over the tape they often find they failed to ask key questions or to pick up on the client's nonverbal communication.

Most clinical programs are premised on the idea that business lawyers must not only master the legal knowledge and analysis necessary for competent performance, but they must also understand the needs of their clients, the underlying business, and entrepreneurship in general. The initial client interview can be a real eye-opener for the students in this regard. Because their legal education has focused on the primacy of law, the students have to be re-educated to start their relationship with the client by learning a great deal of nonlegal information about the business, such as what it does, how it makes money, and what its short- and long-term goals are.

Many clinics use a "law firm" model where the professor acts as the partner and the students play the role of associates. Others have a model where students are placed with existing law firms and supervised by lawyers practicing with those firms. Some charge modest fees, while others are free. Regardless of whether they are billing for their time, most business clinics require their students to maintain timesheets and submit bills.

Even where the legal services are pro bono, preparing a bill is an educational experience for both the law students and the clients. Law students, of course, need to get in the habit of keeping track of their hours in order to bill out their time when they practice. The business owners benefit from the mock bills by gaining the understanding that legal services cost money — and that they will eventually have to pay for them down the road.

Providing legal services to clients is the centerpiece of the educational project in the clinic. Opportunities for learning arise in many situations — the ethical dilemmas involved in multiple client representation, the professionalism aspects of how to conduct a client interview, the substantive knowledge of the legal matters presented, and the cultural understanding of what it means to be a business lawyer.

Actually performing the legal work teaches lessons that are simply not available in the classroom. "Perhaps one of the best learning experiences the students receive in the clinic is the opportunity to work with various governmental agencies," says Joseph Stone, director of the Business Law Center at Loyola University Chicago School of Law. "They get first-hand experience in how frustrating it can be to deal with certain government bureaucracies, and they learn the importance of professional skills like patience and diplomacy in reaching their goals."

The experience in the clinic pays dividends for the students when they enter the profession. Stone notes that former students currently in practice regularly report to him that they got more useful information and skills from the clinic than from any other course in law school. Similarly, on-campus interviewers for law firms often remark to clinic participants that they wish they had had a course like the clinic when they were in law school since much of what was covered in the clinic took a long time to learn on the job.

The underlying philosophy of most programs is that business lawyers should always strive to be problem solvers. They should also appreciate that they are part of a team of professionals that business owners need to make their ventures successful. Sometimes the members of that team do not speak the same language, especially when law students have to deal with "MBA types."

To overcome the cultural divide between business professionals and legal advisers, some law clinics are joint ventures between an institution's law school and business school. Indeed, some clinics, such as the Entrepreneurial Legal Services Clinic at the University of Missouri Kansas City, are part of larger "entrepreneurship centers" housing many governmental and private business support organizations and perhaps a small business incubator.

Although client representation lies at the heart of the clinic, the most significant teaching often occurs not in the classroom or the conference room, but in the clinical professor's office where the student and instructor work closely to review draft documents and to brainstorm about approaches to a client's problems.

Although state practice rules for law clinic participants are typically written with the litigation-based clinic in mind, business clinic instructors often obtain the necessary court approvals for their clinic students just the same. Nevertheless, because the students are not admitted to the bar, their work must be reviewed and approved by an individual who is licensed. The one-on-one meetings between a clinic supervisor and a student lawyer are very labor intensive and time consuming, but the payoff for the students can be great.

While each client has some specific needs, there are many legal matters common to all small businesses. Therefore, in addition to the client representation and supervisor meetings, the clinics typically include a classroom component where students are exposed to a survey of substantive business law topics. The classroom component usually is not carried out in typical law school style.

According to Thomas Morsch, director of the Small Business Opportunity Center at Northwestern University School of Law, "While the Socratic method is a wonderful way in which to introduce students to legal concepts and teach them the fundamentals of legal reasoning and analysis, it is not particularly effective in teaching students what they will need to know to handle a corporate or commercial transaction." To make sure the classroom sessions are up to date and relevant, many clinics rely on expert guest lecturers from the bar and business community to bring a real world perspective on the topics covered in class.

Classroom instruction in those areas where small businesses predictably have concerns helps law students get the lay of the land. The most common legal matters involve establishing an appropriate business entity, preparing form

contracts for use with customers or vendors, searching and registering trade names, drafting employment contracts, and reviewing leases. In some clinics, clients have needed legal assistance with venture capital financing. For clinics that handle nonprofit organizations, the preparation and handling of applications for tax-exempt status is a high priority.

Unlike the more traditional clinical programs at most law schools, however, the vast majority of business clinics expressly exclude litigation from the list of services they provide.

Most instructors stress that participation in the clinic actually involves the practice of law, and all of the demands that go along with it. The courses are designed to be a bridge between law school and law practice. An important lesson students need to learn is that in practice lawyers must teach themselves about the law on a continuing basis. The clinics get students into the practice of doing that. Because the actual needs of a given client can never be known ahead of time with certainty, the classroom instruction does not always coincide with the matters the students are handling in the clinic. Indeed, students, like lawyers, often find themselves in a crash course tutorial as they learn how to address an actual problem.

Many instructors require students to maintain journals to record their impressions of law practice. The journals provide a starting point for a reflective discussion in class or during office hours about the inter-relationship of aspirational goals and the reality of law practice and the lesson one learns in reconciling the two.

Of course, one of the important lessons for any business lawyer is the appreciation of the fact that legal services must create value for the client. Small business clinics do create value for small business owners. Dina Schlossberg, clinic supervisor and lecturer at the University of Pennsylvania's Small Business Clinic, observes that the clinic "lifts the burden for clients because they want to focus on their mission instead of on the paperwork."

When clients hand off legal matters to law students so the business people can do what they do best, the business clinics create win-win situations for the law schools and the clients being served. For example, Banana Publishing Inc. (BPI), a publisher of specialty telephone directories and a client of the Small Business Clinic at Western New England College School of Law, asked its student lawyers to review copyright matters, especially those pertaining to photographs BPI may want to use on its covers. "I think this is a great program," said the president of BPI, Stephen Cosenke. "This is going to benefit our company and the students."

The clinics also create value by allowing clients to avoid problems down the road. According to Zachary Shulman, J. Thomas Clark Senior Lecturer of Entrepreneurship at Cornell's Johnson School of Management, "Often, it is not in the budget of a start-up company to hire legal counsel; instead clients seek counsel only after problems arise. By using programs like Cornell's Entrepreneurship Legal Services, clients can take advantage of affordable legal services to be proactive and avoid potential legal pitfalls and traps."

Dina Schlossberg at Penn agrees, saying "the clinic serves a population of clients who otherwise would not be served." Indeed, many clinicians report that their programs' community outreach provides a way for their law schools to "do well by doing good." The societal payoffs are sometimes surprising. For example, the Small Business/Nonprofit Clinic at Hamline University School of Law in Minneapolis helped with the legal work to establish a mobile medical clinic in India, whose founder (the clinic's client) was inspired by a meeting with Mother Theresa. In many clinics, the societal benefit is part of a plan to promote social justice by assisting the development of poor communities.

Business clinics in general focus their efforts on clients who are not otherwise being served, so they can avoid the charge that they are taking paying clients away from working lawyers. Many, like the clinic at George Washington, serve clients that are best described as "microbusinesses" employing from one to five persons with less than \$5,000 in start-up capital. With demand for legal services far outstripping supply, however, many business clinics maintain long waiting lists.

Even when a client gets to the top of the list, the clinic may not be able to take the matter. As Susan Jones, director of the Small Business Clinic/Community Economic Development Project at The George Washington University Law School, sees it, "whether we can accept a case depends on a variety of factors such as the complexity of the matter, the size and variety in our case load, and whether the client has a business plan." In other clinics case selection can also be affected by the politics of alumni and bar relations.

As the business clinic movement continues to build steam, legal educators are beginning to see that it is an excellent vehicle for inculcating the values and practices that business lawyers hold dear. Business clinics may help students better appreciate the challenges of business lawyering, which they sometimes misunderstand as merely a forms practice. By putting students in the middle of real transactions, they gain a deeper understanding of the subtleties of making a transaction come together. "Once it's done, it looks so simple — but it's the making of the deal that presents the difficulty," notes Schlossberg of Penn. "Without seeing the deal, the students don't know how much of an art business lawyering can be."

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