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# DEVELOPING A LAW / BUSINESS COLLABORATION THROUGH PACE'S SECURITIES ARBITRATION CLINIC\*

*Jill I. Gross\*\**

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## INTRODUCTION

This article details an interdisciplinary collaboration between the Securities Arbitration Clinic at Pace Law School ("SAC") and the graduate program at Pace University's Lubin School of Business, designed and initiated by the authors. The purpose of the collaboration is to provide a co-curricular learning experience to both J.D. and graduate business students<sup>1</sup> while enhancing the *pro bono* legal services delivered by SAC to its clients. Part I of this article details the history of SAC before the authors initiated the collaboration, and the reasons SAC needed financial expertise. Part II of this article describes models of interdisciplinary collaboration, particularly between law and business degree programs, that the authors explored and considered before designing their own model. Part III explains the collaborative model adopted by SAC, and identifies the goals, benefits and limits of the

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1. The business students are typically M.B.A. candidates majoring in Finance, or else candidates for an M.S. in Personal Financial Management.

chosen model. Finally, in Part IV, the authors offer guidance for other schools considering a similar collaboration. Part IV also illustrates how the authors' model meets the multiple needs of clients, law students and graduate business students.

## I. BACKGROUND OF COLLABORATION

### A. History of the Securities Arbitration Clinic

SAC is a clinical law program in which students, for academic credit<sup>2</sup> and under the supervision of law faculty, provide free legal assistance to small investors who have arbitrable disputes with their securities brokerage firms, but who are unable to obtain legal representation because of the small amount of their claims. Pace opened SAC in 1997<sup>3</sup> after Arthur Levitt, former Chairman of the Securities and Exchange Commission, reached out to law schools in the Northeast to increase the accessibility of legal counsel to small investors.<sup>4</sup> Although

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2. J.D. students receive one academic credit per semester for the seminar component of the clinic, and between one and three clinical credits per semester for work on their cases, depending on the time commitment the students can make to their case work. For more information, see <http://www.law.pace.edu/jjls/clinic.html> (last visited Nov. 2, 2005).

3. Professor Barbara Black, of Pace Law School, was the first law professor in the country to respond to Chairman Levitt's overture by opening Pace's Securities Arbitration Clinic in 1997. The following year, both Fordham and Brooklyn Law Schools opened similar clinics, followed by Buffalo Law School in 1999. For a more extensive description of the history and early years of Pace's clinic, see Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000). See also Romaine L. Gardner, *The First Four Years: The Securities Arbitration Clinic at Brooklyn Law School*, in SECURITIES ARBITRATION 2002 at 507-515 (David E. Robbins Chair, PLI 2002); Constantine N. Katsoris, *Securities Arbitration: A Clinical Experiment*, 25 FORDHAM URB. L.J. 193 (1998) (documenting experiences at other "first generation" clinics).

4. See Black, *supra* note 3, at 37; Press Release, Securities Exchange Commission, SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors - Levitt Responds To Concerns Voiced At Town Meetings (Nov. 12, 1997), available at <http://www.sec.gov/news/press/pressarchive/1997/97-101.txt> (last visited June 15, 2005). Chairman Levitt's focus on investor protection alerted him to the lack of fairness in arbitration because small investors, whose claims were too small to make it cost-effective for a lawyer to take the case, were faring poorly without legal representation. He concluded that one solution was to use the vehicle of the law school

the SAC program at Pace started small (with one faculty supervisor and six law students), heavy student and client demand, coupled with a generous grant from the New York State Attorney General's Office,<sup>5</sup> has fueled the expansion of the clinic.<sup>6</sup> Currently, the clinic has three faculty supervisors,<sup>7</sup> each devoting a portion of their teaching time to the clinic, and anywhere from eight to ten upper-level J.D. students each academic year.<sup>8</sup>

SAC's clients are small investors who meet SAC's eligibility

clinic to deliver legal services to these small investors. *Id.*

5. See Press Release, Office of New York State Attorney General, Telecom Executive Agrees to Give Up IPO Profits (May 13, 2003), *available at* [http://www.oag.state.ny.us/press/2003/may/may13b\\_03.html](http://www.oag.state.ny.us/press/2003/may/may13b_03.html) (last visited June 15, 2005). This May 2003 grant led to SAC's fall 2003 launch of the Pace Investor Rights Project, which sponsors advocacy, research and educational programs in the area of investor justice. See, e.g., Press Release, Pace Law School, Pace Law School Received \$200,000 Grant to Launch the Pace Investor Rights Project (Sept. 8, 2003), *available at* <http://www.law.pace.edu/news/2003/SAC-Sept-2003.html> (last visited June 15, 2005).

6. Pace's success with SAC led to the creation of additional SACs, primarily in New York State. Currently, there are twelve Securities Arbitration Clinics nationally. In addition to Pace, Fordham, Brooklyn, and Buffalo, in 2001 a clinic opened at Duquesne Law School ("Securities Arbitration Practicum"), in 2002 at University of San Francisco School of Law ("Investor Justice Clinic"), in 2004 at Albany, Cardozo, Syracuse, and St John's Law Schools, and in 2005 at Touro and New York Law Schools. The 2004 explosion is due primarily to grants awarded by the New York State Attorney General stemming from settlements obtained from defendants in securities fraud enforcement cases brought by the office. See Press Release, Office of New York State Attorney General, Former Telecom Executive Agrees to Turn Over IPO Profits (Dec. 4, 2003), *available at* [http://www.oag.state.ny.us/press/2003/dec/dec04b\\_03.html](http://www.oag.state.ny.us/press/2003/dec/dec04b_03.html) (last visited June 15, 2005); Press Release, Office of New York State Attorney General, Telecom Executive Agrees to Give Up IPO Profits (Oct. 9, 2003), *available at* [http://www.oag.state.ny.us/press/2003/oct/oct09a\\_03.html](http://www.oag.state.ny.us/press/2003/oct/oct09a_03.html) (last visited June 15, 2005); Press Release, Office of New York State Attorney General, Telecom Executive Agrees to Give Up IPO Profits (May 13, 2003), *available at* [http://www.oag.state.ny.us/press/2003/may/may13b\\_03.html](http://www.oag.state.ny.us/press/2003/may/may13b_03.html) (last visited June 15, 2005). In 2005, the Albany clinic closed but Northwestern University School of Law opened its Investor Education Center, following a grant from the NASD Investor Education Foundation. See <http://www.law.northwestern.edu/investorprotection> (last visited November 16, 2005).

7. Along with co-author Professor Gross, Professor Barbara Black and Adjunct Professor Richard B. Dannenberg currently are the other faculty supervisors in the clinic.

8. The number of students selected for the clinic depends on student interest, case load, and the number of clinical credits that each student wants to register for in each semester.

standards.<sup>9</sup> Once the students preliminarily determine that the client is eligible for representation, they initiate a detailed investigation of the client's claim of wrongdoing to evaluate its legal viability and evidentiary strength. This investigation typically includes telephonic and in-person interviews of clients, factual and legal research, a review of account documentation, and, where appropriate, witness interviews. The typical claims that customers allege revolve around sales practice violations by brokers, including unsuitable recommendations, churning, unauthorized trading and misrepresentations.<sup>10</sup>

If the clinic determines the claim has merit, *i.e.*, one with a reasonable chance of resulting in *some* financial recovery through arbitration, and the client accepts the clinic's offer of representation,<sup>11</sup> students then draft a Statement of Claim to file with either NASD Dispute Resolution (NASD-DR), or the New York Stock Exchange (NYSE) Arbitration Department, the two primary dispute resolution forums for customer-broker disputes in the securities industry.<sup>12</sup> After

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9. These standards ensure that the clinic provides legal assistance to only those clients who could not obtain a lawyer privately. To be eligible for SAC's services: (1) the client's household annual income should not exceed \$75,000; (2) the claim should not exceed \$50,000; (3) the client should not have any major assets except a primary residence and a car; (4) the client should have consulted three attorneys who have declined to offer representation because of the amount or nature of the claim, or a legal referral service certifies that the client is unlikely to obtain representation on a contingency basis; and (5) the client should have resided in the New York metropolitan area during the time of the challenged transactions. Preference is given to senior citizens. SAC's eligibility criteria and questionnaire are available for download at Pace Law School's website, at [http://www.law.pace.edu/jjls/securities\\_arbitration\\_clinic.htm](http://www.law.pace.edu/jjls/securities_arbitration_clinic.htm) (last visited June 15, 2005).

10. For a more detailed description of these common customer claims, see Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1008-1013 (2002). Other claims the clinic has investigated include wrongful withholding of interest, failure to execute a customer's order, improper margin liquidation and mishandling customer funds.

11. During an academic year, SAC handles almost one hundred preliminary inquiries, investigates more than thirty cases in detail, and offers formal representation to approximately five to ten clients each year. The clinic does not charge legal fees for its services, but investors are directly responsible to the arbitration forum for all costs other than legal fees, such as filing and hearing fees, incurred in the arbitration. All other costs, such as overhead and administrative salaries, are borne by the clinical program.

12. For detailed information about the arbitration process in each forum, see the following websites: <http://www.nasd.com> for NASD Dispute Resolution, and

the respondents serve their Answer, the parties engage in pre-hearing discovery, a process typically limited to the exchange of relevant documentation, and the selection of arbitrators. The parties then present evidence at a hearing,<sup>13</sup> and the panel issues its decision in an arbitration award.<sup>14</sup>

Through this process, the clinic students have secured meaningful financial recoveries for their clients. The monies lost could have been the client's nest egg, retirement savings, children's college education funds, or small savings account. To a small investor, the loss of these funds is devastating. For those investors that the clinic declines to represent, the clinic still performs a critical education function, informing investors as to the lawfulness of the broker's conduct, even if it is not a "winning" arbitration claim.

### *B. Why is Interdisciplinary Collaboration for SAC Necessary?*

For most investor claims that the clinic brings into arbitration, a financial expert is needed for case analysis and/or expert testimony. One of the most common claims the clinic investigates involves allegations that the broker recommended a securities transaction or series of transactions that was not appropriate for the customer's investment objectives and/or financial condition, in breach of the broker's duty to make only suitable recommendations (commonly known as a "suitability" claim).<sup>15</sup> In a typical suitability case, both the

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<http://www.nyse.com> for NYSE Arbitration (last visited Nov. 2, 2005).

13. For claims under \$25,000, one arbitrator considers evidence submitted through "Simplified Arbitration," or "on the papers" without hearing live testimony, although the customer or arbitrator may still request a hearing. See NASD Code of Arbitration Procedure Rule 10302; NYSE Arbitration Rule 601.

14. The clinic is able to negotiate settlements in several cases before filing an arbitration, or before a live hearing takes place. Other cases are resolved to award only after a hearing.

15. See NASD Conduct Rule 2310, NASD Manual (CCH) (2004), available at <http://nasd.complinet.com/nasd/display/index.html> (last visited June 15, 2005) (requiring that a broker, in recommending the purchase of any security, must have reasonable grounds for believing the recommendation to be suitable on the basis of facts disclosed by the customer as to her other holdings and as to her financial situation and needs). Courts hold that an investment is unsuitable if (1) the investment was incompatible with [his or her] investment objectives; and (2) the broker recommended the investment although (3) the broker knew or reasonably believed the investment was

customer and broker may hire a financial expert to assist in identifying unsuitable recommendations, articulating a theory of recovery in a statement of claim, calculating the appropriate measure of damages,<sup>16</sup> and, if necessary, testifying at an arbitration.

Another common customer complaint is misrepresentation, in violation of both federal and state securities laws, and the common law.<sup>17</sup> Here, clients claim that brokers induced them to buy securities by misrepresenting the level of risk incurred by the purchase, by claiming to have information that was not yet priced into the stock, or by promising a specified rate of return. Alternatively, not listing the drawbacks of investments such as illiquidity, deferred contingent sales charges, or unusual political and economic risks, can constitute actionable behavior on the broker's part.<sup>18</sup> Financial consultants can help isolate these misrepresentations, and can spot statements that are true as well as false.

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inappropriate. See generally Barbara Black & Jill I. Gross, *Economic Suicide: The Collision of Ethics and Risk in Securities Law*, 64 U. PITT. L. REV. 483, 490-92 (2003) (discussing laws governing suitability claims). In arbitration, customers can recover damages from a broker stemming from an unsuitable recommendation. *GMS Group, LLC v. Benderson*, 326 F.3d 75 (2d Cir. 2003) (affirming district court's denial of brokerage firm's motion to vacate arbitration award based on customer's suitability claim).

16. Claims for damages can include fees for attorneys, expert witnesses, and document preparation. See, e.g., *Arena v. Prudential Securities, Inc.*, 2005 NASD Arb. LEXIS 2219 (NASD Arbitration September 8, 2005); *Fazio v. Lehman Bros.*, 2003 NYSE Arb. Dec. LEXIS 178 (NYSE Arbitration October 20, 2004).

17. Section 10(b) of the Securities Exchange Act of 1934 prohibits fraud in connection with the sale of securities. 15 U.S.C. § 78(j)(b) (2000). Rule 10b-5, promulgated by the Securities and Exchange Commission under section 10(b), states: "It shall be unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit to state a material fact . . . ." 17 C.F.R. § 240.10b-5. Because the statute of limitations for violations of section 10(b) is relatively short (see 28 U.S.C. § 1658(b) (2002) (setting forth limitations period of the earlier of two years from discovery of the violation or five years from the violation)), the clinic often alleges negligent and/or fraudulent misrepresentation causes of action under applicable state law. See, e.g., *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263-66 (1996) (setting forth elements of a New York State negligent misrepresentation claim).

18. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 207-08 (1976) (holding a private action for damages is created when a seller of securities makes "untrue statements of material facts or fails to state material facts necessary to make the statements therein not misleading," and may be held "absolutely liable for any damages resulting from such misstatement or omission," if scienter can be shown).

Financial expertise is also needed to vigorously pursue churning claims – claims that the broker engaged in excessive trading solely for the purpose of generating commissions.<sup>19</sup> In a typical churning claim, an expert calculates the turnover ratio, a ratio of annual purchases to average account value, which can be suggestive of, and often is dispositive proof of, excessive trading.<sup>20</sup> Without an independent calculation of the account's turnover, the customer cannot prove churning.<sup>21</sup>

Finally, many claims involve a complex pattern of trading that renders it difficult for law students to calculate the damages flowing directly from the alleged wrongdoing. Increasingly, clients are claiming losses in brokerage accounts that are “wrapped” with other financial services such as check writing, credit cards, management fees, margin privileges, and systematic deposit and withdrawal arrangements. The calculation of damages in these accounts is a very complicated task, one in which the client's own view of the losses can be quite inaccurate. The difficulty in these calculations can render it nearly impossible for the clinic to identify provable damages.

However, due to the lack of monetary resources of clinic clients, SAC has been unable to hire financial experts to assist the law students in the financial analysis necessary to present a viable claim.<sup>22</sup> The need for financial expertise on an increasing volume of cases led the authors to explore other methods of obtaining that expertise without incurring any significant costs. They learned that Fordham's clinic has never used outside financial expertise, although the clinic's faculty is currently considering approaching its business school.<sup>23</sup> Brooklyn's clinic has, on

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19. See Black & Gross, *supra* note 15, at 494-95 (discussing laws prohibiting churning).

20. Jack E. Karns & Jerry G. Hunt, *Can Portfolio Damages Be Established In A Churning Case Where the Plaintiff's Account Garners A Profit Rather Than A Loss*, 24 OKLA. CITY U. L. REV. 213, 216 (2003).

21. *Id.*

22. In past years, the clinic relied on an informal, *ad hoc* arrangement with a Professor of Finance at the Lubin School, who agreed to offer his expertise on a case-by-case basis. The professor offered limited consulting on cases, made himself available to testify as an expert at a hearing if the clinic needed him, and even taught one class to clinic students each year. However, he was not available as a consulting expert on a regular basis, and the clinic was reluctant to over-utilize these generously offered free services unless it was absolutely necessary.

23. E-mail from Professor Romaine Gardner, Co-Director, Securities Arbitration



occasion, sent out account statements to a private company for analysis, or has consulted with an expert, who offered his time on a *pro bono* basis.<sup>24</sup> Moreover, the Securities Arbitration Practicum at Duquesne has established working relationships with local, retired securities experts who enjoy meeting students and offering *pro bono* assistance.<sup>25</sup> The most successful model appeared to be the collaboration of the Securities Clinic at Buffalo Law School with its business school,<sup>26</sup> which turned the authors' attention to an interdisciplinary approach.

## II. MODELS OF INTERDISCIPLINARY COLLABORATION

### A. Interdisciplinarity

Legal education is becoming more interdisciplinary in nature.<sup>27</sup>

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Clinic, Fordham Law School and Former Director, Securities Clinic, Brooklyn Law School to Jill Gross (June 10, 2004) (on file with authors) (confirming information learned previously through conversations). Fordham tried to meet its need last year by using software it obtained as a donation from a financial consulting company that makes the financial analysis easier for law students to complete. However, it has been reported that the software does not work well. E-mail from Professor Marcella Silverman, Co-Director, Securities Arbitration Clinic, Fordham Law School, to Jill Gross (June 10, 2004) (on file with authors) (confirming information learned previously at Securities Arbitration Clinics Annual Roundtable, Fordham Law School, April 14, 2003).

24. E-mail from Deborah Masucci, former Director of Securities Arbitration Clinic, Brooklyn Law School to Jill Gross (June 10, 2004) (on file with authors) (confirming information learned previously through conversations); E-mail from Professor Gardner, *supra* note 23.

25. E-mail from Alice Stewart, Director, Securities Arbitration Practicum, Duquesne University School of Law, to Jill Gross (June 10, 2004) (on file with authors) (confirming information learned previously through conversations).

26. Interview with Cheryl Nichols, Director, Buffalo Law School Securities Clinic, at the Securities Arbitration Clinics Annual Roundtable, Fordham Law School, New York, New York (April 14, 2003).

27. See Anita Weinberg & Carol Harding, *Interdisciplinary Teaching and Collaboration in Higher Education: A Concept Whose Time Has Come*, 14 WASH. U. J.L. & POL'Y 15, 15-16 (2004) ("In recent years, the idea of 'interdisciplinary' teaching and scholarship has become increasingly popular, heralded as a means to dismantle the walls around academic disciplines, and praised by university presidents for the intellectual and administrative benefits that flow from interdepartmental collaboration."); Gary Munneke, *Legal Skills for a Transforming Profession*, 22 PACE

Scholars recently have studied the phenomenon of “interdisciplinarity,” writing extensively about its benefits in legal education and scholarship.<sup>28</sup> Scholars have suggested that interdisciplinary education is necessary to train law students to be more creative problem solvers in law practice.<sup>29</sup> However, merely bringing together the legal discipline with another discipline in the university setting does not guarantee an educational enhancement. Professors Barry, Dubin and Joy summarize the competing considerations:

Interdisciplinary clinical programs offer many opportunities for the acquisition of valuable skills by means of collaboration with and exposure to the culture, professional strengths, and limitations of other disciplines in a group setting. On the other hand, merely

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L. REV. 105, 126 (2001) (“Contemporary legal education may also be characterized by the development of interdisciplinary studies.”). Washington University School of Law has set up the Center for Interdisciplinary Studies to promote legal scholarship and practice from interdisciplinary perspectives. For a complete description of the Center and its programs, see <http://law.wustl.edu/centeris/index.html> (last visited June 15, 2005).

28. *E.g.*, Weinberg & Harding, *supra* note 27, at 15 (discussing the development of interdisciplinary education, particularly in law schools); Karen L. Tokarz, *Introduction: Symposium on Justice, Ethics, and Interdisciplinary Teaching and Practice*, 14 WASH. U. J.L. & POL’Y 1, 1-2 (2004) (introducing symposium issue promoting scholarship examining benefits of interdisciplinary legal education); Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J.L. & POL’Y 11, 18-19 (2003) (noting that “the importance of both interdisciplinary instruction and scholarship is generally accepted”); Kathleen M. Sullivan, *Foreword: Interdisciplinarity*, 100 MICH. L. REV. 1217, 1224 (2002) (extolling virtues of interdisciplinary scholarship by legal academics as a means to improve, among other things, “the teaching of law, and thus improve[] the professional preparation of lawyers”).

29. *See* Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999); *see also* Connolly, *supra* note 28, at 13-14 (stating that “successful legal problem-solving sometimes means that lawyers need to be able to collaborate with other professionals in order to address a client’s problems” but acknowledging that “traditional legal education does little to provide law students with the skills relevant to working with non-legal ideas and the professionals who are trained in those ideas”); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J.L. & POL’Y 195, 201 (2003) (noting that “[a] lawyer’s inability or unwillingness to understand her role as a member of a team which is working to achieve a client’s goals thwarts her effectiveness as a counselor and problem solver”).

bringing professionals together does not ensure that they will function well as a team or make appropriate collaborative decisions.<sup>30</sup>

Thus, the challenge remains in identifying the educational contexts best suited for interdisciplinary higher education.<sup>31</sup> Some approaches include cross-listing courses among various schools within a university and inviting faculty from across the university to guest lecture in courses outside their disciplines.<sup>32</sup> Several scholars have assessed the effectiveness of joint degree programs.<sup>33</sup> However, the skills-based and practical nature of clinical legal education makes it an ideal laboratory for exploring interdisciplinary collaborations.<sup>34</sup>

Clinical legal education literature is replete with references to interdisciplinary efforts in a variety of experiential learning environments.<sup>35</sup> One study revealed that in 2000, over thirty law schools

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30. Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millenium: The Third Wave*, 7 CLINICAL L. REV. 1, 69-70 (2000).

31. Connolly, *supra* note 28, at 23-27 (listing possible contexts for interdisciplinary learning in law school setting).

32. Cf. Weinberg & Harding, *supra* note 27, at 33-34 ("This format of inviting faculty and professionals from diverse disciplines into the university classroom can provide students from one discipline the opportunity to challenge the assumptions, perspectives, and practices of another discipline within a 'safe' learning environment").

33. E.g., Note, Brigid Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J.L. & POL'Y 131 (2001) (evaluating the benefits of a J.D./M.S.W. joint degree program); Linda R. Crane, *Interdisciplinary Combined-Degree and Graduate Law Degree Programs: History and Trends*, 33 J. MARSHALL L. REV. 47 (1999); John Warren Kindt, *An Analysis of Legal Education and Business Education Within the Context of a J.D./M.B.A. Program*, 31 J. LEGAL EDUC. 512 (1981) (evaluating a joint J.D./M.B.A. program).

34. See Joan Meier, *Notes From The Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1322 n. 96 (1993) (noting that "it is precisely through an interdisciplinary approach to the field, with use of 'clinical' simulations, that students can learn the most about ethical, creative lawyering").

35. See, e.g., Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J. L. POL'Y. 249 (2004) (describing interdisciplinary work of George Washington University's Small Business Clinic); Pamela Jo Hatley, *Feral Cat Colonies in Florida: The Fur and Feathers Are Flying*, 18 J. LAND USE & ENVTL. L. 441, 441 n.1 (2003) (describing the University of Florida's interdisciplinary Conservation Clinic); Connolly, *supra* note 28, at notes 69-

had some form of an interdisciplinary clinic.<sup>36</sup> This scholarship not only confirms that interdisciplinary clinics are on the rise, but that clinicians are eager to share their clinical successes and failures with other legal educators seeking to design or enhance an interdisciplinary clinical program.<sup>37</sup>

### B. Interdisciplinary Law/Business Clinics

In the law/business area, fewer interdisciplinary clinics have received notice.<sup>38</sup> Because of the rise of community economic development (CED) clinics, in which law students provide transactional legal services to small, local, start-up businesses and non-profit organizations, clinicians are beginning to talk and write about the need for collaborations with business schools to add particular business expertise to the representation.<sup>39</sup> Moreover, business education scholars

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74 and accompanying text (identifying other examples); V. Pualani Enos & Lois H. Kanter, *Who's Listening: Introducing Students To Client-Centered, Client-Empowering, And Multidisciplinary Problem-Solving In A Clinical Setting*, 9 CLINICAL L. REV. 83 (2002) (describing the Boston Medical Center Domestic Violence Project, an interdisciplinary clinic at Northeastern University School of Law); Annie G. Steinberg, Barbara Bennett Woodhouse and Alyssa Burrell Cowan, *Child-Centered, Vertically Structured, And Interdisciplinary: An Integrative Approach to Children's Policy, Practice, and Research*, 4 FAM. CT. REV. 116 (2002) (describing the work of the Center for Children's Policy, Practice and Research at the University of Pennsylvania, an interdisciplinary project of the Schools of Law, Medicine and Social Work); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2001) (describing interdisciplinary domestic violence clinic at University of Denver College of Law and identifying benefits of collaboration).

36. Barry, Dubin, & Joy, *supra* note 30, at 71 n. 284 (2000) (citing examples of interdisciplinary clinics).

37. See, e.g., Posting of Linda Morton, lm@cwsu.edu, to LawClinic@lists.washlaw.edu (Feb. 21, 2003) (on file with the author) (reporting intention to set up a law student/medical student collaboration on health law problems in the community and seeking other clinicians' experiences in similar work).

38. Susan Jones briefly mentioned the interdisciplinary aspects of her Community Economic Development Clinic at George Washington University School of Law in her 1997 article, including its partnership with George Washington's School of Business and Public Management. See Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 229-30 (1997).

39. At the May 2004 Association of American Law Schools (AALS) Conference

have also lauded interdisciplinary studies for business faculty, suggesting that business school faculty would be receptive to an interdisciplinary collaboration.<sup>40</sup>

For example, Dina Schlossberg recently considered the value of an interdisciplinary transactional clinic in the context of the Small Business Clinic (SBC) at the University of Pennsylvania.<sup>41</sup> The SBC was founded in 1980 as a joint collaboration between the Wharton School's Small Business Development Center (SBDC)<sup>42</sup> and the Law School's clinical program, to enable both law and business students to deliver professional and legal services to small business entrepreneurs.<sup>43</sup> While the collaboration did not involve joint teaching, it did "allow the students from both schools to meet a few times a year to discuss their roles and relationships with regards to their assigned clients."<sup>44</sup> However, due to the tension between the goals of the two schools' programs,<sup>45</sup> the formal collaboration ended after five years, and shifted to two separate programs that referred clients to each other.<sup>46</sup> Schlossberg noted, however, that even though this formal collaboration ended in the mid-1980s, a revival of some model of collaboration would be beneficial to student learning as well as client representation.<sup>47</sup>

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on Clinical Legal Education, attended by the authors, numerous concurrent session workshops were devoted to describing the work and growth of CED clinics across the country. For more information, see AALS, Program for Clinical Legal Education Conference 2004 (May 1, 2004), *available at* <http://www.aals.org/clinical2004/program.html> (last visited October 18, 2005).

40. See, e.g., Stephen L. Payne, *Interdisciplinary Studies and Management Faculty Involvement*, 73 J. EDUC. FOR BUS. 211 (1998) (identifying costs and benefits to management faculty of participating in interdisciplinary programs).

41. Schlossberg, *supra* note 29, at 199-211.

42. The SBDC is a federally-funded Small Business Administration (SBA) technical assistance program. *Id.* at 220-221.

43. *Id.* at 220-21.

44. *Id.* at 221.

45. The author explained that the SBDC was a technical assistance program made up of undergraduate and graduate student volunteers rather than an educational program of the Wharton School, whereas the SBC is a clinical education program of the law school made up of law students enrolled for academic credit. *Id.* There are also very different moral and ethical obligations embedded in the programs as well. *Id.* at 219.

46. *Id.* at 221-22.

47. *Id.* at 195, 235-36 (recommending that "the SBC might better serve its mission if the school were to redesign the SBC and integrate its legal services and educational opportunities with other academic programs or professional services"). Since the

As for securities arbitration clinics, even the first-generation SACs are less than a decade old, and thus have had little opportunity to develop interdisciplinary components. The only SAC to have an institutionalized relationship with a business school is the Securities Law Clinic of the University at Buffalo Law School, which has collaborated with the University's School of Management since its formation.<sup>48</sup> In this arrangement, law and business students jointly attend seminars and work on cases together, so clients have the benefit of legal counsel and financial expertise during the client interview and investigation stage, as well as at the arbitration stage. Additionally, a professor of finance from the business school attends periodic seminars to teach subject matter topics such as portfolio theory, trading analysis, risk assessment and financial planning. The finance professor drafts an expert witness report for a case going to a hearing and is available to testify.<sup>49</sup> As a result of this collaboration, law students gained experience in working with financial experts and the M.B.A. students gained an entirely new perspective on the importance of the lawyer's work.

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publication of her article, Schlossberg has reported that the Penn Law/Wharton collaboration has increased to some extent. M.B.A. students who work in the SBDC at Wharton currently offer consulting services to the SBC on an as-needed basis. The M.B.A. students are compensated (usually towards financial aid) on an hourly basis for their consulting services. Schlossberg continues to consider additional ways in which the law school can work more closely with the business school to maximize the service provided to the SBC clients, as well as to enrich the students' learning environment. Interview with Dina Schlossberg, Faculty Supervisor and Lecturer at the University of Pennsylvania Law School (May 4, 2004).

48. The Securities Clinic is cross-listed with both the law school and the business school, *see* UB School of Management MBA Handbook, Course Descriptions, course code MGF 667/ LAW 890, *available at* <http://www.mgt.buffalo.edu/mba/handbook/chap5courses1.htm> (last visited October 20, 2005), and usually enrolls an equal number of J.D. and M.B.A. students. Telephone Interview with Cheryl C. Nichols, former Clinical Instructor, Director of University at Buffalo Law School's Securities Law Clinic (April 28, 2004).

49. Telephone Interview with Cheryl C. Nichols, former Clinical Instructor, Director of University at Buffalo Law School's Securities Law Clinic (April 28, 2004).

## III. PACE'S SAC/LUBIN COLLABORATION

A. Design of the Program

Based on the positive experience at Buffalo and the under-utilized resource of Pace University's Lubin School of Business, the authors sought to establish a partnership between SAC and the Lubin School's graduate program. In the Spring 2003 semester, and after some preliminary discussions and planning, the authors designed their own version of a law/business collaboration, modified somewhat from Buffalo's model. Dr. Filante agreed to supervise one or two graduate students each semester who serve as financial consultants on a case-by-case basis to SAC and receive three Independent Study credits.<sup>50</sup> The primary reason we decided to involve only one or two business students each semester is that not every case the law students investigate requires financial expertise, and each case requires more legal work than financial work. With this 4:1 law-to-business student ratio, we could ensure that the business student had sufficient case work throughout the semester.

We also decided that the ideal business student for the collaboration is a finance major who has taken courses in investments, financial planning and/or portfolio management, and has some experience owning and trading securities. Such a student will have the skills necessary to review brokerage account statements, analyze trading patterns, understand investment products, and assess the relationships between the clients' financial goals, risk tolerance and the characteristics of the securities that were in the clients' account. This type of student would also be more likely to pursue a career in the securities industry, and thus would welcome the training and experience the collaboration could provide.

In addition, in designing the collaboration, the authors were cognizant of the limits of the attorney-client privilege.<sup>51</sup> Because the

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50. The "course" typically counts as a finance elective in the M.B.A. program's 52-credit degree requirement, *available at* <http://www.pace.edu/lubin> (follow "Graduate Programs" hyperlink; then follow "MBA Programs" hyperlink; then follow "MBA Core Curriculum" hyperlink) (last visited November 22, 2005).

51. The privilege protects the disclosure of confidential communications between the *attorney* and the *client*. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389

privilege generally does not protect communications between an attorney and client when a third party is present,<sup>52</sup> any collaboration model permitting business students to be present for substantive case discussion was problematic. However, a 1961 seminal opinion arising out of the Second Circuit, *United States v. Kovel*,<sup>53</sup> extended attorney-client privilege to communications with a third-party consulting witness. As a result, courts have applied the privilege to a client's communications with a third party hired by his attorney to facilitate the representation.<sup>54</sup> Courts require the party asserting the privilege in this circumstance to prove that the: (1) client had a reasonable expectation that the communications would be kept confidential when made to the attorney in the presence of the third party; and (2) individual was

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(1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976); see *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002) (citing 8 J.H. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev. 1961)) (stating the privilege provides “(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived”).

52. *Cavallaro*, 284 F.3d at 246-47 (stating, that “[g]enerally, disclosing attorney-client communications to a third party undermines the privilege”); see, e.g. *People v. Osorio*, 549 N.E.2d 1183, 1185 (N.Y. 1989).

53. 296 F.2d 918 (2d Cir. 1961). In *Kovel*, a law firm hired an accountant to help it understand particular accounting concepts so that the firm could properly advise its client. The accountant subsequently was convicted of contempt for refusing to testify in a grand jury proceeding about his communications with the law firm, asserting that the attorney-client privilege prevented disclosure of his communications with the firm. On appeal, the Second Circuit vacated his contempt conviction, recognizing that consultation with non-lawyers is required in certain circumstances in order for attorneys to effectively represent their clients. *Id.* at 921-22 (stressing that “[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer”).

54. See, e.g., *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1191 (4th Cir. 1991) (applying privilege to communications among client, lawyer and accountant); *In re Grand Jury Subpoenas* dated March 24, 2003, 265 F. Supp. 2d 321, 330-32 (S.D.N.Y. 2003) (applying privilege to communications among client, lawyer and public relations consultant); *ECDC Envtl. v. New York Marine and Gen. Ins. Co.*, 96 Civ. 6033, 1998 U.S. Dist. LEXIS 8808, \*15 (S.D.N.Y. June 5, 1998) (applying privilege to client communications with a third-party business development and marketing firm hired by plaintiff to serve as its agent in managing plaintiff's response to environmental spills because the firm was “the principal conduit through which plaintiff communicated with counsel”).



"necessary for the client to obtain informed legal advice."<sup>55</sup>

Based on this body of law, the authors concluded that Buffalo's interdisciplinary model, where business and law students are jointly enrolled in the clinic, equally attend seminars and have equal access to client files, was not appropriate for Pace's clinical program because key features of Pace's SAC could lead to an inadvertent waiver of attorney-client privilege. First, Pace's clinical teachers regularly hold "case rounds" during seminars which entails all of the students' participation in brainstorming sessions as to legal strategy. As a result, the regular presence of business students in clinic seminars, during which potentially confidential information is discussed among the student lawyers, would unnecessarily risk eviscerating the attorney-client privilege.<sup>56</sup> Additionally, Pace's clinical program provides unrestricted access to clinic client files for those law students who are governed by the clinic's Student Practice Order.<sup>57</sup> Thus, an interdisciplinary model

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55. The second element stems from the third-party's role as an agent of the lawyer. See *Nat'l Educ. Training Group, Inc. v. Skillsoft Corp.*, No. 148-85 1999 WL 378337, \*4 (S.D.N.Y. June 10, 1999); see also *United States v. Judson*, 322 F.2d 460, 462 (9th Cir. 1963); *Stroh v. General Motors Corp.*, 623 N.Y.S.2d 873, 874 (N.Y. App. Div. 1995) (holding that a daughter's presence during conversations between her mother and her mother's attorney did not disrupt the privilege because the daughter's presence put her mother "sufficiently at ease to communicate effectively with counsel" and thus rendered the daughter an agent of the mother). Conversely, if the client seeks *non-legal* advice from the third party, then the privilege does not apply. See *Cavallaro*, 284 F.3d at 247-48 (rejecting application of privilege to communications with accountant who was not employed by lawyer for legal advice); *United States v. Ackert*, 169 F.3d 136, 139-40 (2d Cir. 1999) (reversing district court's application of privilege to investment banker's communications with a corporate attorney because the purpose of those communications was for the attorney to discover factual information which his client did not have about an investment proposal rather than to have the investment banker interpret information for the client); *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995) (rejecting corporation's attempt to assert the privilege over a memorandum prepared by its auditor for the corporation's attorney and vice president of taxes because the auditor prepared it as part of his role as accountant and business advisor); *ECDC Envtl.*, 1998 U.S. Dist. LEXIS 8808, at \*24-25 (ruling that privilege did not apply to consultants retained by plaintiff's lawyers because the consulting services largely consisted of test data and technical assistance concerning an environmental spill, rather than technical information from the plaintiff transmitted for translation for the benefit of plaintiff's attorneys).

56. Buffalo University's use of confidentiality agreements for all enrolled students alleviates these concerns to some extent.

57. The Order is signed by a presiding Justice of the Supreme Court of the State of

that would allow graduate business students unlimited access to client files and case discussions would also risk breaching the attorney-client privilege.

The authors developed a case by case consulting model in order to protect against the risk of waiving attorney-client privilege with respect to otherwise privileged communications. Under the case-by-case consulting model, students follow a procedure for each consulting arrangement. SAC law students assigned to a case, once they identify a need for financial consulting and obtain the client's consent, contact the graduate business student enrolled in the program.<sup>58</sup> If the business student can offer the required assistance, SAC will retain the student consultant. The collaboration is carried out under the supervision of a finance professor, solely for the purpose of providing financial expertise and facilitating the legal representation of the client. To formalize the retainer, SAC prepares, executes and sends to the financial consultant a retainer letter (known in the private bar as a "*Kovel*" letter) setting forth the parameters of the consulting arrangement. By articulating the purpose and parameters of the relationship, this procedure helps to ensure compliance with modern conceptions of attorney-client privilege within a consulting environment.

After the law students communicate the relevant information and send pertinent documents to the Lubin Business student to enable him or her to provide meaningful consulting services, the Lubin student analyzes the case material. The analysis initially focuses on the client's out-of-pocket (i.e. actual) losses during the period the brokerage firm held the account. Students calculate these losses by sifting through the monthly account statements, identifying a starting and closing balance, and netting out the effects of deposits and withdrawals of cash, as well as securities that may have been transferred into and out of the account. The student must also consider debits and credits resulting from electronic transactions and credit card or check-writing activity. The resulting loss derived from this calculation is then contrasted with the

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New York, Appellate Division, Second Department, and authorizes certain eligible law students to practice law under the supervision of a faculty member as part of the academic curriculum of the Law School.

58. Starting in the spring 2003 semester, and for at least one semester per academic year since then, one graduate business student has enrolled in a Guided Research Project with Professor Filante for 3 academic credits. During the summer 2004 semester, one student worked under the supervision of Professor Filante.

loss the client believes he has incurred. This process assures that the analysis does not omit any steps, and that the students can take the next step—discovering the cause or causes of the losses.

To date, most of the clinic's cases have involved alleged violations of the suitability rule.<sup>59</sup> Examples of behavior that business students have identified that may violate this rule include failure to allocate assets among fixed and variable investments, use of margin, and concentration of assets in high-tech, emerging growth, or low-priced equity shares. Lubin students have assessed whether the broker's recommendations were consistent with the customer's objectives and risk tolerance, and have calculated the return on a more suitable portfolio, resulting in a "market-adjusted damages" calculation.

The Lubin students have assisted in many substantive ways and during a variety of procedural phases of the investigation and pursuit of cases. The business students have helped the law students determine whether there is in fact a viable claim in a case, calculated measures of damages, and evaluated the strength of settlement offers. Business students can also be available to assist in discovery by identifying and reviewing industry-specific documents, prepare an affidavit rendering an expert opinion for a Simplified Arbitration (*i.e.*, a "paper hearing"), and, if a live hearing is necessary, testify as an expert at the hearing.

### B. Goals of the Collaboration

The primary goal of this collaboration is to provide SAC clients with pro bono financial expertise. In order to evaluate the strength of a client's claims, to counsel the client as to appropriate courses of action, and to communicate effectively with opposing counsel, the law students must understand the financial components of the client's case. The expertise of the consultants enables the clinic to deliver higher quality legal services and to represent its clients more zealously. Thus, this expertise greatly levels the playing field when customers pursue their claims in an arbitration forum against a resource-rich brokerage firm with a team of financial experts by its side.

A second goal of the collaboration, unique to clinical legal education, is to improve the lawyering skills of the clinic students by requiring them to work with experts and consultants adjunct to the

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59. See *supra* note 15 and accompanying text.

provision of legal services.<sup>60</sup> The MacCrate Report identified one of the fundamental values of the profession as the “Provision of Competent Representation.”<sup>61</sup> A component of this value, “[w]ith regard to substantive knowledge of the law or of other fields or disciplines” and “[i]f the representation of a particular client requires knowledge that the lawyer does not presently possess,” is for a lawyer to “[a]ssess[] whether the client would best be served by the lawyer’s acquisition of the requisite knowledge. . . or by the lawyer’s enlisting the aid of other lawyers or experts from other fields. . . .”<sup>62</sup> Thus, students must develop the ability to reach out to and work with non-legal professionals to complement client representation.

Goals unique to graduate professional education include gaining hands-on experience to complement the MBA curriculum of lecture and case study courses.<sup>63</sup> The stated mission of the business school is “to educate students in a personalized academic environment for success in business by applying contemporary theory to professional practice.”<sup>64</sup> This course offering enables graduate finance students to apply finance and portfolio theory learned in the classroom to actual cases and clients. This course also teaches finance students about the relative roles of the

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60. Schlossberg, *supra* note 29, at 205 (“Our goal as teachers is to provide a rich learning experience, an experience that is contextually, ethically, and intellectually dynamic. One way to achieve this goal is to engage in collaborations with professionals from other disciplines in projects organized around meeting specific client goals.”).

61. See American Bar Association Section on Legal Education and Admissions to the Bar, Legal Education and Professional Development - An Educational Continuum, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap (1992) [Hereinafter “MacCrate Report,” after Robert MacCrate, Chair of the Task Force that authored the report], at 207-212.

62. *Id.* at 210.

63. Scholars have identified the benefits to business students’ education in injecting interdisciplinary experiential learning activities into their coursework. See Susan W. Palocsay, Marion M. White & D. Kent Zimmerman, *Interdisciplinary Collaborative Learning: Using Decision Analysts To Enhance Undergraduate International Management Education*, 28 J. MGMT. EDUC. 250 (2004) (studying the development of international management students’ decision-making skills through participating in an interdisciplinary consulting activity); Robert A. Clark, Kathy A. Paulson Gjerde & Deborah Skinner, *The Effects of Interdisciplinary Instruction on Simulation Performance*, 34 SIMULATION & GAMING 150 (2003) (suggesting that interdisciplinary work for finance students improves student performance).

64. Lubin School of Business, “Mission Statement,” available at [http://appserv.pace.edu/execute/page.cfm?doc\\_id=1680](http://appserv.pace.edu/execute/page.cfm?doc_id=1680) (last visited June 15, 2005).

lawyer versus the financial consultant in customer cases.

Furthermore, a large plurality of Lubin's finance students move on to jobs in the financial services industry working for brokerage firms, banks, mutual funds, insurance companies, hedge funds, pension funds, and advisory firms. In many cases, they will become registered representatives—stock brokers—licensed by the NASD to acquire a book of clients and generate fee and commission income through the buying and selling of securities for those clients' accounts. Although the licensing process involves study and testing in the areas specific to the clinic's work, the environment of a broker's workplace is much more likely to stress successful selling than fair practices. By providing these proto-brokers with an insight into the clients' perspectives, and the potential penalties a broker suffers when NASD rules are violated, their business education is enhanced greatly.

Additionally, all students involved in the mission of SAC not only learn skills required in their respective professions, but also experience first-hand the rewards of providing *pro bono* professional services to the community.<sup>65</sup> While this value is taught or reaffirmed to law students at an early phase of their legal education,<sup>66</sup> it is not a value always imparted to business students.<sup>67</sup> Moreover, some law students who tend to be interested in business-related courses such as the Securities Arbitration Clinic may not be the students who plan on devoting a significant portion of their professional lives to public service. To the extent these students better understand the need to help small investors who lack access to justice generally available to wealthier investors, and can share that view with other students in other professional disciplines, the collaboration has served the public interest.

Another goal of interdisciplinary programs is to encourage intra-university faculty cooperation. Scholars have preached the values of having increased dialogue not only among the faculty within one school of a university, but also among faculty of a variety of disciplines across

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65. Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227, 270-72 (2000) (discussing social justice benefits of interdisciplinary professional education).

66. For example, Professional Responsibility is a required first-year course in the Pace Law School curriculum and the course typically devotes some class time to teaching the professional obligation of public service.

67. Schlossberg, *supra* note 29, at 219 ("business schools . . . do not have the same ethical orientation toward public service" as law schools).

the university.<sup>68</sup> In Pace's collaboration, SAC faculty supervisors invited Lubin faculty to attend the seminars where the law students learn the substantive law regulating broker-dealer conduct and legal theories of damages, the arbitration process, and the lawyering skills necessary to handle live-client matters and to work with experts. The authors' goal is to increase ways in which the Lubin professors and the clinical law professors can work together in the future, not only in the clinic, but in future scholarship.

### C. Benefits of Collaboration

1. *Clients.* Clients have been the greatest beneficiaries of the collaboration. They have not only received free legal services, but part and parcel of those legal services has been top-notch financial expertise. The clinic's adversaries have the advantages of experienced and expert advisors. To compete with them and have the sense that this competition will be fair, the clinic too must have knowledgeable experts. While it would not have been impossible for SAC to represent these clients effectively without the financial consulting, it certainly has improved the quality of that representation.

A recent experience with one client is instructive. A widower and recent retiree relied on the recommendations of a broker from a large, well-established brokerage firm as to how to invest her retirement monies. The mutual funds chosen by the broker lost a significant amount of value, and the client ultimately had to return to work part-time because her retirement savings were no longer enough to support her.

She sought the assistance of the clinic as she questioned whether the broker had made the correct recommendations. With the assistance of a Lubin student, the clinic was able to conclude that she had a viable claim that the broker's recommendations were not suitable for her investment objectives and financial condition. The Lubin student's expert advice helped the law students draft a Statement of Claim to initiate the arbitration process.

After the clinic filed its claim against the broker and his firm, the respondents initiated settlement negotiations. After some back and forth, the firm eventually made what the clinic students perceived to be a

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68. E.g., Weinberg & Harding, *supra* note 27, at 29-33.

fair settlement offer. Initially, the client did not want to accept the offer. The students did not believe that they had effectively communicated to her the value of the settlement offer, so they enlisted the assistance of the Lubin consultants once again. The consultants met with the law students and the client, and explained to the client in financial terms the potential recoveries she might expect at arbitration. The law students were then better equipped to counsel the client about her options, and she enthusiastically accepted the settlement offer. Thus, the SAC/Lubin collaboration greatly benefited this client.<sup>69</sup>

2. *Law Students.* In addition to the clinic's clients, the law students have benefited from the collaboration. This collaboration model most closely resembles the work environment they will face after graduating from law school. In private practice, lawyers are the primary representatives of their clients and financial experts support the lawyers' work to advance their clients' interests. By providing a close approximation of the "real world," the collaboration confers invaluable legal experience on the students.

The law students have uniformly reported that the collaboration has enhanced their education, their lawyering and their ability to represent their clients. We excerpt below from some of the testimonials taken from law students' Spring 2003 and 2004 end-of-semester memos:<sup>70</sup>

- [The consultant's] work on the [client's] case provided us with a sense of security . . . [and] ensure[d] that we understand [sic] the financial analysis to arrive at a measure of damage.
- [I]t is incredibly useful for the students to be able to better explain to their clients the financial aspects of their cases.
- I think the collaboration is an absolutely invaluable service to the clinic.
- [The consultant] makes sure that we understand what happened in our client's investment so we can explain it more thoroughly in the [S]tatement of [C]laim.
- [The consultant's] assistance was desperately needed after my frustrating attempt to assess the amount of damages with the three margin trades only. . . . I cannot thank [him] enough for

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69. As one student wrote in his evaluation memo, "[w]ithout [the consultant's] assistance, [the client] may not have settled and ultimately, may have won nothing at the hearing had she gone forward without settlement."

70. To protect the students, the authors have not revealed their names, but have the original memos on file.

helping us on this case. If it were not for him [the students] would not have known what to ask in our call back in person interview. It was through [the consultant's] suggestions that we were able to pinpoint the exact direction we were headed with the [clients] and what claims we should be concentrating on.

Clearly, the students have learned a lot from this collaboration, both about the substantive material involved in the case and their own professional skills.

3. *Graduate Business Students.* The graduate business students have also benefited from the collaboration. The Lubin School of Business at Pace University has been the largest entity for most of the University's 98-year history. Its curriculum, although frequently examined, is a traditional mix of finance, management, marketing, law, accounting, and information systems courses.<sup>71</sup> Students who wish to broaden their educational experience often have to do so with independent study or special topics courses, which are typically offered within the Business School. The opportunity to physically and intellectually migrate to the Law School creates an additional and positive experience.

Moreover, learning by doing differs from learning by reading, listening and analyzing. For the former to be a successful pedagogical approach, the business students must enter a world where the tools of the trade are in their hands. Without the collaboration, learning how finance can aid the practice of securities law would never be a part of their coursework in the Business School.

4. *Faculty Supervisors.* Finally, the faculty involved in the collaboration – primarily the authors of this article – have benefited from their collaborative endeavors. First, as educators, the authors have become more aware of the strengths of the clinical teaching approach, and the process by which that approach can be made more successful. They have each gained perspective by witnessing the approach of the other academics to the same problem: the lawyer gathers the evidence, researches the law, and applies the facts to the law to present a persuasive case, whereas the financial planner, with hindsight, analyzes the broker's recommendation and misconduct, and calculates the losses stemming from misconduct. Thus, they have been able to experience

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71. Lubin School of Business website, available at [http://appserv.pace.edu/execute/page.cfm?doc\\_id=1070](http://appserv.pace.edu/execute/page.cfm?doc_id=1070) (last visited June 15, 2005).



first-hand the application of their academic knowledge to clinical practice, and to gain interdisciplinary insights relevant to their teaching.<sup>72</sup>

#### D. Limits of Collaboration

Despite all of these benefits, the SAC-Lubin collaboration has its weaknesses. First, several institutional limits have arisen out of the need to provide academic credit to graduate business students for working in a law school course.<sup>73</sup> Currently, the clinic is neither cross-listed in the Business School nor listed as a defined course for business students.<sup>74</sup> As a result, many business school graduate students who might be eligible and interested in collaborating with the clinic are not aware of the opportunity. Any interest is generated on an ad hoc basis. Now that the collaboration has completed its second full year, a formal listing of the course in the business school catalog will be possible, and such a listing will remove some of the difficulties the authors have encountered to date in enrolling sufficient numbers of business students.

Another drawback that remains is the continued inability to involve more than a handful of Lubin students during the course of the semester. While the clinic now enrolls ten or more law students during the academic year, only one or two graduate business students can offer consulting services each semester. This stems from a number of factors, including the amount of hours that must go into each consulting

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72. Weinberg & Harding, *supra* note 27, at 25-29.

73. In addition to the limits discussed in this article, Schlossberg has identified other institutional and administrative challenges of an interdisciplinary clinical program, such as inter-departmental rivalry, logistical complications, and differences in culture and training. Schlossberg, *supra* note 29, at 212-14. Connolly also has identified several barriers to interdisciplinary law school classes that are also relevant to clinical courses, including physical and psychological isolation, faculty marginalization, overly simplistic instruction in a discipline, potential overreaching, bar passage pressures, cost, logistics, different student expectations and different ethical norms between disciplines. Connolly, *supra* note 28, at 30-36.

74. While Pace University offers a J.D./M.B.A. joint degree program, there are no cross-listed courses between the law school and the business school. Rather, students pursue their degree requirements separately for each degree, but can satisfy the degree requirements in four years, rather than the five years it would take to pursue them separately. See Pace Law School, Joint Programs, available at <http://www.law.pace.edu/academics/joint.html> (last visited June 15, 2005).

arrangement, the limited amount of teaching time assessed to the Lubin faculty for the clinic, and the lack of an effective means of promoting student interest. Graduate business students in finance do not traditionally think of "expert witness" as a career. The authors need to change that mindset, a task not easily accomplished. Additionally, at Pace University, the Law School is in White Plains, some 30 miles from the New York City campus where the vast majority of Graduate Business classes and students reside.

Another drawback for the business students stems from the flip side of the fact that the collaboration model used most closely approximates the way lawyers function. As indicated above, financial experts work for the lawyers in a role one step removed from the client, while the lawyer is the primary representative and counselor to the client. Under this dynamic, the lawyer retains the consultant on a case-by-case basis, rather than having a standing arrangement in which the consultant is involved in each phase of a case, from intake to award. This dynamic thus necessitates a limited and closed role for the financial consultant, and depends entirely on the lawyer for his connection to the case. As a result, the graduate business student must play a deferential role to the law student, a role that many business students are not prepared to take on during their education.

One final drawback for the business students is the inability to attend clinic seminars. This limitation highlights the tension between adopting the purest interdisciplinary approach possible in the live-client context and the attorney-client privilege. Because of the decision to retain the business students as consultants on a case-by-case basis in order to protect the attorney-client privilege, the authors also have concluded that attendance by business school students and faculty at clinic seminars where the clinic students and supervisors discuss specifics of cases would risk the communication of client confidences to the financial consultant, a non-lawyer, and thus it is currently not permitted.<sup>75</sup> This deprives the business students of valuable learning opportunities. It also deprives the faculty of the opportunity to cross-evaluate the respective students because they only supervise the work of students in their own schools.

To compensate, in part, for their inability to attend seminar and thus learn substantive material, the authors have prepared a "Handbook" to

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75. See *supra* notes 51-58 and accompanying text.

serve as an orientation and reference guide for the business students.<sup>76</sup> The Handbook was written under the assumption that law students need assistance in finance and business students need assistance with the applicable securities law. The Handbook is a living document containing the rules and procedures that guide the clinic's activities today, and suggestions for the future based on experiences to date. The authors plan on updating the Handbook each year to reflect the past year's collaborative casework.

As the document exists today, the business student/financial expert is led through the steps of an arbitration process in the same sequence as would exist were the student attending the Law School classes. Since the business student will not be attending the sessions in which a particular case is discussed with respect to factual information and alleged wrongdoing, it is crucial that the student have a sense of the methodological details of a case's acceptance, as well as the ways in which the wrongdoing can be identified and demonstrated quantitatively. The Handbook also provides the law students with an overview of how financial experts go about their work. The Handbook contains a description of the financial products and how they affect statement accounting, thus preparing the students for an intelligent and productive discussion of the issues. Finally, the authors have included a Microsoft Excel workbook file with the data requirements and manipulative formulae in order to guide the students to the damages number they will assert in their Statement of Claim.

#### IV. LESSONS FOR OTHER CLINICS

The collaboration has proved to be an overwhelmingly positive experience for clients, students and faculty. The authors certainly believe that other law schools' clinics practicing in the business area should consider collaborating with the university's business school to enhance the educational experience for its students as well as the

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76. Ron Filante & Jill Gross, *Pace University Law School Securities Arbitration Clinic Lubin School of Business Handbook*, (1st ed. 2004) (unpublished handbook, on file with authors). Topics included in the handbook are: (1) Review of Applicable Law; (2) The Client Interview; (3) Collection of Client Documents and Account Information; (4) Establishing the Relationship Between Student Attorneys and Financial Consultants; (5) Calculating Damages; (6) Preparing the Statement of Claim; (7) Common Defenses; (8) Arriving at a Negotiated Settlement; and (9) The Arbitration Hearing.

delivery of legal services to its clients. There is still a burning need for securities arbitration clinics in other areas of the country, as we receive a steady stream of inquiries from out-of-state investors who have no place to turn for legal assistance. If other SACs open in other parts of the country at law schools that have a business school within their university, they can utilize this model of collaboration to enhance the delivery of legal services to their clients and improve on the educational experience for both law and business students. The authors' experience with the SAC-Lubin collaboration demonstrates that such an interdisciplinary approach is not only possible, but is desirable and enormously beneficial.

Nonetheless, those contemplating setting up an interdisciplinary clinic of this nature must keep in mind several important considerations. First, law school faculty supervisors must consider the impact of the attorney-client privilege on the representation of clients, and design the business students' participation in the clinic to avoid any inadvertent waivers. Second, faculty must consider institutional limitations, such as the scope of faculty teaching assignments, the difficulty of cross-listing courses, and the geographical proximity of the business students to the law school, before embarking on a collaborative program. Third, different educational styles and goals between the two professional schools must factor into the teaching of the course. Finally, law school faculty supervisors must be committed to establishing a good rapport with their business faculty counterparts – a rapport the authors share and highly value as an important component of their success.

Absent unforeseen circumstances, the authors plan on continuing the collaboration – still in its infancy – and seeking ways to regularize it in the curriculum so that it is more institutionally recognized. The multitude of decisions and arrangements made to date will bear fruit in the future as the clinic continues to improve its educational performance and better serve its client base.

## *Notes & Observations*