

2014

Preparing Law Students to Become Litigators in the New Legal Landscape

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Recommended Citation

Paul Radvany, *Preparing Law Students to Become Litigators in the New Legal Landscape*, 33 Rev. of Litig. 881 (2014)

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Preparing Law Students to Become Litigators in the New Legal Landscape

Paul Radvany*

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I. INTRODUCTION

The legal world has undergone rapid change over the past few years and law schools and law students are in the midst of adjusting to this new legal landscape. Employers increasingly want to hire students who are ready to practice. As a law student, I participated in an externship, simulation classes, and an in-house, live-client litigation clinic; as a professor, I have taught all three types of classes.¹ My experience, first as a law student, then as a litigator, and now as a professor, has taught me the importance and educational value of experiential learning in helping law students

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1. As a law student, Professor Radvany was an intern in a government office and took two simulation classes and a live-client, in-house litigation clinic. He has been a litigator his entire career, first with Debevoise & Plimpton and then as a federal prosecutor in the United States Attorney's Office for the Southern District of New York (the "USAO"). He supervised law students at Debevoise and in the USAO. At Fordham, he directs the Securities Litigation and Arbitration Clinic, and teaches Trial and Arbitration Advocacy and a Criminal Justice Externship. At Columbia, he teaches a Federal Court Clerk Externship and Trial Practice.

develop their litigation skills. It is more important than ever for students who are interested in litigating to take in-house, live-client litigation clinics, simulation courses, and externships while in law school so that they learn how to make strategic decisions and gain the skills that will enable them to practice upon graduation. This Article argues that while all of these forms of practical legal education are valuable, live-client, in-house litigation clinics are especially important because they contain certain features that are very difficult to replicate in externships or simulations.

II. THE CHANGING LAW SCHOOL AND LEGAL LANDSCAPE

There is a consensus that clinical and other forms of experiential learning² should be part of every law school curriculum and that the vast majority of law students benefit from taking experiential classes.³ In the current economic climate, it is increasingly clear that law students need to obtain the decision-making ability and skills necessary for them to litigate once

2. See Paul S. Ferber, *Adult Learning Theory and Simulations - Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 428 (2002) (“In its simplest sense, experiential learning theory is an intellectual recognition of the simple fact that people learn from their every day life experience. Based on the disciplines of social psychology, philosophy, and cognitive psychology, experiential learning theory provides a foundation for an approach to learning as a lifelong process, inside and outside the classroom. Learning how to learn from experience is an integral part of professional life. While continuing legal education helps, learning from experience is particularly important for lawyers.”).

3. See Nancy M. Maurer & Liz Ryan Cole, *Design, Teach and Manage: Ensuring Educational Integrity in Field Placement Courses*, 19 CLINICAL L. REV. 115, 124 (2012) (“[E]xperiential education, including field placements, in-house clinics, and other courses incorporating real law practice, has become a more valued and prominent part [sic] law school curriculum as law schools respond to various calls for curricular reform.”); see also Linda F. Smith, *Designing an Extern Clinic Program: Or as You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527, 528 (1999) (“[The] classical curriculum fails to teach most skills (e.g., trial advocacy, client interviewing, problem-solving, witness interviewing, client counseling, negotiating, mediating, lobbying, drafting) which are today recognized as fundamental.”).

they graduate.⁴ There are many reasons that law students need to be ready to litigate when they enter the working world. First, government offices and non-profits do not usually have sufficient resources to train new lawyers. Second, in this economic environment, it seems likely that more students will decide to establish their own practice upon graduation.⁵ Students deciding to practice on their own need to know how to litigate, as they will be the only lawyer representing their clients and will not have colleagues within their firm to consult.

The third reason it is important for graduating law students to have litigation skills relates to the changing practice among large law firms. These firms, which hire a significant number of law students, and their clients, have undergone a great deal of change during the past few years. In the past, many first-year associates would receive on-the-job training as large clients who had long-term relationships with the firms would understand that paying for these associates' work was in their interest in the long run, even if the work they were doing was not always worth the hourly rate charged. However, as the economy has changed and clients are increasingly comparison shopping for legal representation based, in part, on cost, it has become increasingly common for clients to demand that even first-year lawyers have the ability to practice at a level that adds value to their case.⁶ Many clients of large firms refuse to pay for first- and second-year associates' work because they do not believe that these junior associates have the requisite experience and skills to

4. See Cynthia Baker & Robert Lancaster, *Under Pressure: Rethinking Externships in a Bleak Economy*, 17 CLINICAL L. REV. 71, 76 (2010) ("The current economic situation means fewer opportunities in the law firm and overall legal job market This downturn means that new associates are busier and under more pressure to demonstrate performance immediately upon hire.").

5. See *id.* at 72 ("Although data is not yet available, experience from prior recessions suggests that more lawyers will turn to solo practice.").

6. See *id.* at 76 ("General counsel at corporations and partners in law firms are unwilling to pay for young associates to learn on the job Employers are no longer interested in - and clients are increasingly unwilling to pay for - training new hires and instead are looking for new associates who have obtained their skill sets elsewhere.").

contribute meaningfully to the case.⁷ As a result, many have called on law schools to ensure that their graduates are prepared to practice.⁸

Another development that has affected young lawyers at large- and medium-size firms is that the type of work available for young associates has changed dramatically. There is far less relatively routine work for recent graduates. A decade ago, “the tournament law firm model gave law schools low incentive to emphasize their students’ skills training.”⁹ That was because,

[i]t was a seller’s market for law students, and employers had no ability to demand or expect lawyers better trained in skills. Moreover, the highly-leveraged tournament model busied young associates with tasks like coping with large discovery requests, document review, and basic research and writing, which did not require refined preparation in

7. See David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1, available at http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0 (discussing, generally, the lack of practice-ready law graduates and, citing a 2010 American Lawyer survey, noting that law firm clients are increasingly requesting that no first- or second-year associates be billed for those clients’ matters).

8. See Neil J. Dilloff, *Law School Training: Bridging the Gap Between Legal Education and the Practice of Law*, 24 STAN. L. & POL’Y REV. 425, 427–28 (2013) (“[T]hose law schools that are able to turn out ‘finished’ work-ready graduates will move to the head of the pack, and their graduates will have a leg-up in this uncertain job market.”).

9. Kirsten A. Dauphinais, *Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in Its Wake*, 10 SEATTLE J. SOC. JUST. 49, 61 (2011); see also *id.* at 55–56 (“[U]nder [the tournament model], law firms maintain a leveraged ratio of associates to partners, sometimes employing as many as five non-equity lawyers for every equity partner This engine for prosperity comes with a large proviso As younger lawyers move up the ranks, many of them must leave the firm to maintain the pyramid structure and the high profits. Firms using this model thus need to constantly hire a large number of new associates to replace the attorneys that leave the bottom of the pyramid.”) (quoting Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 600–01 (2010)).

practical skills and allowed breathing space for new associates to learn on the job and on the client's dime.¹⁰

Thus, much of the work junior associates used to do is now completed by staff attorneys, computers, or attorneys working abroad.¹¹ The good news is that the judgment and strategic decision-making that is required in all litigation, as well as most litigation skills, cannot be outsourced overseas or accomplished by computer programs. Judgment can be improved and litigation skills can be learned and practiced during law school if students take a variety of experiential courses. Students can learn and practice these skills through in-house, live-client litigation clinics and simulation courses, and can also improve their judgment and decision-making ability through working on real cases in clinics and externships. Moreover, clinics and externships help students provide needed legal services to clients who otherwise could not afford to hire a lawyer.¹²

There is a growing recognition that students must take several experiential courses while in law school if they want to be practice-ready and that law schools must provide numerous opportunities so that students have the ability to take several such courses.¹³ In recognition of this trend, some law schools have required students to take either a clinic or externship prior to

10. *Id.* at 61–62.

11. See Thies, *supra* note 9, at 604 (discussing the trend of hiring contract or staff attorneys to the work associates were previously paid to do); see also Jon M. Garon, *Legal Education in Disruption: The Headwinds and Tailwinds of Technology*, 45 CONN. L. REV. 1165, 1199 (2013) (“Whatever the benefits and drawbacks to outsourcing on U.S. lawyers, it is an increasing expectation of clients that work which can be done by an overseas attorney for a fraction of the cost of an attorney, a contract attorney, or a paralegal be provided by that low-cost provider.”).

12. See Bernadette T. Feeley, *Guiding Law Students Through For-Profit Field Placements*, 19 CLINICAL L. REV. 57, 58 (2012) (“Similar to other clinical offerings, law school externship programs can assist in providing access to justice for traditionally under-represented clients.”).

13. Maurer & Cole, *supra* note 3, at 124 (“[T]he demands of prospective employers and clients for law schools to graduate ‘practice ready’ lawyers has pushed some law schools to offer more practical course experiences in the belief that this will help their graduates better compete in a depressed job market.”).

graduating.¹⁴ Moreover, the ABA Council of the Section on Legal Education recently approved a requirement that law students must take six credits of experiential courses.¹⁵ In addition, it appears that some states in the near future may require law students to take up to fifteen credits of experiential courses.¹⁶

III. EXPERIENTIAL COURSES ARE CRUCIAL TO DEVELOPING LAW STUDENTS' LITIGATION SKILLS

In order for law students to hit the ground running when they begin practicing—whether they go to a firm, begin a solo practice, or work for the government or a non-profit—it is important that they leave law school with the experiences and training that will prepare them to competently represent clients. Non-experiential courses play a large role in helping law students learn how to litigate. Required first-year courses teach students both substantive law, as well as

14. Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J. L. & POL'Y 11, 45–46 (2013) (“A growing number of law schools have adopted clinic/externship course requirements. As of October 2013, twenty-three U.S. law schools reported that they require their law students to complete a credit-bearing clinic or externship before graduation. Another fourteen schools reported that they provide explicit clinic/externship course guarantees.”).

15. Mary Lynch, *Council on Legal Education Maintains Tenure and 405, Adds Requirement of Six Experiential Credits and Calls for Notice and Comment on Paid Externships*, BEST PRACTICES FOR LEGAL EDUC. (Mar. 16, 2014), <http://bestpracticeslegaled.albanylawblogs.org/2014/03/16/council-on-legal-education-maintains-tenure-and-405-adds-requirement-of-six-experiential-credits-and-calls-for-notice-and-comment-on-paid-externships/>.

16. See, e.g., Tokarz et al., *supra* note 14, at 28–29 (“[I]n 2013, the State Bar of California Task Force on Admissions Regulation Reform unanimously approved new requirements for applicants for the California Bar, the largest bar in the country, mandating fifteen practice-based, experiential law school course credits (not counting the first-year legal writing course). Although the report provides limited details, it notes that students also can complete the fifteen-credit course requirement via legal clinic work or in-the-field experience, such as hours devoted to judicial or governmental externships, during or following completion of law school.”).

issue-spotting and critical thinking.¹⁷ Throughout the law school curriculum, students learn how to analyze case law, legislation, and regulations. In addition, students who want to litigate will need to take certain non-experiential courses that are not required by every law school. For example, litigators need to know the rules of evidence and any student who wants to be a prosecutor or defense attorney needs to take evidence and criminal procedure courses.

However, there is a difference between understanding rules and applying them in real situations. Many litigators will say that no matter how great their evidence professor was, it was not until they started trying actual cases—eliciting testimony from real witnesses with adversaries objecting and judges ruling on those objections—that they truly began to understand how the rules of evidence operated in practice. Moreover, evidentiary rulings are not made in isolation. Rather, in real trials, a judge's rulings are influenced by the claims or charges involved in the case and by the other evidence which has been admitted or excluded. Thus, litigators need to apply the rules they learned in law school in connection with actual cases. Clinics and externships afford students an opportunity to put much of what they learn in their other classes into practice. Moreover, applying the law in real cases helps students gain a better understanding of their doctrinal classes, as they are able to observe how the law operates in practice.

Students who want to litigate upon graduation should take experiential courses to obtain litigation skills and, equally as important, to acquire the judgment which is necessary to make important decisions and to counsel clients. Students will need to develop the ability to make difficult strategic decisions in a case where there are many interrelated moving parts—including one's client, the witnesses, one's adversary, and the judge or arbitrator, to name a few—and where the law may be unsettled. In addition, clinics are valuable to ensure that law students graduate having

17. See Paulette J. Williams, *The Divorce Case: Supervisory Teaching and Learning in Clinical Legal Education*, 21 ST. LOUIS U. PUB. L. REV. 331, 341 (2002) (recognizing that first-year courses and most traditional law school courses "have a goal of teaching students a set of doctrinal principles and a process of legal analysis by which students learn to 'think like lawyers'").

learned many, if not all, of the fundamental skills referred to in the MacCrate Report. Thus,

[c]linics can integrate a foundation in the ten fundamental lawyering skills with instruction in advanced aspects of these skills, ethical judgment and values, the distribution of justice, and the lawyer's pro bono obligation. Moreover, clinics allow students to use lawyering skills in a real-world context and to discover for themselves how they respond to the role of 'lawyer.'¹⁸

Issue spotting alone does not teach students how to use good judgment. Making the right decisions and learning how to be an effective lawyer takes a significant amount of time and a great deal of preparation. This is where a supervisor, either in a clinic or in an externship, can play a significant role.¹⁹ One commentator explained the importance of clinic supervisors:

Nowhere is the intersection of legal theory and legal practice more intense than in supervising students representing real clients on real cases. Supervision is an ongoing dialogue between student and teacher about that representation. The teacher gives shape to the dialogue through each decision about what to include in, and how to conduct, the discussion.²⁰

Each type of experiential course has benefits for students and, taken as a whole, are not costly.²¹ Aspiring litigators should take a number of different experiential courses to acquire the necessary

18. Ann Juergens, *Using the MacCrate Report to Strengthen Live-Client Clinics*, 1 CLINICAL L. REV. 411, 417 (1994).

19. *Id.*

20. Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 110 (1994).

21. Peter A. Joy, *Considering the Cost of Clinical Legal Education*, 85 N.Y. ST. B.A. J., Sept. 2013, at 20, 22 (“[T]he lower per-student cost of simulation courses and externships should help support the more faculty intensive in-house clinical courses . . .”).

experience and training. Thus, a “sound legal education must be a proper combination of doctrinal courses, simulation lawyering skills courses, externships, and in-house clinical courses.”²² Simulations involve performing skills, such as interviewing a potential client, and receiving feedback and critique from the professor. They are useful for teaching students certain skills, and therefore are used in externship courses, clinics, and, of course, simulation classes, such as trial advocacy. They “offer[] the advantage of total control to ensure performance of each skill and the introduction of new challenges at appropriate times for student learning.”²³ Moreover, a student can practice the same skill, such as direct-examination, in a trial advocacy class a number of times throughout the semester. Because students receive detailed and immediate feedback from the professor, each time they conduct an exercise they will improve on their previous performance.

While simulations can be “valuable teaching tools, . . . they cannot substitute for dealing with real people.”²⁴ Moreover, “the principles that are learned in the classroom, that are rightly often abstract and theoretical, become concrete and real when put in the context of a real case on behalf of an actual person.”²⁵ It is very difficult to create a simulation that encompasses all of the issues and events that occur when dealing with a real client, real witnesses, real adversaries, and real judges. For example, because litigators play a large role in discovering and developing the facts of a case, a simulation with set facts cannot recreate this experience. Thus, simulations “face[] the challenge of replicating reality realistically. This may be more easily done for some skills (e.g. writing a legal memo) than for others [such as] . . . counseling a client” or negotiating with an adversary.²⁶ Moreover, “certain skills (such as, problem-solving, case planning and strategizing) may be best explored in a live setting since simulating them is too

22. Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C.J.L. & SOC. JUST. 309, 327 (2012).

23. Smith, *supra* note 3, at 532.

24. Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 596 (2008).

25. *Id.*

26. Smith, *supra* note 3, at 532.

time-consuming.”²⁷ In addition, students in live-client, in-house clinics interact with the professor far more often than those in simulation classes, and the nature of the interaction takes on more importance as students are working on real cases with real clients.²⁸ Thus, “students may approach simulation problems with less concentration and ‘approach real problems with a heightened seriousness of purpose.’”²⁹

In addition to taking simulation classes, students should also participate in externships during law school where they learn from both the seminar portion and the in-field placement.³⁰ While externships may differ, generally “a student works for academic credit in a legal setting outside the law school under the supervision of an attorney and also attends a related seminar class at the law school.”³¹ Different law schools have different ways of organizing their externships. Thus, the professor who teaches the seminar portion of the class may or may not supervise the students’ fieldwork. Some externship seminars are taught by a lawyer who supervises the students’ work at the placement, while other seminars are taught either by an adjunct professor or by a full-time faculty member who does not work at the placement. Students in an externship may all work in the same law office or in different offices, such as in a criminal justice externship, where students may

27. *Id.*

28. Phillip W. Broadhead, *A Model Program for Establishing a 1993 Criminal Appeals Clinic at Your Law School: More Bang for the Buck*, 75 MISS. L.J. 671, 679–80 (2006) (“The clinical professor must be willing to not only allow the student/lawyers the freedom to engage in independent thought and action in the case, but must also be willing to mentor and evaluate the performance in the clinical supervision portion of the course. None of these inter-professional dynamics between client, professor, and student can be confronted in simulation exercises outside of the in-house live-client clinical setting.”).

29. Smith, *supra* note 3, at 532–33.

30. See Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240, 253–54 (2009) (noting that externship students learn “through several aspects of the externship, including the externs’ pre-placement training, their work experiences, and the seminar class”).

31. *Id.* at 243; see also *id.* at 249 (“The observable features of an externship program typically include four basic components: field placement, journals, supervision, and a seminar class.”).

work in various prosecutors' or legal aid offices. As explained in more detail below, having the same professor for the in-field placement and the seminar has certain advantages.

Externships provide concrete benefits. They can be a rewarding experience and helpful for students to develop their professional identity. Field placements "immerse students in the professional role, expose them to professional norms and values in actual practice settings, and then allow them to evaluate and incorporate those norms and values."³² Moreover, externships help students determine what career to pursue upon graduation and make connections to lawyers practicing in their area of interest. Thus, an externship "can provide very practical opportunities for student exploration of career options, networking, resume building, and jobs."³³ Moreover, the "career-shopping aspect of the externship may benefit the community as a whole, as students who might not otherwise have chosen a public-service or government career follow those paths as a result of their externship experiences."³⁴ Finally, externships can help students develop necessary skills and improve their decision-making ability while providing needed legal services to clients.

IV. LIVE-CLIENT, IN-HOUSE LITIGATION CLINICS ARE CRUCIAL FOR DEVELOPING STUDENTS' LITIGATION SKILLS

Because "[t]here are many educational benefits that can be derived only through clinical experiences,"³⁵ students will benefit from taking an in-house, live-client litigation clinic even if they also

32. *Id.* at 253.

33. Feeley, *supra* note 12, at 58; see also James H. Backman & Jana B. Eliason, *The Student-Friendly Model: Creating Cost-Effective Externship Programs*, 28 TOURO L. REV. 1339, 1346 (2012) ("[E]xternships allow students to seek experiential opportunities in the geographical area where the law student hopes to begin practicing law or where the student eventually expects to settle down in a career position.").

34. Kathleen Connolly Butler, *Shared Responsibility: The Duty to Legal Externs*, 106 W. VA. L. REV. 51, 55 (2003).

35. Chemerinsky, *supra* note 24, at 596.

take a simulation course or participate in an externship.³⁶ In clinics, “[s]tudents benefit from having clients and seeing the duties and complexities that come from serving real people. There is an opportunity for training about professionalism that comes when students have their own clients whom they must represent.”³⁷ Moreover, partly because clinics are taught by a full-time professor, who supervises all of the casework, they are a “superior structure to support an integrated and spontaneous approach to learning which encompasses the full array of educational goals possible in a clinical program.”³⁸

There are many reasons in-house, live-client litigation clinics are helpful for developing students’ litigation abilities. Perhaps most importantly, working on and managing their own cases with real clients under the direct and close supervision of a clinical professor teaches students how to improve their judgment so that they can make better strategic decisions. The ability to make good decisions is crucial given that there are many moving parts to any litigation and many things cannot be predicted with certainty. Clinics also help students apply the skills they have learned from their non-clinical courses and obtain a greater understanding and appreciation of how legal doctrines are applied to real cases.³⁹ Equally important, clinics teach students important litigation skills. There are a number of different skills required in litigation, such as interviewing, counseling, negotiating, conducting oral arguments, trials, arbitrations, and hearings, as well as persuasive writing. Many

36. While there may be different definitions of what constitutes a clinic, for purposes of this article, a clinic involves a full-time clinical professor supervising the casework and teaching the seminar. All of the work the students accomplish in representing the clinic’s clients is done under the direct supervision of the professor.

37. Chemerinsky, *supra* note 24, at 596.

38. Smith, *supra* note 3, at 534.

39. Stephen Wizner, *Is Social Justice Still Relevant?*, 32 B.C. J. L. & SOC. JUST. 345, 351 (2012) (“Beyond skills training, clinical legal education leads law students out of the protected environment of law school classrooms into the real world of law so that they may gain a deeper understanding of how legal doctrines and legal theories actually work (or fail to work), learn about the actual functioning (and malfunctioning) of the legal system, and develop good professional values and an appreciation of the important roles that lawyers play in society.”).

of these skills can be learned, practiced, and improved upon by working in a clinic.⁴⁰

Another benefit of live-client, in-house clinics is that students often work in teams with other students on their cases. Sometimes, they have individual projects they are working on, and at other times, they are working closely with each other to accomplish a goal. Students learn how to collaborate with colleagues—a very important skill to learn because usually once students graduate, they will not be the only lawyer working on a case.⁴¹ Therefore, it is important that while students are in law school they are exposed to working with others and learn how to overcome any challenges teamwork may entail. Often the professor can help foster collaboration between students:

Teaching teamwork involves instructing students in critical life skills, including communication, planning and coordination, leadership and cooperation, as well as conflict resolution, problem solving, and creative thinking. In addition to gaining these life skills,

40. See Esther Canty-Barnes, *Serving the Needs of Disabled Children: A Look at the Special Education Clinic at Rutgers Law School–Newark*, N.J. LAW. MAG., June 2003, at 71, 72 (“Clinical students represent real clients with real problems and concerns. Through the clinic, students are able to develop a wide range of legal, advocacy and interpersonal skills while performing a much-needed service in the community.”).

41. *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 511, 515 (1992) (“[A]n additional feature of the in-house clinic is the opportunity it provides to engage in collaborative learning. Most of law school learning is intensely individual. Legal practice, in contrast, is replete with situations in which preparation and performance occur in a collaborative environment. The in-house clinic provides a setting where this collaborative learning can occur. Moreover, in many clinics, an examination of the process of student–student or student–faculty interaction is an explicit focus of the experience.”); see also Elena Kagan, Associate Justice, U.S. Supreme Court, Georgetown University Law Center, (Mar. 17, 2014), available at <http://www.c-span.org/video/?318317-1/conversation-sc-justice-kagan> (commenting on the importance of teamwork for lawyers).

students derive other benefits from the experience, including interpersonal satisfaction.⁴²

Lawyers who took clinics while in law school view the experience as helpful to develop their litigation skills. In fact, “early-career lawyers value clinical experience more highly than any other aspect of the formal law school curriculum in preparing them to make the transition to the profession.”⁴³

For the remainder of this Article, I will focus on three aspects of in-house, live-client litigation clinics. Although, some of these can be found in externships, they are not usually all present because it is more challenging to ensure that each externship offered by a law school will contain all of the features of in-house, live-client litigation clinics.⁴⁴

A. Students Benefit from the Supervision Provided in an In-House, Live-Client Clinic

In experiential courses, students learn how to be lawyers from their supervisors.⁴⁵ A supervisor who is an experienced and

42. Janet Weinstein et. al., *Teaching Teamwork to Law Students*, 63 J. LEGAL EDUC. 36, 38 (2013).

43. Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 58–59 (2009).

44. Peter Jaszi et al., *Experience as Text: The History of Externship Pedagogy at the Washington College of Law, American University*, 5 CLINICAL L. REV. 403, 410 (1999) (“Even at their best, externships necessarily lack some of the essential components found in in-house clinics: they rarely give students primary case responsibility; do not provide the intensive, supportive, yet appropriately distanced supervision of case development and client relations that in-house clinics afford; and they do not incorporate the mix of supervision, case rounds and classroom instruction that encourages in-house clinic students to learn client representation skills while acquiring a critical perspective on lawyering and its relation to doctrine, legal institutions, and clients’ lives.”).

45. See Tokarz et al., *supra* note 14, at 41 (“[T]he first law practice experiences that students have should involve effective faculty supervision. The clinical supervisor can help set the student on a path of lifelong learning. Through the supervisor-student relationship in clinics and externships, students learn how to seek out assistance and mentorship, and how to develop an appropriate and effective relationship with an attorney with more knowledge and experience.”); see also Williams, *supra* note 17, at 365 (“‘Supervision’ is the term used to

talented litigator will create a better learning experience for the students. Supervision “is at the core of effective clinical teaching. It is through supervision that the clinical teacher responds to the individualized learning needs of the students and the requirements of the case.”⁴⁶ Clinics are taught by full-time professors who usually have a great deal of litigation experience and were considered to be strong litigators before they were hired. The process for hiring full-time professors is rigorous and usually involves the entire faculty, so the professors hired have been vetted to a greater extent than adjuncts. Moreover, prior to being hired, clinical professors often have had supervisory responsibilities in previous jobs, and quite often, previous teaching experience—either as adjuncts or through fellowships. Thus, as compared to an externship where the supervisor is not a full-time professor, the “more traditional on-campus ‘in-house’ clinic presents less of a challenge in terms of training and motivating supervising attorneys.”⁴⁷

Moreover, as clinicians are full-time professors, their focus, in addition to representing clients, is educating students and supervising the students’ work. As they advance in their teaching careers, they will improve both their teaching and supervisory skills. Clinical professors spend a great deal of time working with students and providing them with feedback. Most clinical professors believe that a non-directive style makes for a better learning experience.⁴⁸ Clinicians understand how to supervise in a non-directive manner

encapsulate the primary method we employ to teach in the Clinic. It is not supervision in the same sense that a partner or managing attorney supervises the work of junior attorneys, although it certainly includes some of the task assignment and project management functions included in that concept. Supervision in the Clinic is a key teaching and learning opportunity.”).

46. Peter Toff Hollman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L. J. 301, 301–02 (1986).

47. Barbara A. Blanco & Sande L. Buhai, *Externship Field Supervision: Effective Techniques for Training Supervisors and Students*, 10 CLINICAL L. REV. 611, 612 (2004).

48. See Williams, *supra* note 17, at 373 (“A lesson from clinical teaching that I found surprising is how valuable it is and how difficult it is to be non-directive. Both learning theory and good clinical practice say that learning is more effective if students learn from their experience rather than being lectured at. Through supervision I can encourage students to reflect on their experience and to think about complexities of the situation that might otherwise not occur to them.”).

and, because supervising and educating students is their full-time job, have time to be more non-directive than supervisors in the field. If a supervisor is non-directive, it “allows the student greater autonomy, and provides the student with the opportunity to be fully in the role of the primary lawyer representing the client. This role assumption is generally viewed as one of the core goals of a clinic program. If a teacher is directive and gives the student instructions rather than guidance, the student is in the role of law clerk, not lawyer.”⁴⁹

For example, when a student asks, “How do I explain this to my client?” what could be a relatively short conversation if one is directive can easily be a half-hour or longer discussion in a non-directive environment, depending on the decisions to be made and the different paths that can be taken. Professors may help students by asking questions:

- What do you think we need to do before meeting with our client?
- What are the possible options going forward?
- Do you need to conduct any research?
- What do you think our client might ask you or want to know?
- What, if any, information and advice should we provide her?
- What concerns might she have?
- What do you think is the best course of action to take?

The conversations that follow these questions help the students learn how to think for themselves—much like they will have to do upon graduation. Of course, during the discussion students also benefit from the views of the professor, but his or her opinions are usually only expressed after the students’ thoughts have been solicited and discussed. An externship supervisor may not have the time, let alone the ability, to be non-directive.⁵⁰

49. Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49, 84 (2004).

50. See, e.g., Stacy Caplow, *A Year in Practice: The Journal of a Reflective*

In addition to having detailed discussions with students regarding what course of action should be taken, many, if not most, clinicians have students conduct the litigation task, whether it be interviewing and counseling clients, negotiating with adversaries, or conducting the hearing, trial, or arbitration. The professor is there every step of the way: guiding the students, helping them prepare, mooted them, giving them suggestions, editing their written work, and providing them with detailed feedback.

Supervision in externships poses greater challenges.⁵¹ Students in an in-house litigation clinic are supervised in a law office wholly devoted to educating students by a full-time professor, while externship students are supervised at their placement.⁵² Often the supervising lawyer of the extern is not the professor who teaches the seminar portion of the class.⁵³ In fact, in some externships, each

Clinician, 3 CLINICAL L. REV. 1, 31–32 (1996) (“Despite my possibly unique situation, this experience highlights the vagaries of externships that rely on the good will, interest, and teaching skills of field supervisors. Differences of temperament, workload, and values among supervisors portend erratic experiences. As we all know, it is easier to do a task ourselves than to wait for the student to complete something which, even if they do get it right, takes them much more time and effort. This inefficiency is the paradoxical heart of the in-house law school clinical programs that are dedicated to teaching students to develop their own problem-solving techniques and to foster their independent decisionmaking skills, however long this process may take and even if mistakes are made along the way. Ample time and patience, lack of distraction, and teaching expertise characterize the typical in-house clinical supervisory relationship—a sharp contrast to the more hurried and erratic supervision provided by a practitioner.”).

51. See Nancy M. Maurer & Robert F. Seibel, *Addressing Problems of Power and Supervision in Field Placements*, 17 CLINICAL L. REV. 145, 148–49 (2010) (addressing the challenges students may face with externship supervisors, focusing on “[t]he inherent power imbalance in the supervisor/supervisee relationship”).

52. See Elliot S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 376 (2001) (“The advantage of [the in-house clinic] model is that the primary purpose of the law office in which students work is education. In these clinics, students’ first professional experiences are undertaken under the supervision of faculty. The pedagogy is designed to engender appropriate professional values while also teaching students the theory and practice of lawyering.”).

53. See Michele Mekel, *Putting Theory into Practice: Thoughts from the Trenches on Developing a Doctrinally Integrated Semester-in-Practice Program in Health Law and Policy*, 9 IND. HEALTH L. REV. 505, 515–16 (2012) (“Therein lies both the intended fortune and potential folly of off-site, full-time practicums in

student is assigned to a different attorney within the externship office. These supervising attorneys are not chosen by the law school, nor are they necessarily selected because they are good supervisors.⁵⁴ They may be chosen solely because they are interested in having a student help them with their case. They may have no supervision experience, not be experienced litigators, and not even be particularly good lawyers. Moreover, their own jobs often present deadlines that take precedence over their work with students. Thus, “[i]n an off-campus field placement, the primary concern of the supervising attorney must be the work of the agency . . . while the concern for the education of the field extern must by nature be a secondary goal.”⁵⁵ In addition, they may have neither the time nor the skill to give students helpful feedback.⁵⁶

Moreover, even if the person who teaches the seminar portion of an externship is the supervisor for all of the students in the class, teaching students is not the supervisor’s full-time job. The “complete collaboration” between professor and student “makes the in-house clinic a unique educational experience for the law student,” but such collaboration is not always present in an externship.⁵⁷ This

legal education: the day-to-day instruction of students occurs outside of the law school walls and beyond the direct control of vetted law faculty. Rather, as the practicum portion of the SIU Program provides direct training in professional practice, approved field supervisors at the assigned placement sites are charged with the daily instruction and oversight of students.”).

54. See Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 NOVA L. REV. 95, 104 (1987) (“Many site supervisors are competent attorneys but are not effective teachers. Not only do many of them lack the time to provide effective supervision, but they lack the necessary skills as well. This is true of the legal profession as a whole as evidenced by the lament of many inexperienced attorneys that they receive inadequate supervision and evaluation of their work from their supervisors.”).

55. Blanco & Buhai, *supra* note 47, at 612; see also Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 CLEV. ST. L. REV. 275, 289 (1996) (“Field supervisors will vary in their aptitude and attitude. While the field supervisor may be an excellent lawyer, a concerned mentor and a fine role model he or she cannot be expected to have the skills, perspective, time or inclination to ensure the educational viability of the student’s experience.”).

56. See Mekel, *supra* note 53, at 516 (“As such, field placement attorneys overseeing students must have both time for and expertise in effectively providing such direction and feedback to students.”).

57. Philip M. Genty, *Clients Don’t Take Sabbaticals: The Indispensable*

is not to say that students cannot have a wonderful learning experience in an externship. As noted above, they can and they do. However, the nature of supervision may vary.⁵⁸

B. Students Learn How to Litigate by Working on Their Own Cases

One reason in-house, live-client litigation clinics are useful to train future litigators is because once they have completed the clinic, the students have actually practiced as “lawyers” in representing a client. Many clinicians tell their students that they must take ownership of “their” case to represent “their” client.⁵⁹ The students are responsible for most of the work and play an important role in determining what the best course of action is at various stages of the case.⁶⁰ Of course, nothing students do in a clinic is done without a great deal of discussion and feedback from supervisors who ultimately approve all decisions and work product.⁶¹ While at times it also can be beneficial for students to observe an experienced

In-House Clinic and the Teaching of Empathy, 7 CLINICAL L. REV. 273, 284 (2000).

58. See Blanco & Buhai, *supra* note 47, at 620 (“Off-campus field externships are inherently problematic as an educational experience because there is necessarily a fundamental conflict of goals for supervisors and students. The field supervisor must answer to the primary demands of the employer and the employment. Field supervisors, who are usually not compensated for the job as student supervisors, and who agree to accept the supervision of a law student, must incorporate the component of the law school’s institutional goals and objectives of education and mentoring of a student to a busy law practice and calendar.”).

59. See Milstein, *supra* note 52, at 376 (“Students in clinics are given complete responsibility for handling an actual legal matter for a real client.”); see also Dunlap & Joy, *supra* note 49, at 86 (noting that students should be “encouraged to take ownership of the case” and hopefully will “come to appreciate the importance of learning how to devise answers on her own, or at least push herself to suggest alternative plans of action and to weigh the benefits and detriments of each plan”).

60. When my students represent a client at arbitration, they give the opening statements and closing arguments after having extensively prepared with me. They also conduct all the direct- and cross-examinations.

61. See Dunlap & Joy, *supra* note 49, at 86 (“Clinicians should assure the student that the faculty member will review each proposed course of action before the student executes the plan.”).

attorney in action, students gain more from actually playing the role of the lawyer. First, if students know they will be conducting the interview or negotiations, they will prepare differently than if they were going to be an observer. Second, conducting the task and reflecting upon the experience will allow students to improve the next time they perform the skill.⁶²

This process differs from many externship experiences. In an externship, it is challenging for organizations to allow students to do most of the work on a case. Thus, it is often difficult for students to take ownership of a case as students are often working on another lawyer's case. Moreover, because most students who intern in an office during the semester only work one or two days a week, they are sometimes not present for important events that occur in the case. Although the attorneys can inform the students about what they missed during the days they were not at the office, doing so provides a different educational experience than that of a clinic, in which students are present for everything that happens in their cases.

Finally, although simulation classes are helpful to teach students certain skills, they can never replicate working on a real case with real clients. For instance, many real clients fear having to testify at hearings, arbitrations, and trials. Students counsel these clients to try to allay those fears. In addition to a professor providing feedback to the student on their counseling skills, the client gives the student direct feedback through the questions they ask, the statements they make, and ultimately, whether their concerns about testifying have been alleviated. An actor simply cannot provide the same experience.⁶³ Another example of a real-life situation that is

62. Tokarz et al., *supra* note 14, at 41 (citing Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807, 821 (2007)) (stating that the clinical method “help[s] the student develop the skill of learning how to learn, . . . give[s] feedback that is essential to the students’ improvement and development[,] . . . [and] make[s] the student’s experience the subject of critical review and reflection”).

63. See David F. Chavkin, *Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 3, 12 (2009) (“[S]tudents are affected by real interviews with real people with real problems at levels that simulated interviews with actors with simulated problems cannot hope to approach.”).

impossible to replicate in a simulation is a counseling session with a client who has been accused of committing a crime. Some defendants face the choice between pleading guilty and getting a substantially lower sentence but, by pleading guilty, they risk being deported. This would involve a very challenging counseling session, both because of the tremendous consequences that flow from the decision, and because of the analysis one must conduct to counsel one's client on what his or her chances may be if he or she chooses to go to trial. Such counseling sessions simply cannot be replicated in a simulation.

C. *The Seminar Enhances the Students' Clinical Experience*

Another important aspect of an in-house, live-client litigation clinic is the seminar. In addition to the casework, clinics include a seminar taught by a clinical professor. Because the professor who teaches the seminar also supervises all of the students' casework, the seminar can be structured in a manner that will be most beneficial for the students.

The professor can gear class discussions toward the students' cases. Instead of simply lecturing on the challenges of preparing a witness to testify, the professor and the students can use an example from a recent prep session to illustrate a point for the other students in the class. Or, if the specific class involves negotiating a settlement with one's adversary, one can discuss a recent negotiation the students have conducted to enhance the students' learning experience. These are all discussions in a class setting made possible because the professor is working closely with the students on their casework.

Conducting case rounds where students have the opportunity to present their cases provides another important part of a clinic seminar. This allows students to discuss the decisions that need to be made, and thereby educate the other students and obtain feedback, which will be helpful in making those decisions. While one can conduct case rounds in externship classes, the attorney-client privilege and confidentiality concerns limit the conversations students can have regarding their fieldwork, unless all of the students in the class are externing in the same organization and the professor

is also employed there, which is not often the case.⁶⁴ However, in a live-client, in-house clinic where the professor is supervising all of the students' work, not only can the students discuss all aspects of their cases, but the professor can also help foster that discussion because he or she supervises all of the students and their cases and is knowledgeable about everything that has occurred during that semester. Moreover, for cases that have continued from prior semesters, the professor can explain to the students what has previously occurred in the case.⁶⁵

The seminar portion of a clinic can also be used to effectively teach students the skills they need to litigate well. Because the professor is supervising the students' cases, he or she can tailor the skills that are taught during the semester to the skills the students will need to adequately represent their clients. Thus, if the students will be conducting a trial or arbitration during the semester, the professor can teach them how to make opening statements and closing arguments and how to conduct direct- and cross-examinations. If students will be conducting a mediation or a negotiation, the professor can discuss how one prepares for, and advocates for clients in, those settings. In addition, the professor can shape mock exercises to make them as similar as possible to the students' casework. The professor can have the students participate in either short exercises or a semester-long simulation, which can complement the casework.

64. Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 519 (2004) (“[I]n many externship programs, externs receive express instructions *not* to discuss any confidential matters from their placements in the externship class, and, in most cases, they comply.”).

65. See Susan Bryant & Elliott S. Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education?*, 14 CLINICAL L. REV. 195, 198 (2007) (focusing on “learning opportunities that rounds present and identif[ying] the ways that teachers can maximize this learning”).

V. CONCLUSION

In conclusion, it is crucial that students take advantage of all forms of experiential learning while they are in law school. Simulations, externships, and clinics all have much to offer, and students can benefit from all of them. For students interested in litigating, a live-client, in-house litigation clinic is important for learning how to make difficult decisions and gaining the skills necessary to represent clients effectively in the real world.

