

CHAPTER ONE

INTRODUCTION

1. Introduction, structure and background

1.1 Introduction

At the University of the Witwatersrand, Johannesburg, the course ‘Practical Legal Studies’ (“PLS”) is a compulsory year course in the final year of LLB.¹ This course is generally referred to, in the global legal academia, as ‘Clinical Legal Education’ (“CLE”).²

CLE is the primary mode of instruction in various law school courses – particularly courses that are described as “clinical”, such as simulation-based courses (students assume professional roles in hypothetical situations), in-house clinics (students represent clients or perform other professional roles under supervision of a member of the faculty, who is an attorney), and externships (students represent clients or perform other professional roles under supervision of an attorney who is not a member of the faculty).³

CLE forms part of the LLB curriculum at most of the South African Universities,⁴ as well as in many of the LLB curricula in other countries. There are many similarities in the approach to

¹ The undergraduate LLB degree is the South African minimum requirement for admission to the professions of attorney and advocate. South Africa has a bifurcated legal practice system. Attorneys consult directly with clients and appear in the lower courts (i.e.: the magistrates’- and regional courts) on clients’ instructions. Advocates are not instructed by clients directly and appear in the High Courts on briefs by attorneys. The practical qualification requirements for attorneys and advocates, after graduating with the LLB degree, also differ.

² The study will focus on clinical legal education. “Practical legal studies” will be regarded as the name of the clinical legal education course offered by the University of the Witwatersrand. The course will be referred to as “clinical legal education (CLE)” for purposes of this study.

³ Stuckey *et al* 2007 : 165 - 166.

⁴ SAULCA (South African University Law Clinics Association) (formerly AULAI), is a voluntary association of all South African University Law Clinics, established to promote and protect the interests, values and goals of its members. Part of SAULCA’s mission is to promote high quality CLE programmes at universities in South Africa. <http://www.saulca.co.za/home> (accessed on 11 May 2014). The following South African university law clinics, are listed members of SAULCA: Rhodes University Law Clinic in Grahamstown and its Queenstown clinic, the Queenstown Rural Legal Centre (<http://www.ru.ac.za/law/resources/lawclinic/>); University of Stellenbosch: Stellenbosch Legal Aid Clinic (<http://blogs.sun.ac.za/law/legal-aid-clinic/>); University of Cape Town: UCT Law Clinic (<http://www.law.uct.ac.za/>); University of Fort Hare, East London Campus (<http://www.ufh.ac.za/faculties/law/>); University of Johannesburg Law Clinic (law clinics at Auckland Park, Doornfontein and Johannesburg Magistrates’ Court) (<http://www.uj.ac.za/EN/Faculties/law/departments/LawClinic/Pages/default.aspx>); University of KwaZulu-Natal (law clinics at Howard College Campus Law Clinic and University Law Clinic, Pietermaritzburg (<http://law.ukzn.ac.za/LawClinic.aspx>); University of Limpopo Law Clinic (Turffloop Campus, Polokwane/Mankweng) (http://www.ul.ac.za/index.php?Entity=School%20Main%20Menu&school_id=10); University of Pretoria Law Clinic (<http://web.up.ac.za/default.asp?ipkCategoryID=327>); University of South Africa

CLE, both locally and abroad, but there seems to be as many, if not more, differences in the approach, particularly relating to student assessment. This study will focus on student assessment in CLE.

CLE can encompass a variety of courses and clinical methods. A number of descriptions are provided to facilitate the reading of this thesis. Note that the descriptions below contain only the key features of each. There is substantial literature available that expounds on each.

- **CLE:** The most recent (and I submit, updated) definition of **Clinical Legal Education** reads: “[c]linical legal education involves an intensive small group or solo learning experience in which each student takes responsibility for legal or law-related work for a client (whether real or simulated) in collaboration with a supervisor. Structures enable each student to learn from their experiences through reflecting on matters including their interactions with the client, their colleagues and their supervisor as well as the ethical dimensions of the issues raised and the impact of the law and legal processes.”⁵
- **Experiential education / experiential learning:** integrates theory and practice by combining academic inquiry with actual experience. “Experiential education is the primary mode of instruction in various law school courses, especially courses that are generally described as “clinical”: simulation-based courses, in-house clinics, and externships. These courses in law schools differ from each other in the following ways:
 - in **simulation-based** courses, students assume professional roles and perform law-related tasks in hypothetical situations,
 - in **in-house clinics**, students represent clients or perform other professional roles under the supervision of members of the faculty, and

(Unisa Legal Aid Clinic, Pretoria) (<http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=15672>); University of Venda (Univen Law Clinic, Thohoyandou) (<http://www.univen.ac.za/index.php?Entity=Legal%20Aid%20Clinic&Sch=6>); University of the Witwatersrand (Wits Law Clinic, Braamfontein, Johannesburg) (<https://www.wits.ac.za/lawclinic/11045/witslawclinic.html>); Nelson Mandela Metropolitan University (Nelson Mandela Metropolitan University Law Clinic, Missionvale, Port Elizabeth) (<http://www.nmmu.ac.za/Courses-on-offer/Degrees,-diplomas---certificates/Details.aspx?appqual=5Y&qual=54400&faculty=1500>); University of the Free State (UFS Law Clinic, Bloemfontein) (<http://law.ufs.ac.za/>); North West University: Law Clinic Potchefstroom Campus (<http://www.nwu.ac.za/p-fl/Law-Clinic>) and Mafikeng Campus Community Law Centre, Mmabatho (<http://www.nwu.ac.za/content/nwu-mafikeng-campus-faculty-law-community-law-centre-5>); Walter Sisulu University (Walter Sisulu University Law Clinic, Transkei) (jilatal@webmail.co.za); University of the Western Cape (UWC Legal Aid Clinic, Belville, Cape Town) (<http://www.uwc.ac.za/Faculties/LAW/CriminalJusticeProc/Pages/default.aspx>); University of Zululand (University Law Clinic, KwaZulu-Natal) (<http://www.unizulu.ac.za/faculties/faculty-of-commerce/4about-us/>).

⁵ Giddings 2013 : 14.

- in **externships**, students represent clients or perform other professional roles under the supervision of practicing lawyers or they observe or assist practicing lawyers or judges in their work.”⁶
- **Practical Legal Studies (PLS):** The University of the Witwatersrand Law Clinic (“WLC”) teaches ‘Practical Legal Studies’ as a compulsory course to final year LLB students. They use a combination of the live-client teaching model, simulations, tutorials and plenary lectures.
- **Practical Law:** The University of Pretoria Law Clinic (“UPLC”) teaches CLE in the course, ‘Practical Law 410 and 420’, to final year LLB students as an elective. They use a combination of the live-client teaching model, simulations and plenary lectures.⁷ The curriculum for the classroom component is referred to as Study Themes. The lectures are presented over the course of a semester.
- **Applied Legal Studies:** The University of Johannesburg Law Clinic (“UJLC”) teaches CLE in the compulsory year course, ‘Applied Legal Studies’, as a compulsory year module to final year LLB students.⁸ They use a combination of the live-client teaching model, simulations and plenary lectures. The curriculum for the classroom component is arranged into five modules and taught over 15 one hour lectures.
- **Legal Practice:** The University of the Free State presents this as a compulsory, first, second, third and fourth year subject. The University of the Free State Law Clinic (“UFSLC”) teaches ‘Legal Practice’, and makes use of a combination of the live-client teaching model, simulations, externships, community outreach programmes and plenary sessions. In Legal Practice in years one, two and three faculty staff presents courses in legal ethics, legal analysis, numeric development, advocacy skills, legal writing, practical labour law, legal drafting, office management, bills of costs and practical divorce law.
- **Community service learning:** Service provided by a university to the community where reciprocity of learning by the service provider and service beneficiary is a key feature. Such service is anchored in an academic module and bears credits.

⁶ Ibid.

⁷ UNIVERSITY OF PRETORIA LAW CLINIC, PRACTICAL LAW 410, STUDY GUIDE: 2012 : 7 - 16.

⁸ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

1.2 The structure of this study

A narrow description of this study would be: “Assessment methodologies in CLE using the experiences of four South African university law clinics emanating from the apartheid era”.

The problem definition is: Are the South African university law clinics under examination (“South African university law clinics”) assessing differently from other jurisdictions; and if so, is this a problem?”

The conclusion will be drawn that: South African university law clinics assess differently; it poses problems; and the assessment regimes need to be remedied, taking into account the nature of legal aid in post-apartheid South Africa and the post-apartheid problems it needs to address.

The ultimate conclusion will propose a menu of possible assessment methods which may enhance the choices of assessment methodologies available to South African university law clinics.

Although the aim of this study is to find appropriate assessment methods for CLE, the effectiveness of an assessment programme can only be determined when measured against a curriculum. By drawing on the relevant literature, reviewing the current CLE manual for South African university law clinics and reviewing the curricula of four South African university law clinics, I address the question: “How to design a curriculum with assessable content, specifically for South African university law clinics?” This question is probed in Chapter Two.

Clinical teaching methods can make distinctive contributions to student learning and the most productive use of those methods requires an understanding of the objectives for which they can be deployed. South African university law clinics seek to meet dual objectives in relation to student learning and community service causing ‘dynamic tensions’⁹ between these objectives. In this thesis I propose that these objectives can be advanced in parallel but that in post-apartheid South Africa the forms of learning may need to be prioritised to ensure pedagogical sustainability of the clinics and more effective services to indigent South Africans. To this end the missions of university law clinics are foundational,¹⁰ as are the focus, skills and values and the clinics’ goals and objectives. Discussion of clinical pedagogy, in three categories, namely the clinic experience,

⁹ Gavigan 1997 : 443, 459.

¹⁰ Munro 2002 : 231 - 232.

classroom instruction and tutorial sessions,¹¹ as well as specialised clinical units, will serve to address the sub-question of: “Which components of CLE teaching will best contribute to advance the identified purposes of the objectives of the clinic?”¹² The comparison of curriculum requirements that were identified across a number of jurisdictions to those of four South African universities under review will provide the answer to the question posed above: “How to design a curriculum with assessable content, specifically for South African university law clinics?”, which will conclude Chapter Two. An ideal curriculum will be proposed.

In the history of CLE in South Africa, there is only one record of any concerted effort to consider the assessment of CLE courses.¹³ The questions are: Do South African university law clinics assess differently from other jurisdictions, and is this a problem? Sub-questions are: should formative and summative assessments be applied; and whether assessment parameters should be set. In Chapter Three I am collating different assessment methodologies and indicate the advantages and disadvantages of each.

The conclusion is drawn that: South African university law clinics assess differently; that it poses problems; and that the assessment regimes need to be remedied. The conclusions to the sub-questions are that: both formative and summative assessments must be applied, within set parameters for assessment and mark allocation.

In Chapter Four the question of the necessity or not to assess students in CLE courses is asked. I indicate that: assessment is required. The sub-questions of the need to grade the assessments and whether specific grades should be awarded are posed. Both are answered in the affirmative.

In Chapter Four the further question of whether specific factors that influence and challenge assessments in CLE can be identified in the South African environment. The conclusion is drawn that a number of assessment challenges can be identified; and solutions are suggested.

In Chapter Five the question posed is whether the curriculum proposed in Chapter Two, when measured against the forms of assessment identified in Chapter Three, is found to be appropriate for CLE courses in South Africa. In answer to this question a table, providing an

¹¹ See Chapter Two, paragraphs 5, 5.1, 5.2, 5.3 for a full discussion.

¹² The objectives being student learning and community service.

¹³ Aulai Manual 2005.

evaluation of the variety of assessment tools with an indication to which would be an optimal tool for a specific task of part of the curriculum, is provided.

I strongly believe not one form, but every module, for both curriculum and assessment methods employed, must be informed by full possibility of mechanism; and that it must be selected by those working closely with students, such as directors, course- coordinators and clinicians, to order to determine methods most optimum for students, law clinics and law schools in general.

1.2.1 Research methods

The research components of this study are doctrinal, qualitative and by way of comparative review. In developing this study I took a grounded theory approach to build theory in relation to the development and sustainability of assessment methods in CLE.¹⁴

1.2.1.1 Doctrinal research: Literature Review

I undertook a preliminary review of relevant national and international literature to identify current areas of trends, interests and concerns in relation to CLE curricula and assessment methodologies.¹⁵

I obtained material about the development and operations of a range of CLE curricula and assessment programmes, including international examples. It enabled me to identify concerns which suggested that my research should include gathering and analysing data in relation to South African clinical curricula and assessment programmes by way of non-doctrinal qualitative research.

1.2.1.2 Qualitative research: Interviews and Questionnaires

My preliminary literature review was used to develop a set of themes that I could address in semi-structured interviews with the clinical directors of the four South African university law clinics under review. Identical sets of questions were posed to the respective clinical directors and answers were taken down in their presence during the interviews which were confirmed during the interviews.

¹⁴ Eisenhardt 1989 : 532.

¹⁵ Ibid 54. Eisenhardt states: “An essential feature of theory building is comparison of the emergent concepts, theory or hypotheses with the extant literature”.

The interviews also provided opportunities to corroborate the content of documents, CLE course outlines, assessment- and grading methods employed, relating to the clinical programme in question.¹⁶

My preliminary literature review was also used to develop a set of themes that I could address in questionnaires to students at Wits Law Clinic, whose assessment regime serves as the principal focus of the four South African university law clinics under review. Identical sets of questionnaires were distributed amongst the students and the data obtained was compiled after completion.¹⁷

1.2.1.3 Comparative review

Eisenhardt outlines a comparative method by which grounded theory is developed through “continuous comparison of data and theory beginning with data collection”.¹⁸ This method involves “the emergence of theoretical categories solely from evidence and an incremental approach to case selection and data gathering”.¹⁹ My use of this comparative method was facilitated by the review of four South African university law clinics.²⁰ The aim was to test the factors identified in the literature as promoting assessment methods in CLE, whether other factors can be identified and whether certain factors can be shown to apply in only some instances.²¹ Each comparative review involved extensive research, in which I used documentary sources along with interviews of the respective clinical directors.

In my selection of participants for review I was looking at university law clinics in proximity to my research base, who operate active clinics and which have their founding objectives rooted during the apartheid era in South Africa. It must be emphasised that this in no way proposes to be a complete study of the totality of CLE programmes in South Africa. I am looking only at a select group of clinics whose functions and objectives are informed by their

¹⁶ Wilson 2003 – 2004 : 421. Interviews commenced in 2012 and research ethics principles were followed in the conduct of this research. Written ethics consent forms were provided by the four clinical directors, as well as their consent that their respective clinics may be identified in terms of the rules of their respective universities.

¹⁷ Ibid. Questionnaires were distributed during 2009 – 2011. Completion of the questionnaires was done anonymously and voluntarily. Research ethics principles were followed in the conduct of this research.

¹⁸ Eisenhardt 1989 : 534.

¹⁹ Ibid.

²⁰ Ibid 537. The “case selection” in this study encompassed a selection of South African university law clinics. The clinics were selected *inter alia* to fill different categories in relation to whether their CLE courses are compulsory, are year- or semester courses, and what types of teaching and assessment methodologies are employed.

²¹ Case studies included in the Carnegie Report, on the efforts of the City University of New York and New York University to integrate the various aspects of legal education. See Sullivan *et al* 2007 : 38 – 43.

originating during apartheid. I acknowledge that other university law clinics developed post-apartheid and that the historically disadvantaged clinics progressed substantially.²² I specifically selected university law clinics that originated during apartheid, who potentially are still focused mainly on the origins of their formations, namely the provision of legal aid to the indigent and not recognising the context in which they are needed, as students need the clinics for CLE training, as do the indigent clients for legal assistance.

Each of the four comparative review participants has maintained extensive records of planning, establishment and operation of their CLE programmes and allowed me access to those records. The data collection methods provided for stronger substantiation of the theories developed.²³ The data analysis was a key feature of theory-building comparative research.²⁴

1.2.2 The scope and limitations of the study

Although the research involved the analysis of curricula, the scope of the area of the study is focused on the assessment methods of the various components of the curriculum.

Limitations were experienced when undertaking comparative studies on CLE in the USA, UK and Australia, mainly as a result of the differences in the environments within which law clinics in those jurisdictions operate. The main focus of the study was on the assessment of a practical course, with limited academic components, as opposed to an exclusively academic course. The assessment methods evaluated were therefore limited to those that may be applicable to practical courses.

1.2.3 Conclusion: Contributing to the scholarship of clinical legal education

The theory of CLE is rooted in two broad competing and distinct objectives, namely the objective of enhancing community service through students' experiential learning; and the emphasis on students' experiential learning as the foreground for possible social justice.

²² The majority of South African university law clinics, including the clinics of historically disadvantaged universities are active members of SAULCA (South African University Law Clinics Association) (formerly AULAI), a voluntary association of South African University Law Clinics, established to promote and protect the interests, values and goals of its members. Part of SAULCA's mission is to promote high quality CLE programmes at universities in South Africa. <http://www.saulca.co.za/home> (accessed on 11 May 2014).

²³ Eisenhardt 1989 : 538.

²⁴ Ibid 539.

The question to be asked by university law clinics is: Are we doing this work for the poor or the student? I locate my argument in the second objective, namely that my primary objective is on student learning and my secondary objective is community service. In Chapter Two I explain why I locate this thesis in that objective.

It should be noted however that this binary is complicated in South Africa where CLE began for many primarily as an instrument of social justice. I do not suggest in this analysis that the one is more important than the other. I do maintain however that, for the sound objective, namely students' learning pedagogy in the four university law clinics under review, the assessment of those students' work may be refined and facilitate a more objective consideration of student performance.

In this study, I attempt to address a gap in the South African literature, namely the assessment of students in CLE programmes. In addressing this, it was necessary to review the curricula of university law clinics where CLE courses are taught. Although I used to teach CLE at WLC from 1999 until 2012,²⁵ I found value in writing this study at some distance from the programme in question, both at WLC and from the other three clinics I reviewed. This distance was valuable as clinical scholars tend to write about the programme in which they teach, rather than about programmes that they have made the subject of a research project.²⁶

While there are helpful accounts of particular clinics' assessment regimes and challenges with the assessments, there is a limited coverage of the pedagogical sustainability of clinical legal education as a teaching methodology and in particular the assessments of students in these programmes. This study explores the multiple dimensions of this sustainability that relate to CLE.

1.3 Background

As background to this study, the following need to be noted. A general trend in legal education (which is supported by the School of Law at the University of the Witwatersrand) is an augmented focus on the practical application of the substantive law. CLE is mainly a practical course although it includes training in the substantive law. CLE serves a two-fold purpose,

²⁵ I currently teach academic courses at the Law School of the University of the Witwatersrand.

²⁶ See for example: Bellow & Johnson 1970 : 664; Hardaway 1981 – 1982 : 459; Sherr 1995 : 108; Mitchell *et al* 1995 – 1996 : 1; Watterson, Cavanagh & Boersig 2002 : 7; Dickson 2004 : 1; Ross 2007 : 779; Levy-Pounds & Tyner 2008 : 7 and Montana 2009 : 97.

namely practical legal training of students and providing free legal services to the (indigent) community.²⁷

CLE at the University of the Witwatersrand is currently taught in the following manner (in brief): students are divided into groups and allocated to different clinical supervisors (academic staff who are also practicing attorneys and referred to as clinicians), who specialise in different fields of law and head up different specialised clinical units.²⁸ Students, working in pairs as a result of large student numbers,²⁹ interview clients, represented by the indigent in the community and qualifying for legal aid in terms of a means test,³⁰ in the law clinic. This ‘real-client in-house’ model is described as: “in this model the clinic is based in the law school (hence ‘in-house’) and the unit is offered, monitored and controlled in-house too. The clients are real, with problems requiring actual solutions (hence ‘real-client’). The client base may be selected from the general public at large or from a section of the public ...”³¹ In the clinic the cases presented by clients to the students are screened by the clinician for suitability, as a clinical programme must consider distinguishable types of cases that will serve as good learning vehicles for their students. “Simple service cases,”³² which students can see from initial interview to resolution, make for the best learning tools.³³ After the screening process, appropriate legal matters are taken on – many for litigation through the courts. Apart from the compulsory two hours clinic duty per week, students have a compulsory weekly tutorial with their clinicians where cases are discussed and students are instructed.³⁴ Each student pair is responsible for a number of cases during the academic year. Students are also lectured in the conventional manner once a week, for a double lecture, either by

²⁷ South African universities have identified their objectives as three-fold, namely teaching, community service and academic research. See Wimpey & Mahomed 2006 : 17. University law clinics generally have to satisfy two main objectives, namely teaching of the students and service to the community. See Du Plessis 2008 : 2.

²⁸ On specialisation in the law clinic see: De Klerk & Mahomed 2006 : 306 – 318.

²⁹ The ideal ratio between clinician and students in clinical courses has been suggested to be between 1 : 7 and 1 : 12. See Shrag 1996 : 175. The UK model proposes a maximum of 1:12 and the US models advocate 1 : 8. See Grimes & Brayne 2004 : 9. The University of the Witwatersrand ratio over the past number of years ranged between 1 : 38 and 1 : 46. See Du Plessis 2009 : 92.

³⁰ Du Plessis 2008 : 5.

³¹ Brayne, Duncan & Grimes 1998 : 12.

³² Tarr 1993 : 33, 34.

³³ Du Plessis 2008(b) : 25. “Simple service cases” are those which students can see from initial interview to resolution. In Du Plessis 2008(b) divorce cases, as simple services cases are illustrated to be good learning vehicles for students, whilst affording their clients social justice. Through these “simple service cases” a law clinic can strike a balance between teaching of students and service to its clients. Tarr 1993 : 33, 34. When cases are presented that have the potential to lead to impact litigation, factors, other than suitability for student teaching, may be considered.

³⁴ Du Plessis 2009 : 93.

way of a plenary or in their specialised units. Students are expected to work on their case files during the week, which will be discussed during the weekly tutorials.³⁵

The challenge in CLE is not so much in teaching of the course, but the assessment of the students' performances. At the University of the Witwatersrand a method of assessment was adopted whereby the mark allocation for the year comprises of various different assessment components within the CLE course. Different percentages are attached to the various components, which are often adapted from year to year. These assessment components generally are: case file work, written tests, a written assignment on the attendance and review of a court case, an oral examination and trial advocacy exercises.³⁶

In assessing CLE, a number of different assessment regimes and methods have been suggested, which will be examined in this study. Challenges which influence assessments are identified, as well as contributing factors thereto.³⁷ These challenges will be discussed and addressed.

Relative to jurisdictions such the USA, the UK and Australia, little has been researched and published on CLE in South Africa.³⁸ The University of the Witwatersrand was the second university (after the University of Cape Town) to establish a CLE programme during the 1970s. Clinical programmes, with an academic content, were only recognised during the late 1980s and early 1990s and accredited by the Law Society of South Africa.³⁹ During the mid 1980s the Association of University Legal Aid Institutes (AULAI) was established with the primary objective to promote clinical programmes at South African universities.⁴⁰

At the University of the Witwatersrand the CLE programme is run by the Wits Law Clinic ("WLC"), which forms part of the School of Law. During the 1990s the course "Practical Legal

³⁵ Du Plessis 2009 : 91 – 115.

³⁶ Du Plessis 2009 : 103 – 107.

³⁷ For a detailed discussion see Du Plessis 2009 : 91 – 115.

³⁸ Greenbaum opines that, more than just CLE, "South Africa seems to have lagged behind in interrogating pedagogical perspectives related to legal education, even at a time when there is clearly a need for engagement with concerns about the law curriculum, methods of pedagogy, skills training, literacy and other factors impacting on the provision of higher education." "South African legal education literature in general is extremely limited and has not concerned itself with theoretical approaches or insights from education in any depth." See Greenbaum 2012 : 16, 17.

³⁹ The Law Society of South Africa, the governing body of attorneys, prescribes certain rules regarding attorneys' practices. The law clinic at the University of the Witwatersrand, as well as the other South African university law clinics which will be reviewed as part of this study, are accredited in terms of sections 1 and 3(1) of the Attorneys Act, 1979 and Rule 115A of the Law Society of the Northern Provinces ('Accreditation and Certification of Legal Aid Clinics').

⁴⁰ Wimpey & Mahomed 2006 : 1. Note that Aulai underwent a name change during 2013, and is now known as the South African University Law Clinics Association, "SAULCA").

Studies” (“PLS”), which is the course name for the CLE programme, became a compulsory credit bearing course for all final year LLB students at the University of the Witwatersrand. Students were trained in the law clinic, which was operating as a general practice. The assessment of students was easier to monitor, as they generally received the same clinical exposure. Towards the end of 1999 this general practice changed into a practice specialising in separate units.⁴¹ The clinical programme was completely restructured, including the way in which legal services are now rendered to the public.⁴² As a result of these specialised units, students necessarily are exposed to different experiences during CLE. It therefore becomes more difficult to control and monitor students’ exposure and experiences across the different units, which impacts on the assessment of their clinical work. The challenge for clinicians is in ensuring that assessments of all the students across the different specialised units are standardised. The specialised units at WLC all form part of the same academic course, PLS, and the assessment regime should therefore be standardised across the various specialised units. I will submit that a standard assessment rubric should be developed to address this challenge. The difference in experience, relating to both practice and academic, of the clinicians heading up the various specialised units, may impact on student assessment.

Assessments of students are currently both formative, during clinic sessions and during tutorials, and summative by way of written tests, assignments, trial advocacy exercises, oral examination and the assessment of their case file work. Due to so little being published on CLE in the South African context the programme at the University of the Witwatersrand developed in isolation, with some reflection on other South African universities and foreign programmes only relatively recently.⁴³

I conducted research on CLE over the past eight years and identified the most urgent need in CLE in the South African landscape to be that of the assessment of students. This urgency can mainly be attributed to the following: a) large student numbers,⁴⁴ resulting in students working in

⁴¹ The WLC currently operates in the following specialised units: family law, refugee law, consumer law, labour law, land and urban evictions, delict (“tort”) and a general law unit.

⁴² De Klerk & Mahomed 2006 : 307.

⁴³ The first South African article on CLE was published in 2006. This was followed by a number of South African publications since, resulting in a new awareness amongst South African clinicians. An international clinical conference was hosted by WLC in 2007 and further AULAI conferences were held in Cape Town during 2011 and in Port Elizabeth during 2013.

⁴⁴ Shrag 1996 : 175; Grimes & Brayne 2004 : 86. See discussion in paragraph 5 of chapter 4 of this study.

pairs or groups,⁴⁵ often making it difficult for clinicians to differentiate between work done by individual students;⁴⁶ b) clinicians' time constraints,⁴⁷ which are often interlinked with large student numbers, resulting necessarily in larger case loads;⁴⁸ c) language barriers amongst students and clients,⁴⁹ specifically where only a low percentage of students are able to converse with a client and the remaining students are dependant on their interpretations of client consultations.⁵⁰ Various assessment challenges are identified in this regard;⁵¹ d) interviewing skills generally remain unassessed,⁵² as are undocumented assistance to clients;⁵³ e) the challenge of the assessment of students in an even-handed manner across the different specialised units;⁵⁴ f) the differences in educational backgrounds and experiences amongst students,⁵⁵ as well as the differing levels in students' knowledge of substantive and procedural law which impact on students' abilities to master the cases they are working on;⁵⁶ and g) The differing levels of clinicians' experience in supervision and assessment.⁵⁷ CLE is an intensive and time-consuming practical course, placing high demands on students by both the Law School, the law clinic and the clients. The students ultimately need recognition for their efforts, as well as indications of their practice weaknesses, which also will serve to mould them for future practice. Students therefore need to be assessed rigorously, with proper feedback.⁵⁸

The outcome of a diligent study of assessment procedures will serve as an important indicator of the successes and shortcomings in the programme. Whilst the importance of a well-planned curriculum can not be discounted or ignored, the successes of the curriculum will only become apparent when its outcomes are properly assessed. The flip-side of proper and diligent assessment is therefore unequivocally that the need for a well-planned curriculum becomes accentuated.

⁴⁵ De Klerk & Mahomed 2007 : 312; Hyams 2006 : 77 – 95; Chavkin 1994 – 1995 : 199 – 244; Blumenfeld 2010 : 109 – 142.

⁴⁶ Du Plessis 2009 : 97, 104.

⁴⁷ Ibid 107, 108.

⁴⁸ Ibid 107.

⁴⁹ Ibid 95.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid 94.

⁵³ De Klerk 2007 : 97; Du Plessis 2009 : 96.

⁵⁴ De Klerk & Mahomed 2006 : 306 – 318; Du Plessis 2007 : 44 -63; Vawda 2006 : 295 – 305.

⁵⁵ Du Plessis 2007 : 98 – 100.

⁵⁶ Ibid 100, 101.

⁵⁷ Ibid 101.

⁵⁸ Ibid.

This study will focus on identifying appropriate methods of assessment for CLE, particularly for the programme at the University of the Witwatersrand, and for CLE programmes at South African universities in general. In order to achieve this, curricula need to be reviewed, whereafter an assessable curriculum will be suggested, which will be tested against suggested assessment methods. Although this study will focus on the WLC primarily, three other law clinics and CLE programmes at South African universities will be reviewed in the process, namely the universities of the Free State law clinic (“UFSLC”), Pretoria law clinic (“UPLC”) and Johannesburg law clinic (“UJLC”).⁵⁹

The South African models of assessment will be measured against assessment methods applied in foreign jurisdictions, such as universities in the USA, the UK and Australia.

The importance of assessment was succinctly described by Watson as: “[a]ssessment has always been an important part of academia – it is, after all, a fundamental part of our accreditation function. We do not only teach, we certify, and in so doing we act as gatekeepers to certain occupations, professions and statuses”.⁶⁰ Fisher holds that “[a]ssessment is about putting students at the center of education ... [it] shifts the focus from what is delivered to students to what students take away from the educational experience ... [a]ssessment is about setting goals for student learning, gathering information about how well students are achieving those goals, and then using that information to take action to improve student learning.”⁶¹ The University of the Witwatersrand Senate Policy and Standing Orders on the Assessment of Students’ Academic Performance describes assessment as “an integral and vital part of teaching and learning. The process of assessment of student performance has educational value, in that assessment can support the achievement of a number of goals: it can guide, help and form the learner by providing appropriate feedback, but should also be a way of determining whether a student has

⁵⁹ The university law clinics were selected as they were in proximity to my research base, they operate active clinics and they have their founding objectives rooted during apartheid-era in South Africa, with their main focus potentially still on the origins of their formations, namely community service and thereby potentially neglecting or failing to recognise the needs of students, i.e. CLE training. Other university law clinics developed post-apartheid and the historically disadvantaged clinics progressed substantially. The majority of South African university law clinics, including the clinics of historically disadvantaged universities are active members of SAULCA (South African University Law Clinics Association) (formerly AULAI), a voluntary association of South African University Law Clinics, established to promote and protect the interests, values and goals of its members. Part of SAULCA’s mission is to promote high quality CLE programmes at universities in South Africa. <http://www.saulca.co.za/home> (accessed on 11 May 2014).

⁶⁰ Watson 2003 : 30

⁶¹ Fisher 2011 : 3.

acquired the necessary competencies.”⁶² The Senate Policy on the Assessment of Student Learning requires the design of student assessments to achieve the following purposes:

- To be an educational tool to teach appropriate skills and knowledge
- To encourage continuous learning and detect learning problems
- To determine whether students are meeting, or have met the educational aims and outcomes of a course and to give students continuous feedback on their progress
- To facilitate decisions relating to student progress
- To provide a measure of student ability for future employers
- To inform teachers about the quality of their instruction
- To allow evaluation of a course.

2. Chapter outline

In order to achieve the goals and outcomes of assessments, appropriate for CLE courses, and applied to assessable curricula, the following are discussed in the chapters indicated.

2.1 Chapter Two. Clinical Legal Education: The Design of a Curriculum with Assessable Content

To determine whether the assessment regime applied in clinical programmes is effective an effective assessment programme and an assessable curriculum must be designed and implemented.⁶³ This chapter will focus on factors to be taken into account in the design of an assessable curriculum in CLE.

The mission of the university law clinic must be determined and be clear as it will be the foundation from which the subsequent student and institutional outcomes, curriculum, teaching methods and assessment will be reflected.⁶⁴ The mission statements of the Law Clinics of the four South African universities under review will be examined.

⁶² <http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssessmentOfStudentLearning.doc>

⁶³ Lynch 2011 – 2012.

⁶⁴ Munro 2002 : 231 - 232.

An effective assessment programme, which is designed to determine the success of the curriculum, apart from the mission of the clinic, assumes certain preconditions,⁶⁵ such as whether the CLE education course will be mandatory, the focus of the clinic and the clinicians, skills and values that are required by the profession and the expected outcomes (also referred to as the clinic's goals and objectives).

The question of whether CLE should be a mandatory course in the LLB curriculum will be probed, as will the focus of a university law clinic, CLE and the role of the clinician.

The pedagogy employed with CLE training will be discussed in three categories, namely the clinic experience, the classroom component and the tutorial component. Specialisation within university law clinics will be discussed, as, when planning and setting a curriculum, the possibility of these specialised units, as well as the even-handed assessment of student operations across various specialised units, need to be considered.⁶⁶

Expected outcomes, skills and values were identified as preconditions in designing a curriculum that can be assessed effectively. Different definitions of outcomes will be examined. It will be indicated that the outcomes of a clinical programme are relevant to the needs of the society, students and the profession. Guidance for developing outcomes were suggested by a number of jurisdictions, which will be examined, as will the seven main goals (outcomes), each with their own sub-goals, of CLE, as identified for South Africa.⁶⁷ The essential skills identified that law graduates should have or would need when entering the legal profession,⁶⁸ the skills taught in South Africa,⁶⁹ as well as the mostly neglected, but extremely important skills of language and writing, will be discussed. Values, critical to the future of the profession,⁷⁰ and other core values that every competent lawyer must embrace, identified across a wide number of jurisdictions, will be examined.

A detailed discussion of the curriculum will follow. A curriculum which will serve the clinic's mission and the stated outcomes for the students must have certain characteristics which

⁶⁵ Lynch 2011 – 2012.

⁶⁶ De Klerk & Mahomed 2006 : 306 – 318; Du Plessis 2007 : 44 – 63.

⁶⁷ Steenhuisen 2006 : 266 – 279.

⁶⁸ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44 and CLEO 2007; for the USA and Canada, see MacCrate 1992; Munro 2002 : 232, 234; and Findley 2006 - 2007 : 324; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brücker & 2008 : 579.

⁶⁹ De Klerk *et al* 2006 : 29 – 262.

⁷⁰ Chavkin 2007 : 5.

include focus, coherency and logical coordination, the provision for incremental and developmental formation of student abilities and that all the outcomes should be required for all students.⁷¹ The importance of valid assessment and continual feedback as an integral part of the curriculum will also be indicated. Suggestions from other jurisdictions will be explored in an attempt to find a comprehensive and appropriate curriculum for South Africa. Common course content in those jurisdictions will be sought.⁷² I will further discuss a manual compiled by AULAI during 2005, listing topics that may be covered in CLE programmes.

A review of the curricula of the Universities of the Witwatersrand, Pretoria, Johannesburg and Free State will be done, followed by a curriculum summary. Outcomes and skills stated for South Africa will be measured against those stated for multiple jurisdictions. The curriculum requirements identified across a number of jurisdiction and the curricula of the four South African universities under review will be compared.

In the final instance, in an attempt to formulate an ideal curriculum for South African university law clinics, I will compare the curriculum requirements that were identified across the aforementioned number of jurisdictions to those used by the four South African universities under review.⁷³ Once I identified the common, and ideal, components for the curriculum, these will be measured against outcomes and skills determined for these components in the South African landscape. The required components for a curriculum in CLE will be identified which clinicians may structure according to their needs, but I will suggest that all components should form part of the teaching of CLE.

⁷¹ Munro 2002 : 235, 236.

⁷² For the UK: the Law Society of England and Wales, *see* Stuckey 2007 : 44 and CLEO 2007; for the USA and Canada, *see* MacCrate 1992; Munro 2002 : 233, 234; and Findley 2006 - 2007 : 324; the Bar Council of India, *see* Bloch & Prasad 2006 : 209 – 212; for Australia, *see* Giddings 2008 : 12; for Germany, *see* Brücker & 2008 : 579.

⁷³ All these universities follow the in-house live-client model and students are required to attend weekly clinic duties. The formulation of a curriculum will focus on the classroom components of the clinical legal education courses.

2.2 Chapter Three. Forms of Assessment, the Setting of Parameters for Assessment and Mark Allocation

In chapter three the different forms of assessment that can be applied successfully in CLE will be discussed. The prescriptions of the University of the Witwatersrand's Senate Policy on the Assessment of Student Learning will be examined.⁷⁴

The differences in and different applications of formative and summative assessments will be discussed. In the discussion of the setting of parameters for assessment and mark allocation, the focus will be on the WLC with comments on specific challenges experienced by the other three university law clinics under review.

The different forms of assessment that will be examined and discussed are: written tests; spot tests, minute papers and short essay quizzes; multiple-choice quizzes; in-class short-answer tests; written assignments; essay examinations; oral examinations; rotation and interim assessments (including feedback); reflective journals; self evaluation, peer evaluation, feedback and peer editing; client evaluation; case file work assessment / case portfolio, trial advocacy skills and computerised assessment tools.⁷⁵

The use of assessment rubrics will be discussed. The definition of a rubric as a scoring tool will be provided, as well as the different types of rubrics. The question of why clinicians should use rubrics will be probed and the process of developing rubrics will be explored. The applicability of group work rubrics will be discussed.

At the University of the Witwatersrand, as with other universities, a certain percentage of student assessments need to be reviewed by external examiners. The moderation systems which include internal assessors, internal moderators and external examiners will be discussed. To assist with these processes, guideline rubrics will be offered.

2.3 Chapter Four. Factors that Influence and Challenge Assessment in CLE, with proposed Solutions

Attention should be paid to factors that may influence assessments in CLE courses. These factors will be explored and solutions to challenges that they pose will be suggested.

⁷⁴ <http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssessmentOfStudentLearning.doc> at 2.

⁷⁵ Many of these forms of assessment originate from comparative foreign jurisdictions, which are by no means superior, but the comparison can be used to improve assessment methodologies in South Africa.

Before the discussions of these factors, it will be necessary to prove the necessity of assessment for CLE. Should the answer to the necessity or not of assessment be that we need to assess, the question of the need to grade the assessment must be answered. Once it is determined that grading is necessary, the question of whether specific grades should be awarded, or whether grade descriptors will suffice, need to be answered.

The challenge in CLE is not in the teaching of the course, but the assessment of the students' performances.⁷⁶ Challenges in assessment in the South African environment include the following factors:

2.3.1 Large student numbers

An ideal ratio between clinician and students in clinical courses has been suggested in various jurisdictions. South African university law clinics often exceed the maximum suggested ratio more than three times.⁷⁷

2.3.2 Clinicians' time constraints

Clinicians often indicate that they operate under undue time constraints, mainly because the large student numbers result in larger case loads and contact times. It will be shown that clinicians are often responsible for creating their overloads.

2.3.3 Assessing interviewing skills

It is impossible for the clinician to attend on every student consultation conducted with clients. This lack of direct supervision during consultations means that interviewing skills remain largely unassessed. It will be shown that this is by no means a unique problem.

2.3.4 Language barriers⁷⁸

At WLC the university's language of instruction is English. Clients who frequent the clinic are sometimes not able to articulate their problems in English. The students who are proficient in such other language, may be either overburdened or be limited in their access to the client pool.

⁷⁶ Du Plessis 2011 : 1 – 10.

⁷⁷ Shrag 1996 : 175; Grimes & Brayne 2004 : 86. See discussion in paragraph 5 of chapter 4 of this study.

⁷⁸ web.wits.ac.za/NR/rdonlyres/86CE4FF3.../0/languagepolicy.pdf; Du Plessis 2009 : 95; Barry 2007 : 50.

2.3.5 The nature of the client pool (undocumented and unassessed assistance to clients)⁷⁹

The client pool mainly consists of the indigent in the community. The students' abilities to assist clients in distinguishing the various pockets of a general problem is deserving of assessment,⁸⁰ even if a case is not taken on for litigation. These assessments pose to be difficult as the clinician may generally not be present during these consultations.

2.3.6 Students working in pairs⁸¹

Clinicians often see the end-product of "joint" effort without having an opportunity to fully observe the process of production. Assessing and allocating grades to an individual student becomes challenging. It will be shown that the pairing of students is preferable and more advantageous.

2.3.7 Students allocated to different specialisation units

Ortiz suggests that, when planning and setting a curriculum, the possibility of operating the clinic in specialised units, needs to be considered.⁸² This proposal is echoed by Stuckey.⁸³ The sentiment of specialised clinics is echoed by Australians Evans and Hyams, who believe that clinics should explore the mix between generalist and specialist clinical units.⁸⁴ Like Stuckey, who voiced the perspective in the USA,⁸⁵ they suggest that specialist training is both appropriate and desirable in an ever-increasing climate of professional specialisation. In a number of South African university law clinics, students are divided into groups that are allocated to specialised units, thereby exposing them to different clinical and legal procedures and different court systems.

⁷⁹ De Klerk 2007 : 97; Du Plessis 2009 : 96.

⁸⁰ A typical client profile was described as "... when consulting, clinic clients 'tend to present to the clinic lawyer a rather large package [pockets] of problems, half of which have nothing to do with the law and the other half so intertwined with poverty that their actual legal problems are often very hard to extract' and (f)ormulating the mandate is only half the battle won ..." De Klerk 2007 : 97.

⁸¹ De Klerk & Mahomed 2007 : 312; Hyams 2006 : 77 – 95; Chavkin 1994 – 1995 : 199 – 244; Blumenfeld 2010 : 109 – 142.

⁸² Ortiz 2011.

⁸³ Stuckey 2007 : 41.

⁸⁴ Evans & Hyams 2008 : 52 – 86.

⁸⁵ I submit that, although South African law clinics, both in structure and practice are, in my opinion, under-recognised globally for their leading methodologies, they can draw from the assessment systems of the USA, where law clinics often have complicated CLE systems.

The assessment of students in an even-handed manner across the different specialised units poses certain challenges.⁸⁶

2.3.8 Education and experience variances amongst students

Students are not only expected to present the substantive law in clinical context, the students need to be exposed to areas of legal practice outside the scope of the law clinic and the practices of the social and/or business environment within which the client's legal problem manifests.⁸⁷ This problem is acknowledged across a number of jurisdictions and various solutions are proposed, such as the introduction of enrichment subjects,⁸⁸ skills classes in legal research, analysis and writing, the process of analysis and structured reasoning to assist students to "think like lawyers", as a future lawyer must be taught "how to provide an objective opinion."⁸⁹ Students must be equipped to, as future lawyers, operate effectively in a changing global environment.⁹⁰ The challenge lies with the assessment of students. Some students acquired these skills prior to entering the clinical course, whereas other students' exposures were limited. Cognisance needs to be taken of the specific backgrounds and understanding of South African students, and how this impacts on their receptivity to particular forms of CLE and how they may in turn influence CLE.⁹¹

2.3.9 Differing levels in students' knowledge of substantive and procedural law

Some students are not capable in carrying over their knowledge and application of substantive and procedural law into clinical practice. These are weaknesses that impact on their case work. The assessment challenge lies in the fairness of subtracting a percentage of marks for these weaknesses when students' case file work is assessed.

2.3.10 The differing levels of clinicians' experience in supervision and assessment

Is it possible that the more experienced clinician really is better at assessment than a less experienced clinician who offers new insights through research? Other factors that may impact on

⁸⁶ De Klerk & Mahomed 2006 : 306 – 318; Du Plessis 2007 : 44 -63. I further submit that the South African university law clinics are unique instruments of social justice. It is however important to build on past experiences and to assess the current context.

⁸⁷ Du Plessis 2007 : 59.

⁸⁸ Cody & Green 2007 : 64.

⁸⁹ Motala 1996 : 696 – 698.

⁹⁰ Iya 2008 : 34 – 52.

⁹¹ See Vawda 2006 : 295 – 305 for an in-depth discussion.

the teaching and assessment methods of clinicians are that one clinician may be more experienced in litigation whilst another in teaching; different clinicians may have different perspectives regarding the focus of the course; a new clinician may have been trained by a more experienced clinician who became stale regarding his/her focus and methodologies; and the clinical director may hold a different view and/or have a different approach from that of some of the clinicians. These differences may have a huge impact on student learning and focus of the CLE course.

2.3.11 Student expectations

A 2005 survey on student expectation will be discussed.⁹² Curriculum design as well as assessment methods may have to be adapted to ensure that the students' expectations are addressed.

2.3.12 The requirements of the South African Qualifications Authority.⁹³

The South African Qualifications Authority prescribed a set of exit-level outcomes for the revised LLB degree. These exit-levels must be heeded.

These challenges identified above will be reviewed and solutions will be proposed.

2.4 Chapter Five. Measuring the Curriculum against the Identified Assessment Criteria

Towards the end of chapter two a curriculum for CLE in the South African environment will be proposed. In chapter five, the proposed curriculum will be measured against the forms of assessment identified in chapter three as appropriate for CLE. The outcome will be an indication of whether the proposed curriculum can be assessed by the identified and proposed assessment methods.

⁹² McQuoid-Mason 2006(a) : 166 – 173

⁹³ McQuoid-Mason 2006(a) : 166 – 173; Du Plessis 2008 : 4.

2.5 Chapter Six. Conclusion

Chapter six of this study will contain the conclusion and recommendations of this study.

CHAPTER TWO

CLINICAL LEGAL EDUCATION: THE DESIGN OF A CURRICULUM WITH ASSESSABLE CONTENT

1. Introduction

To determine whether the assessment regime applied in clinical programmes is effective an effective assessment programme and an assessable curriculum must be designed and implemented.⁹⁴ This chapter will focus on factors to be taken into account in the design of an assessable curriculum in CLE.⁹⁵

In the design of both an assessable curriculum and an effective assessment programme I will draw on literature from a number of jurisdictions, both locally and globally. It should be noted that the clinical models of the comparative foreign jurisdictions are by no means superior, in fact, South African university law clinics, both in structure and practice are under-recognised globally for their leading methodologies. This is not to say, however, that there is no point of comparison that could be used to improve our curricula and assessment methodologies. It is this narrow point of assessment – an issue which the four clinics under review seem to battle with – where it becomes helpful to draw on foreign jurisdictions.

An effective assessment programme, which is designed to determine the success of the curriculum, apart from the mission of the clinic, assumes certain preconditions,⁹⁶ such as whether the CLE course will be mandatory, the focus of the clinic and the clinicians, skills and values that are required by the profession and the expected outcomes (also referred to as the clinic's goals and objectives). The aim of this chapter is neither to design a specific curriculum, nor to discuss assessment methods, but to provide guidance to university law clinics in the design or review of their clinical programmes that will incorporate CLE.

The curricula of four South African university law clinics will be discussed, namely those of the universities of the Witwatersrand ("WLC"), Pretoria ("UPLC"), Johannesburg ("UJLC") and the Free State ("UFSLC").

⁹⁴ Lynch : 2011 – 2012. An effective programme is one that reaches its aims. The aims form part of the mission statements of the clinics (discussed in paragraph 2 of this chapter) as well as in the respective CLE courses.

⁹⁵ On curriculum development, see Woolfrey 1995 : 151 – 159.

⁹⁶ Ibid.

The Association of University Legal Aid Institutions (“AULAI”) produced a standard curriculum and teaching manual, which includes an assessment guide,⁹⁷ as well as a text book.⁹⁸ Although De Klerk heralds these achievements as significant, he indicates that CLE not only remains largely marginalised at law schools, but that the clinical courses have also become stale. He criticises the clinics for following essentially the same formula since inception, limiting the course to final year students, the clinical experience compressed into a single course, offered in isolation from the rest of the degree and affording students with little in the sense of choice.⁹⁹

The most valuable clinical programmes are those which place significant operational responsibility in the hands of students, because that level of trust encourages their learning more effectively than any other strategy.¹⁰⁰ Students at Monash, Australia are, within a few weeks from the start of their clinical course, trusted to see clients on their own and to provide advice to clients after consulting with the clinician.¹⁰¹ This proved to be effective in developing respect for clients, increased student confidence and the educational outcome of rapid but sustained and comprehensive student learning.¹⁰² In South Africa, students were allowed to consult with clients within a few weeks (or often less than that) from the onset of such clinics during the early 1970s.¹⁰³

At UPLC students attend an intensive two-day workshop, whereafter they consult with clients, initially in groups, later in pairs and eventually as individuals.¹⁰⁴ At WLC, students consult with clients from the second week of clinic duty and at UFSLC students already consult during their first clinical session. At the University of Johannesburg, students study evidence and litigation techniques, of which a few lectures are devoted to consultation techniques. At UJLC the CLE course is offered in the fourth year. The clinical director advised that during January, prior to the formal start of the university semester, CLE students must attend a day of orientation where they are trained in consultation techniques. During their first week of clinic, students do not consult with clients - instead they attend theoretical exercises with a clinician. During the second week of clinic students start to consult with clients. The clinicians’ offices are within sight of the

⁹⁷ Aulai Manual 2005.

⁹⁸ Stilwell *et al* 2004; De Klerk *et al* 2006.

⁹⁹ De Klerk 2006(b) : 245.

¹⁰⁰ Evans & Hyams 2008 : 60.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ De Klerk *et al* 2006 : 264.

¹⁰⁴ Haupt 2006 : 234, 235.

clinic and students consult with the clinicians. Clients may only leave the clinic once the students consulted with their clinicians.

2. Determining the mission of the clinic

In order to design assessable content to clinical programmes, it is imperative that the clinic has a clear mission. In most law schools, CLE is taught in a live-client environment. Hyams indicates that “[c]linic has a broader mandate than just the integration of practical legal skills with knowledge of the law. Clinicians can (and should) take on the mantle of teaching for lifelong learning, which includes three additional requirements of a professional ... - autonomy, judgment and a commitment to lifelong education.”¹⁰⁵

When formulating a mission statement, the clinic’s primary constituencies need to be identified whereafter the framework for dialogue on the mission should be established.¹⁰⁶ Potential constituencies include the public served, students, employers of law graduates, law schools, applicants for admission, taxpayers, alumni, courts, all the role players in the legal profession and the university to which the clinic is attached.¹⁰⁷ Some important questions to consider are:¹⁰⁸ the knowledge, skills and values a lawyer may need during the next 10 to 20 years?; what technology must be mastered?; will a broad base of knowledge and a wide range of skills suffice, or is specialisation required?;¹⁰⁹ the emphasis on scholarship?;¹¹⁰ how will teaching, research and service be prioritised?;¹¹¹ and what will society’s need for lawyers be in the future – numbers, fields of specialisation, multi-disciplinary practice?¹¹² Fisher proposes that typical mission statements should address the preparation of students for the practice of law,¹¹³

¹⁰⁵ Hyams 2008 : 25.

¹⁰⁶ There must be collaboration between the legal profession, which regulates the post-degree vocational training phase and the academy, which controls the foundational education phase. See Greenbaum 2012 : 26.

¹⁰⁷ Munro 2002 : 231; Swanepoel, Karels & Bezuidenhout 2008 : 100, 101.

¹⁰⁸ Munro 2002 : 231 - 232.

¹⁰⁹ Ibid.

¹¹⁰ Ibid. I submit that scholarship is necessary in order to theorise about the wider area of clinical legal education.

¹¹¹ Ibid. I submit that there is uniqueness to the university law clinics in South Africa, specifically as instruments of social justice, which originated during the apartheid-era. What is important for the clinics 20 years into the South African democracy is to build on the past and assess what the current context is. The current context calls for a prioritising of teaching of students in CLE courses. This will be discussed in more detail in paragraph four below.

¹¹² Munro 2002 : 231 - 232.

¹¹³ Fisher 2011 : 3.

promoting justice and scholarship,¹¹⁴ encouraging diverse perspectives and communities,¹¹⁵ including service and embracing high ethical standards.¹¹⁶

The four South African universities under review formulated clear mission statements. The mission statement of WLC was formulated in 2006 to read: “The Wits Law Clinic aspires to: develop and provide an effective clinical legal education programme to students; promote published research by clinical teachers; and to provide quality legal services to the community.”¹¹⁷

At UPLC the mission statement reads: “To use the practice of law (simulated and actual) as a context to teach and research substantive and procedural law, ethics, professional skills, effective interpersonal relations, appropriate dispute resolution techniques and the ability to integrate law, fact, procedure and values; to provide quality legal services to the indigent thereby increasing access to justice; to promote access to and transformation of the organised legal profession by providing opportunities and training to candidate attorneys especially those from previously disadvantaged groups; and to foster a commitment in staff and students to build a society based on democratic values, social justice and the rule of law.”¹¹⁸

UJLC states the aim/mission of Applied Legal Studies, incorporated into their clinic, as two fold, namely clinical legal education of final year LLB students, with the focus on analytical skills, the application of theory and an appreciation of the practical nature and consequences of theory; and the rendering of free legal services to the indigent according to the guidelines of the Attorneys Act and the Law Society of the Northern Provinces.¹¹⁹

The mission and vision of UFSLC is stated as a venture conducted by the University’s Faculty of Law, where primarily: a) members of the indigent society of the greater Mangaung area of the Free State Province, that qualify in terms of a means test, receive free legal services; and b) final year students of the Faculty receive practical legal training, are exposed to various aspects of legal practice and engage in community service learning projects.¹²⁰

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Fisher 2011 : 3.

¹¹⁷ Mahomed 2008 : 63

¹¹⁸ UNIVERSITY OF PRETORIA LAW CLINIC, PRACTICAL LAW 410, STUDY GUIDE: 2012 : 3.

¹¹⁹ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2.

¹²⁰ UNIVERSITY OF THE FREE STATE LAW CLINIC: MISSION AND VISION.

Once the clinic's mission is determined, it will be the foundation from which the subsequent student and institutional outcomes, curriculum, teaching methods and assessment will be reflected.¹²¹

3. Should CLE be a mandatory/core course in the LLB curriculum?

Integration of CLE into the core curriculum of the law school will reveal its value as a teaching methodology, whilst when it “remains a separate enterprise from the core teaching of law it is vulnerable to being undermined due to ideological opposition, changing educational fashions or resource cuts.”¹²² Skills teaching form part of the core of CLE. “A minimalist approach to skills teaching – through ... Clinical Law courses, which are given a “second-class” status – fails to equip graduates adequately ... [t]he separation of substantive law content from skills and ethics and the lack of intellectual focus on integrating these three aspects has been a continuing theme throughout American legal education scholarship”.¹²³ Pedagogic aims can be set and achieved as CLE has intellectual worth in the extent to which it enables students to better understand concepts and principles of law and the context within which these operate.¹²⁴ Up to 95% of students' time in law school is spent on reading and discussing law and cases, whilst, in practice, they will go days or weeks doing none of that. They will instead be drafting, reviewing, negotiating and composing memos, emails and letters, skills acquired when CLE is made mandatory. CLE allows students to learn to formulate an action plan, which they enact through structured experiences upon which they can reflect and modify for future action.¹²⁵

In the South African landscape, O'Regan J said that the lives of law graduates “are determined in a real sense by the skills and habits that they have acquired at law school” and that “much of the test of what constitutes a competent lawyer is skills-based rather than content-based”.¹²⁶ De Klerk agrees and posits that no law school can claim to produce competent graduates without clinical experience, as “(t)here is no substitute for the real thing.” He is critical of curricula which offers CLE as an elective, as students will be allowed “to enter the practice of

¹²¹ Munro 2002 : 231 - 232.

¹²² Hall & Kerrigan 2011 : 30.

¹²³ Greenbaum 2012 : 20, in discussing the MacCrate report.

¹²⁴ CLEO 2007.

¹²⁵ Ortiz 2011 : 6.

¹²⁶ O'Regan 2002 : 247.

law without ever having seen a client, been inside a courtroom or interviewed a witness.”¹²⁷ These sentiments are echoed by many South African scholars and practitioners,¹²⁸ as “[t]he ability to handle facts ... must be developed in an environment in which the presentation of facts resembles that in the real world.”¹²⁹ At a workshop the author presented at the University of Manitoba, Canada during April 2013, a student indicated that a clinical course would be wasted on her, as she already signed an employment contract as a legal adviser and would not require practice skills. My reply to her is echoed by Landsberg who was confronted by the same comments from Chinese law students in Beijing: “[P]roblem solving skills acquired in experiential courses have broad application ... and there is student demand for lawyering skills and clinical courses.” Students who enter law-related jobs where “[t]hey want professional skills education, and potential employers want them to have professional skills.”¹³⁰ The first employer after graduation is not likely to be the employer for an entire career.

CLE is offered as an elective course at UPLC. The Director indicates the advantages as “[s]tudents wanting ‘to do clinic’ as opposed to ‘having to do clinic’ are generally those planning to enter the legal profession and/or having strong feelings on social justice for the indigent.”¹³¹ The limited number of students ensures a lower student per supervisor ratio and thus more time for personal contact, mentorship and assessment practices that may be too complex or time consuming when dealing with large groups of high student-clinician ratios”. He recognizes disadvantages of the elective module as “... a relatively small percentage of final-year law students are exposed to learning the law in a social justice setting and to skills and values associated with clinical legal education. The course is also perceived to be elitist in the sense that it is exclusive to the academically strong students”.¹³² Vawda, from the University of KwaZulu-Natal, responds “[w]ithout question, clinical law should be offered as a compulsory course ... [t]he option of a voluntary clinical course is not desirable, especially as it will not garner academic credit points.”¹³³ It may not serve as sufficient motivation for students, and does not justify

¹²⁷ De Klerk 2006 : 246 - 250.

¹²⁸ For example: Vawda 2004 : 124, Parmasand 2003 : 202 – 204 and McQuoid-Mason 1982 : 162.

¹²⁹ McQuoid-Mason 1982 : 162.

¹³⁰ Landsberg 2011 : 49.

¹³¹ For a discussion on the social justice component of CLE, see Barry, Camp, Johnson, Klein & Martin 2012 : 401 – 458; Levy-pounds 2008 : 12.

¹³² Haupt & Mahomed 2008 : 280.

¹³³ Vawda 2004 : 124.

committing scarce resources to such an option.”¹³⁴ CLE is a mandatory course in the final year of LLB studies at WLC, UJLC and UFSLC.

CLE received favourable feedback from students. American students across a number of universities commented as follows on their experiences of clinical legal education: [“there should be] a way to increase the number of credits allowed [for clinical legal education], because those have been some of the best learning experiences I’ve had.” “I learned how to interact with clients ... and actually help people get a divorce. And most importantly to me, the clinic made me realize that family law is what I want to practice when I graduate.” “A clinic inspires the kind of learning and self-confidence that simply cannot be taught in a traditional law school classroom.” “From a practical perspective, I got more training writing motions and other legal skills from my time at the law clinic than my entire three years in law school. To be honest, I don’t think there is any law school in America that has enough of a practical focus ...” “I like the clinic’s small-case style, which allows [me] to monitor the same case, from start to finish ...” “There will be no other time in your career where your supervising attorney’s primary goal is truly to teach you how to be an attorney in such a practical and meaningful way.” What I liked least about law school was “the unwillingness of ... old-school, the old guard, to change.” “Working at the ... legal clinic has afforded me opportunities to hone my legal writing and advocacy skills.”¹³⁵

These sentiments were echoed by South African students:¹³⁶ “I learnt to extract information ... despite communication issues and developed value-judgment skills ...” “The course is meeting the aims as a stepping stone to practice ... the interaction with clients” “Learning legal drafting and interviewing skills were very valuable” “CLE is a necessary component of the LLB degree – having such a taste of what practice is going to be like was invaluable” “... for the first time I was able to put what I’ve learnt into practice, how to apply the law” “I now feel adequately prepared to conduct a proper interview” “It was humbling to have to work for people whom I usually don’t take notice of ... I learnt that real people exist beyond what I am familiar with and they have real problems and real emotions” “It would be useful if the work of the law clinic was taught earlier ... to put law in practice” “The practice is vastly different from the theory. It is good to be exposed to practice now as opposed to the first time during

¹³⁴ Vawda 2004 : 124.

¹³⁵ Ortiz 2011 : 8 - 12.

¹³⁶ Extracts from students’ evaluations of the CLE course at the University of the Witwatersrand Law Clinic, 2011.

articles” “It made me confident and I gained a lot of experience drafting a range of documents” “It improved my communication, drafting and letter writing skills and boosted my confidence.”

4. The focus of the clinic, clinical legal education and the role of the clinician

The focus of a university law clinic, which forms part of the university’s law school, and generally includes an accredited academic course in the LLB curriculum, is key in determining how the teaching methodology of CLE will be applied in the training of the students and the setting of the curriculum. This in turn will determine the role of the clinician, who fulfills a dual role, namely that of an attorney, who assumes professional responsibility for all the matters the students are dealing with, and that of a law teacher, who has to account to the employer, the university.

South African universities state their objectives as threefold, namely teaching, community service and academic research.¹³⁷ University law clinics comply with the first two objectives. Academic research by law clinic clinicians, resulting in accredited publication output, already is an essential output of some law clinics.¹³⁸ During the 2011 Association of University Legal Aid Institutions (“AULAI”) (now “SAULCA”) winter conference,¹³⁹ it was confirmed by the delegates that such research output should form an essential objective for all South African law clinics.¹⁴⁰

The focus of clinics was a topic of investigation during the 1980s already. Iya explains: “The critical issue is that many of the clinical programmes are said to focus their emphasis only on the perspectives of service rather than education ... A team of professors that visited the University of the Witwatersrand in 1986 argued that ... a new structure be devised for the clinic ... to guarantee the pedagogical goals which justify the clinic’s prominence in the new curriculum.”¹⁴¹ In 1990 Bamberger reported that “a teaching law clinic is not an efficient provider of proper service to clients. Teaching is its primary function. Teaching takes time,

¹³⁷ Wimpey & Mahomed 2006 : 17. Note that the University of Pretoria has changed its objectives that that of research and teaching and learning, with community engagement to be embedded in these two objectives. www.up.ac.za.

¹³⁸ Du Plessis 2007 : 46.

¹³⁹ Note that at a Special General Meeting held at the Nelson Mandela Metropolitan University, Port Elizabeth on 5 July 2013, the name “AULAI” was changed to “SAULCA - South African University Law Clinics Association”.

¹⁴⁰ The conference was held on 27 – 30 June 2011 and hosted by the University of the Western Cape in Cape Town.

¹⁴¹ Iya 1995 : 270.

resources, and the energy from the practice”. This conclusion under the heading “purpose and method” was reached after his observation that “[c]linical faculty and students everywhere are pulled in opposite directions by the demands of service and teaching. The tension is worse in South Africa. There are so few providers of legal assistance for the poor. There are more clients at the clinic’s door than can be admitted, if the staff and students did nothing else. The students do not increase the capacity for service. On the contrary, if they are to learn in the experience of law practice, fewer clients can be served.”¹⁴²

Although I acknowledge that there will probably always be more clients who need legal assistance than can be accommodated at university law clinics, the South African landscape changed since Bamberger’s comments in 1990. Today there are more legal aid clinics rendering free legal services to the indigent communities. There are many NGOs, NPOs and government institutions, such as Lawyers for Human Rights, the Legal Resources Centre, Black Sash, Provincial consumer agencies, Ombuds servicing various industries, Attorneys’ *pro bono* centres, *ProBono.com*, Public Defenders’ offices, a myriad of legal call centres attached to insurance companies and Legal Aid South Africa’s (“LASA”) many justice centres. The focus and objectives of LASA’s justice centres and the other legal aid clinics and centres are vastly different from that of a university law clinic. They do not provide training to students, but focus primarily on client services. The pressure on university law clinics to service the poor are no longer the same, as referrals may be made to a number of these centres and agencies. Although some university law clinics have funding cooperation agreements with LASA, the latter indicated that partners (who encompass more than just university law clinics) to these agreements accounted for less than one percent of all new matters handled by LASA during 2009-2010 (3 463 out of 416 147 new matters).¹⁴³ These statistics prove that LASA alone are able to relieve much of the pressure formerly placed on university law clinics relating to client representations.

Although tension exists between the teaching of students and client services,¹⁴⁴ the general view across a number of jurisdictions are that the main focus of a university law clinic should be CLE, i.e.: the teaching of students by the clinicians and not the provision of free legal services.¹⁴⁵

¹⁴² Bamberger 1990 : 1.

¹⁴³ LASA 2010.

¹⁴⁴ Stuckey 2007 : 197; Giddings 2008 : 7.

¹⁴⁵ See Du Plessis & Dass 2013 : 390 – 406 for a full discussion on defining the role of the university law clinician.

The South African view, as was also confirmed by the delegates during the 2011 AULAI winter conference, was set out by Du Plessis as:

“Where clinical legal education is compulsory, the role of law clinics in the academic environment becomes more pronounced and a stronger emphasis is placed on the academic training of students in the clinical environment. Access to justice for the indigent is no longer the main or only focus of the law clinic, but will remain a strong component, as client service is inseparable from the clinical methodology.”¹⁴⁶

De Klerk echoed this view :

”Students pay good money to complete clinical courses and have legitimate expectations of the benefits they should receive in return. The teaching that takes place in a clinic should therefore never be incidental or secondary to the practice of law. Teaching students remains the core business of (university) law clinics”.¹⁴⁷

CLEO (the Clinical Legal Education Organisation, (UK) holds the view that, ‘however much the clinic wishes to advise and assist those members of the community who have unmet legal needs ... the principal aim of clinical programmes is educational. It is the needs of the student and supervisor competence that must dictate which clients are assisted and in what areas’.¹⁴⁸ The same sentiment was voiced for South Africa: “In planning the clinical curriculum, clinicians have to define the parameters within which the clinic should operate. Only types of cases that will satisfy the goals of clinical legal education should be considered, and [clinicians] should limit the volume of cases taken on ... to ensure that students derive the best possible training ...”¹⁴⁹

In the USA and the UK CLE is about the student experience and therefore it should be the student who conducts a case, not the clinician.¹⁵⁰ If students are only told what to do, they will not learn much – they must learn why certain practices are better and learn necessary lawyerly skills and relationships with clients, adversaries and adjudicators. The case file therefore belongs

¹⁴⁶ Du Plessis 2007 : 46.

¹⁴⁷ De Klerk 2007 : 98. This was also confirmed by authors Mahomed and Haupt. De Klerk & Mahomed 2006 : 31 and Haupt 2006 : 237.

¹⁴⁸ CLEO 2007 : 3, 4; MacFarlane & McKeown 2008 : 65.

¹⁴⁹ Du Plessis 2008 : 14.

¹⁵⁰ Macfarlane & McKeown 2008 : 65, Wizner 2001 - 2002: 13, Stuckey 2007 : 195 – 197.

to the student, as it is a teaching tool and the student must do the work, not observe it being done. The clinician should therefore not practice, but train the student to practice.¹⁵¹

The focus of the clinic and CLE furthermore determines the role of clinicians in academia and where they fit into the university system. Findley puts the misconception that clinicians may not be fully-fledged academics merely because they teach in a clinical and practical environment, to rest. He supports the argument that “[r]eferencing the academic program to lawyer performance does not imply the slightest narrowing of legal education to a form of technical training. On the contrary, it demands a broadening which few law schools could presently achieve ... it is terribly demanding precisely because it is so rich in both conceptual and practical elements.”¹⁵² The academic role of the clinician is further acknowledged when the focus of CLE, as a core and fully assessed compulsory subject in the LLB curriculum, is on student training.¹⁵³

Clinicians, as academics, are not only required by their faculties to research and publish, but more scholarly research and publication emanating from university law clinics is also supported by AULAI.

When I embarked on this study, I was able to find one manual and two South African journal articles written exclusively on student assessment in CLE.¹⁵⁴ I also found two conference papers by South African scholars on the subject.¹⁵⁵ Over the fourteen years that I practiced as a clinician at the WLC I had numerous discussions around assessments with my colleagues, not only at WLC, but from a variety of South African university law clinics. Many challenges and solutions were identified during these conversations. These however did not make it into print as scholarly endeavours. As a result, excellent ideas were forgotten or lost and never shared with other clinicians. These ideas were particularly valuable, as they focused specifically on the challenges we face in the South African clinical landscape. My perception is that South African clinicians are anxious for solutions to assessment challenges. I believe that once identified challenges and solutions are made available as scholarly endeavours, a resultant growth in clinical

¹⁵¹ “Practice” in this context refers to the total of the practice concerning the specific case, excluding the court appearance. The student should ideally, with the supervision of the clinician, prepare a case from the initial consultation until the case is ready to go to trial. Students in South Africa do not have the right of appearance in courts and there are no student practice rules. For a discussion of student appearances and practice rules in the USA, see Sarkin 1993 : 231.

¹⁵² Findley 2006 - 2007 : 310, 311.

¹⁵³ As Giddings explains: “Even when clinics are well-ensconced, it takes a long time to influence the rest of legal education. Giddings 2010 : 301.

¹⁵⁴ Aulai Manual : 2005; Haupt & Mahomed : 2008 and Du Plessis : 2009.

¹⁵⁵ Grobler & Keulder : 2011 and Du Plessis : 2011.

activity will become evident. In my review of the four South African university law clinics their assessment practices appeared to be overly formalistic and they lacked creativity. Creativity should be the hallmark of CLE. I hope that this study will inspire clinicians to be more creative in their assessments of students and am looking forward to them sharing their experiences. By sharing their experiences as scholars, they will address the gaps in the South African CLE literature and allow other, specifically South African, scholars to build thereon. South African clinical scholars must ideally be able to access a body of domestic scholarly work from which they can embark on comparative research.

Clinicians' experiences should carry over to a fundamental reason for them to engage in research, namely to develop scholarship that will critically reflect their contributions and improve their clinical practice. I am in agreement with Hall and Kerrigan that CLE courses in law schools will be vulnerable when they remain separate from the core teaching of law,¹⁵⁶ which will include the development of scholarship in the specific field of teaching, namely CLE. When clinicians engage in research that critically reflects their contributions, law schools will be more inclined to view clinicians, who often are on administrative tracks at universities, as fully-fledged academics.¹⁵⁷

CLE is about "learning by doing and reflecting"¹⁵⁸ and "[u]nderstanding through both doing and reflecting is at the centre of the clinical ethos".¹⁵⁹ Giddings states that this ethos "should be recognised as important to both the academic and vocational dimensions of legal education".¹⁶⁰ Giddings further states that "[t]here is only limited scholarly writing on Australian clinical programs"¹⁶¹ and quotes Tranter who refers to "the history of Australian clinical legal education as yet to be authoritatively written".¹⁶² Scholarship in Australia is also encouraged.

Scholarship is necessary to theorise about the wider area of CLE, but it is particularly important to enhance scholarship around tools of assessing student performance. It is unlikely that the question of effective assessment of students is one that can ever have a final answer and the more we theorise about assessment, the more creative and effective we will become in the assessment of students.

¹⁵⁶ Hall & Kerrigan 2011 : 30.

¹⁵⁷ See Findley 2006 - 2007 : 310, 311.

¹⁵⁸ Brayne, Duncan & Grimes 1998 : 2.

¹⁵⁹ Ibid.

¹⁶⁰ Giddings 2013 : 3.

¹⁶¹ Ibid 11.

¹⁶² Ibid.

In comparison to some other jurisdictions, such as the US, very little scholarly research on “legal education” has emanated from “normal” faculty teachers. Ironically, the recent contributions on teaching law at South African law faculties have come from clinicians.¹⁶³ Iya, a South African scholar, holds the view that traditional academics have a negative attitude towards CLE and they push research, on CLE, aside as merely the concern, if at all, of practitioners. “Ironically, the clinicians with their largely practitioner background discard research of a scholarly nature as the concern of academic teachers.”¹⁶⁴ Iya enforces the prediction by Professor Steven Leleiko that “in the long run the intellectual environment of the clinic will be most intellectually and emotionally challenging and difficult in legal education, requiring faculty and students to confront the full range of intellectual activities which face the lawyer”.¹⁶⁵ Professor Adam Habib, Vice Chancellor of the University of the Witwatersrand, in an interview on 25 February 2013, said: “A university’s reputation is defined by its research. The national need for serious professionals and skills — this is an immediate need. But the stature of a university is built by the nature of research — otherwise you can’t get candidates to build the skills.”¹⁶⁶ “Clinicians have to engage in scholarship, for without question law schools need to credit traditional writing about non-traditional subjects, that is, scholarly writing about clinical methodology, pedagogy, case studies and the practice of law” for which clinicians are well positioned.¹⁶⁷ It would therefore be sensible for universities to employ clinicians as academic staff, as opposed to support staff members, which will inculcate the practice of scholarly work and publication output.

The foregoing further accentuates the importance of a well-planned curriculum for clinical legal education that can be properly assessed.

¹⁶³ See for example – to name but a few: AULAI MANUAL 2005 : Vol 1 & 2; Bodenstein : 2005 & 2006; De Klerk *et al* : 2006; De Klerk : 2006, 2006 (a) & 2007; De Klerk & Mahomed : 2006; Du Plessis : 2006, 2006 (a), 2007, 2008, 2008 (a) 2009, 2011 & 2013; Grove : 2006; Haupt : 2006 & 2006(a); Haupt & Boniface : 2006; Haupt & Mahomed : 2008; Iya : 2008; Kok : 2006; Mahomed : 2006 & 2008; McQuoid-Mason : 2008; O’Regan : 2002; Osman : 2006; Steenhuisen : 2006 & 2006 (a); Stilwell : 2006 & 2006 (a); Swanepoel : 2006 & 2008; Van der Merwe : 2008, Vawda : 2004, 2006 & 2008; Wimpey : 2006.

¹⁶⁴ Iya 1995 : 273.

¹⁶⁵ Iya 1995 : 273.

¹⁶⁶ Habib 2013 : 2.

¹⁶⁷ Iya 1995 : 273.

5. Pedagogy: the clinical experience and inclusion of a classroom and tutorial components

The pedagogy of CLE should ideally consist of three basic components, namely clinical duty, classroom teaching and clinician/student tutorial sessions. In gaging the effectiveness of these components, student feedback serves as a valuable benchmark.

At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on assessment of the course ‘practical legal studies’. For 2009, 27 students, for 2010, 17 students and for 2011, 16 students completed the questionnaire.¹⁶⁸

Students were asked: “Please indicate how much knowledge and experience you gained from lectures, tutorials and clinic duty. For 2009, 13 students gave positive feedback on lectures and 14 students gave negative feedback. For tutorials, 24 students gave positive feedback, with two students commenting that “during tutorials we also discuss other alternative matters that may arise from the same set of facts”, and one student gave negative feedback, commenting “I hate tutorials”. Two students left the answer blank. For clinic duty, 25 students gave positive feedback and two students gave negative feedback, commenting that “we learnt nothing, the clients are not sophisticated”. For 2010, seven students gave positive feedback on lectures and 10 students gave negative feedback. For tutorials, 15 students gave positive feedback and two students gave negative feedback. For clinic duty, 16 students gave positive feedback and one student gave negative feedback. For 2011, eight students gave positive feedback on lectures and eight students gave negative feedback. For tutorials, 15 students gave positive feedback, and one student gave negative feedback. For clinic duty, 16 students gave positive feedback and no students gave negative feedback.

The clinical experience, formal classroom lectures and tutorials provide the framework for the CLE pedagogy. It is necessary to review these three components when setting a curriculum.

5.1 The clinic experience

The infrastructure for an in-house live-client model is well established in South Africa.¹⁶⁹ This model is used by the four universities reviewed in this study. In-house live-client courses can be

¹⁶⁸ As these surveys were optional and

¹⁶⁹ For more on this model (also sometimes referred to as an ‘in-house clinic’) see Du Plessis 2008 : 13.

used to achieve clearly articulated educational goals. It is important to have a clear understanding about what students are required to learn, especially in light of the high cost of operating these clinics and students therefore need to be taught about their relationships with the clinicians and the restrictions placed on their freedom to act as lawyers.¹⁷⁰

Although acknowledging that a substantial part of traditional or doctrinal law teaching incorporates problem solving, practice-orientated clinical experiences teach students a different, but equally important as traditional teaching, kind of reasoning. These are “ends-means thinking”, or problem-solving – described as “the process by which one starts with a factual situation presenting a problem or an opportunity and figures out the ways in which the problem might be solved or the opportunity might be realised.”¹⁷¹ Vawda describes problem-solving as a highly interactive methodology whereby students and clinicians work together in solving clients’ problems.¹⁷² He identifies a number of steps involved in the problem-solving approach, such as problem definition, option identification, decision making, and implementation.¹⁷³ The process involving these steps is applied in the clinical setting initially,¹⁷⁴ with continuous re-enforcement during tutorial sessions. A live-client clinic enables students to scratch beneath the surface of the legal system and explore the hinterland of expectations, promises and goals engendered by the legal process.”¹⁷⁵

5.2 The classroom component

In a live-client clinic a ‘problem-first’ approach is often used as pedagogy. This leads to clinicians labouring under an intrinsic belief that students will learn certain skills simply by seeing a real client with a legal problem. The assumption is then that they will develop further skills from having to find a solution to that problem ‘on the run’. Evans and Hyams argue that, although there is evidence that many things are learned in this manner, this ‘osmotic’ exposure model may not be the best way in which to learn lawyering skills.¹⁷⁶ It is therefore advisable to run a seminar and tutorial programme alongside the live-client work. This will support and

¹⁷⁰ Stuckey 2007 : 189.

¹⁷¹ Findley 2006 - 2007 : 311.

¹⁷² Vawda 2004 : 121.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Hall & Kerrigan 2011 : 34.

¹⁷⁶ Evans & Hyams 2008 : 63.

expand the legal skills learnt in the clinical environment. The classroom component is also essential, because the clinician often has to “teach things students should have learned before enrolling in client representation courses, such as the rules of evidence and professional conduct and basic lessons about lawyering skills”.¹⁷⁷ The classroom component, whether in smaller groups or by means of seminars is also regarded as important in the South African teaching of clinical legal education.¹⁷⁸ Classroom content can support a focus on professionalism and ethics,¹⁷⁹ and is also essential for the teaching of certain types of work done by practitioners that may be substantial and that students are unable to be taught in a clinical setting only.¹⁸⁰ This will require a concomitant reduction in casework load.¹⁸¹ Vawda suggests a classroom component of two hours per week where clinicians meet with all the students and offer instruction in the theory of clinical law, skills, ethics and values,¹⁸² as the focus of CLE is rather on training students than (uncontrolled) client services. Hyams holds that “[a]dequate time must be allowed in the formal clinical classroom curriculum and in the supervisor/student relationship to allow both formal (classroom) instruction and informal discussion to take place.”¹⁸³ At its most basic, the emphasis of the clinic may need to be restructured so that the number of clients that are seen in a given week is reduced, or the seminar/classroom component of the units undergoes a renewal and change of focus.¹⁸⁴ There is value in integrating practicing lawyers and judges into the classroom component as guest lecturers. They can give students a realistic view of the practice of law and bring diversity to clinical legal education.¹⁸⁵

5.3 The tutorial component

Tutorial sessions are geared towards guiding students through the stages of learning.¹⁸⁶ The proper implementation of CLE requires close and direct supervision of students, which will satisfy the goal/outcome aimed at ensuring that the student is working effectively, efficiently and

¹⁷⁷ Stuckey 2007 : 189

¹⁷⁸ Osman 2006 : 276; Haupt 2006 : 234; McQuoid-Mason 1982 : 165; Vawda 2008 : 89.

¹⁷⁹ For ethical skills exercises, see Albert & Gundlach 2011 : 1 – 10.

¹⁸⁰ Styles & Zariski 2001 : 65; Giddings 2008 : 12; Hyams 2008 : 31, 32.

¹⁸¹ Hyams 2008 : 31, 32.

¹⁸² Vawda 2004 : 119. The clinical programmes at the University of KwaZulu-Natal is described in McQuoid-Mason 2008 : 43.

¹⁸³ Hyams 2008 : 31, 32.

¹⁸⁴ Ibid.

¹⁸⁵ Stuckey 2007 : 157, 158.

¹⁸⁶ Colon-Navarro 2011 : 1- 10.

ethically for the client.¹⁸⁷ Clinicians should enforce regular tutorial meetings.¹⁸⁸ CLE, of which tutorials form a large component, “is an active pedagogy in which students are required to perform certain tasks and draw lessons from those experiences.”¹⁸⁹ The learning process is enhanced through action, verbalisation of thoughts and an active engagement with ideas through consultation, discussion and feedback involving peers and clinicians. Vawda suggests that clinical teaching,¹⁹⁰ and I submit specifically the intensity of such teaching through tutorials, is arguably a superior pedagogy to that of presenting lectures to large numbers of students in a lecture hall setting, as it attempts to integrate all the processes of learning in a holistic approach.¹⁹¹ The relationship between clinicians and their students is about managing the expectations of the students, clients and clinicians. Clinicians need to be consistent in dealing with these expectations, which become clear during tutorial sessions. Student feedback norms are a critical expectation control issue,¹⁹² as this can serve as an examination of the clinical curriculum.¹⁹³

At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on assessment of the course ‘practical legal studies’. For 2009, 27 students, for 2010, 17 students and for 2011, 16 students completed the questionnaire.¹⁹⁴

Students were asked: “Please comment on whether your performance during tutorials should be specifically assessed on a continuous basis”. For 2009 eighteen students responded “yes” and nine students responded “no” to the continuous assessment of performance during tutorials. For 2010 thirteen students responded “yes” and four students responded “no”. For 2011 nine students responded “yes” and seven students responded “no” to the continuous assessment of performance during tutorials.

¹⁸⁷ Vawda 2004 : 122. Also see the goals/outcomes later in this chapter. Cody & Schatz 2010 :174.

¹⁸⁸ Although the tutorial method of teaching, which can also be referred to as reflection sessions students have with their clinical supervisors, is used since the inception of clinics in the USA, UK and South Africa, such method was recommended as a method for imparting legal education in India only since 1994. See Bloch & Prasad 2006 : 178, 179; also see Lerner & Talati 2006 : 121.

¹⁸⁹ Vawda 2004 : 120.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Evans & Hyams 2008 : 73.

¹⁹³ Towards the end of the academic year students are requested to complete an evaluation of the clinical course. This evaluation form can be designed to cover students’ evaluation of their experiences of the various components of the curriculum, their supervision, their views on the assessment procedures and their contact with other members of the clinic staff. These student evaluations proved to be valuable to the clinicians at the WLC over the years, as these students’ inputs influenced the curriculum planning for subsequent years.

¹⁹⁴ WITS LAW CLINIC : 2009, 2010 & 2011.

Student assessment must be continuous, as the clinician will, during the tutorials, approve students' work in advance and observe or record student performances. Consistent discussion and feedback during tutorial sessions not only inform the students about the work they are learning and what is expected of them, but also serve as constant formative assessments of the students' progress. Giddings emphasises that the assessment process should be linked very closely to the provision of useful feedback to students, which is of central importance in a clinical programme.¹⁹⁵ These can be conducted during tutorial sessions.

Tutorials are appropriate *fora* where student autonomy can be balanced with client protection.¹⁹⁶ Under the guidance of the clinician, the student must develop a reflective and critical approach to his or her own experience without risking harm to the client. The highest quality experience comes from a clinician who can strike the appropriate balance between allowing the student the freedom to explore, whilst protecting the client from harm.¹⁹⁷ Swanepoel *et al* describe the tutorial component in clinical legal education as a forum where students are more relaxed and exert more effort into thinking than they would do when their immediate goal was just to memorise material to pass an imminent examination.¹⁹⁸ Tutorials were also identified as *fora* where the clinician's responsibility to provide a pedagogical basis for tackling ethical issues can manifest.¹⁹⁹

In neglecting tutorials, where students are trained in professional practice, effectively prolongs and reinforces the habits of thinking like a student rather than as a practitioner.²⁰⁰ Tutorials serve as a forum where the clinician and students can discuss the merits of cases, as well as the reasons why certain cases may be discontinued.²⁰¹ These cases can serve as models for the teaching of "hypothesis formulation and testing in information acquisition" and "decision making in situations where options involve differing and often uncertain degrees of risks and promises of different sorts".²⁰² Tutorials in CLE should therefore be compulsory.²⁰³

¹⁹⁵ Giddings 1999 : 9.

¹⁹⁶ Stuckey 2007 : 195.

¹⁹⁷ Ibid.

¹⁹⁸ Swanepoel, Karels & Bezuidenhout 2008 : 108, 109.

¹⁹⁹ Evans & Hyams 2008 : 64.

²⁰⁰ Ortiz 2011 : 3.

²⁰¹ This may be due to factors such as lack of merits or the impossibility to obtain relevant evidence.

²⁰² Findley 2006-07 : 311.

²⁰³ See McQuoid-Mason 1982 : 163 for a discussion on the disadvantages of tutorials when they are not compulsory.

6. Specialisation

When planning and setting a curriculum, the possibility of operating the clinic in specialised units, needs to be considered.²⁰⁴ Stuckey agrees that it is impossible to prepare students to practice competently in every field of law.²⁰⁵ He suggests that clinics could either prepare students in a limited range of legal services or for very specific areas of practice. When selecting an area of specialisation, clinicians have to ensure that it will be conducive to good teaching.²⁰⁶ Guidelines are: beneficial to the students (the full spectrum of the curriculum must be covered, intensive teaching, in smaller groups, by a specialist in that area of the law); benefit to the clients (an identified need in the indigent community); and benefit to the clinicians (the availability and/or enhancement of specialised skills).²⁰⁷ To prevent undue exclusivity in specialisation, a general clinical unit may be retained alongside specialist clinics.

Specialised units within the larger clinical setting are becoming the norm at more South African university law clinics.²⁰⁸ Parameters for case specifics and student learning criteria will ensure manageable caseloads.²⁰⁹ Strict guidelines for assessment are essential to ensure “that students are assessed in an even-handed manner across the different specialised units.”²¹⁰

Similar to Stuckey, who voiced the perspective in the USA, Australians Evans, Hyams and Giddings believe that specialist clinical units may provide students with “a richer skill set and a deeper and more comprehensive milieu in which to practice those skills” which will benefit the law school and serves as a valuable resource for the community.²¹¹ Such specialised clinical units must conform to the pedagogical aims of the CLE programme. In South Africa, upon measuring the impact of specialisation, a number of successes were noted.²¹² Amongst these are intensified clinician skills leading to publication output, students benefitting through focused training in

²⁰⁴ For specialisation within a South African university law clinic, see De Klerk & Mahomed 2006 : 306 – 318; Du Plessis 2007 : 44 – 63.

²⁰⁵ Stuckey 2007 : 41

²⁰⁶ De Klerk & Mahomed 2006 : 314.

²⁰⁷ De Klerk & Mahomed 2006 : 312, 313.

²⁰⁸ De Klerk 2006(b) : 250; Du Plessis 2006 : 284, 285; De Klerk & Mahomed 2006 : 306 – 318; McQuoid-Mason 2008 : 10; Haupt 2006 : 238 -241.

²⁰⁹ Du Plessis 2008 : 14.

²¹⁰ Du Plessis 2009 : 97, 98.

²¹¹ Evans & Hyams 2008 : 66, 67; Giddings 2008 : 4.

²¹² De Klerk & Mahomed 2006 : 312 – 314.

smaller groups, assessments conducted by experts and improved networking and funding opportunities.

7. Outcomes, skills and values

In the US, Canada and Australia, “accreditation has been used to drive legal education toward an outcomes-based learning model in which knowledge, skills and values must be clearly articulated and tangibly demonstrated ...”²¹³

Expected outcomes, skills and values were identified as preconditions in designing a curriculum that can be assessed effectively. As the course relates to the training of legal professionals, it is important to identify the skills, values and outcomes that are required by the profession. The following were identified across a number of jurisdictions.²¹⁴

7.1 Outcomes

Outcomes were defined as “the stated abilities, knowledge base, skills, personal attributes, and perspectives on the role of law and lawyers in society.”²¹⁵ The outcomes of a clinical programme are relevant to the needs of the society, students and the profession.²¹⁶ In July 2008, the American Bar Association (“ABA”) shifted its focus from input measures to outcome assessment, urging law teachers to develop clear learning outcomes for their courses.²¹⁷

When planning a curriculum, certain outcomes are expected. Guidance for developing outcomes, were suggested by a number of jurisdictions as:²¹⁸ collaboration with legal practice (including the bench and magistrates, the bar, attorneys’ practice and other necessary and identified constituencies); the outcomes must be consistent with the mission of the law school and

²¹³ Smyth & Liddle 2012 : 21.

²¹⁴ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44; the State Bar of Wisconsin’s Commission on Legal Education, see Findley 2006 - 2007 : 324; for the USA and Canada, see MacCrate report : 1992; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brücker & Woodruff 2008 : 579.

²¹⁵ Munro 2002 : 232.

²¹⁶ Osman 2006 : 275.

²¹⁷ Carpenter *et al* 2008; Hill 2011 : 668.

²¹⁸ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44 and CLEO; for the USA and Canada, see MacCrate 1992; Munro 2002 : 232, 234; and Findley 2006-07 : 324; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brücker & 2008 : 579.

the university; to ensure consistency, outcomes must not be adopted on an *ad hoc* basis, but upon consensus after dialogue and deliberation; outcomes must be measurable - it is self-defeating if an outcome cannot be assessed; an outcome must be stated explicitly and must be clear to all the parties involved, such as the students, the law school, the clinic and identified constituencies; clinics should consider how many outcomes they can reasonably address and assess during the CLE programme; to introduce students to the key skills, values and professional attributes required of a legal practitioner; the ability to bring a case to an appropriate resolution; effective group work; the capacity to reflect; and that the demands of the outcomes on the clinic and the students should be reasonable.

In South Africa, seven main goals (outcomes), each with their own sub-goals, of CLE have been identified.²¹⁹ These are:

- 7.1.1 the goal relating to professional responsibility. The sub-goals (outcomes) are: a system of legal ethics and ethical philosophy; personal norms/morality; the professional role of legal practitioners; the analysis of legal institutions; social awareness; and affording students the opportunity to reform the system;
- 7.1.2 judgment and analytical abilities. The sub-goals (outcomes) are: recognition of relevant facts and applicable law; understanding strategy, tactics and decision making; understanding process and procedure; synthesis; and reflection;
- 7.1.3 substantive law. The sub-goals (outcomes) are: strengthening and deepening of existing knowledge; acquiring new knowledge; the impact of theory (strengthening and extending acquired theory); and the study of specific law areas;
- 7.1.4 applied practice skills. The sub-goals (outcomes) are: consultation skills; client counseling; negotiation; trial advocacy; appellate advocacy; drafting of legal documents; legal research;²²⁰ factual investigation; and office management;
- 7.1.5 legal services to the community;
- 7.1.6 learning and working in groups; and
- 7.1.7 integration of all or some of these goals.

²¹⁹ Steenhuisen 2006 : 266 – 279.

²²⁰ For a discussion on introducing computer-assisted research methodologies, see Donnelly 2008 : 58; Shirley, Davies, Cockburn & Carver 2006 : 147.

Mahomed (from WLC) indicates that these goals pose challenges such as funding concerns, client numbers, supervision, infrastructure, assessment, the continuity of service and a high standard of professionalism from both clinician and student.²²¹ Osman and Vawda (from the University of Kwa-Zulu Natal) offer additional goals/outcomes,²²² as does the UPLC.²²³

Most of the South African university law clinics seem to support the goals/outcomes identified by Steenhuisen,²²⁴ which compares well to those identified by other jurisdictions. South Africa, comprising a wider diversity relating to both clients,²²⁵ students and physical location of universities as those in other jurisdictions discussed, need to adapt these outcomes to accommodate the diversities experienced in their own universities.²²⁶

7.2 Skills

On the importance of skills, Chief Justice Richard J Scott of the Manitoba Court of Appeal, in his speech ‘A Judge’s perspective on legal education’,²²⁷ took his inspiration from the following quotation:

“A student could read all the books [about the guitar] in the world, and ... not know the most important thing: how to play. If I could change one thing about higher education in Canada, it would be to convince the academy that giving our students effective and repeated practice using their cognitive skills is more important than providing them with knowledge, and that, despite the significant economic and logistic challenges we face, tools are now available that allow us to teach these skills more effectively than we have ever been able to in the history of education.”²²⁸

The honourable Chief Justice indicated that “I think this says it all.”²²⁹

²²¹ Mahomed 2008 : 58.

²²² Osman 2006 : 260, 261.

²²³ UNIVERSITY OF PRETORIA LAW CLINIC, PRACTICAL LAW 410, STUDY GUIDE: 2012 : 4 – 7.

²²⁴ These outcomes are assessable. The methods of assessment used by the universities of Pretoria, Johannesburg, the Free State and the Witwatersrand will be discussed in a later chapter of this study.

²²⁵ See DIVERSITY IN SOUTH AFRICA

²²⁶ On student and client diversity, diversity management and CLE specific approaches to diversity, see Iya 2008 : 38 - 43 and 48 – 49. On diversity teaching in clinical law programmes in South African clinics, see Vawda 2008 : 87 – 97 and Vawda 2006 : 295 – 305.

²²⁷ Delivered on 18 October 2012, as the keynote address at the Conference of the Association for Canadian Clinical Legal Education.

²²⁸ Anderssen 2012.

²²⁹ Scott 2012 : 67.

In 1989 the ABA Section on Legal Education and Admission to the Bar appointed a task force with its primary aim to study, and make recommendations of how to narrow the ‘gap’ between law schools and practice. The results were published in 1992 and generally referred to as the MacCrate report. The task force developed a list of skills and values each member of the profession should possess. A list of ten skills and four values were identified as: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counselling, negotiation, litigation and alternative dispute resolution procedures, organising and managing legal work and, lastly, recognising and resolving ethical dilemmas. It found that the “skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive state during the law school experience, and continues throughout a lawyer’s professional career.”²³⁰

In 2007 the Carnegie Foundation for the Advancement of Teaching and Educating Lawyers: Preparation for the Profession of Law (referred to as the “Carnegie Report”) created a model of legal education.²³¹ The report “focuses on the “sundering” of the three apprenticeships of legal education: conceptual knowing (cognitive), acting (practice) and moral discernment (ethical-social), recommending a reintegration into the curriculum of doctrine, skills and the development of a sense of professional responsibility.”²³² An observation was that legal education approaches improvement incrementally, not comprehensively as the relatively subordinate place of the practical legal skills is symptomatic of legal education’s approach to treat the major components of legal education in an additive, not an integrative, way. Practical skills are addressed only to a point which is a conceptual and pedagogical problem.²³³ A recommendation is to design the program so that students and faculty weave together disparate kinds of knowledge and skill and that practical skills of lawyering are most effective in small-group settings. I submit that this recommendation can be implemented successfully in CLE where students work either in pairs or student firms,²³⁴ which automatically narrows the learning down to small-group settings. In a live-client (practical) environment such as in which CLE is generally taught, students can, in their respective pairs or firms, apply and broaden their knowledge and hone their practical skills that are taught in the clinical course.

²³⁰ MacCrate report : 1992. Also see Brücker 2008 : 588 – 593; Greenbaum 2012 : 19, 20.

²³¹ Sullivan *et al* 2007.

²³² Greenbaum 2012 : 20, 21; Sullivan *et al* 2007 : 19.

²³³ Also see Chavkin 2007.

²³⁴ See discussion of student law firms in chapter four, paragraph six, of this study.

The Queensland University of Technology, encouraged by the Australian Law Reform Commission's 2000 exhortation to re-orientate legal education around "what lawyers need to be able to do", proposes the following set of skills.²³⁵

"Table of Skills by Category

Attitudinal skills	Cognitive skills	Communication skills	Relational skills
- Ethical orientation - Creative outlook - Reflective practice - Inclusive perspective - Social justice orientation - Adaptive behaviour - Pro-active behaviour	- Problem solving - Legal analysis - IT literacy - Legal research - Document management - Discipline & ethical knowledge	- Oral communication - Oral presentations - Advocacy - Legal interviewing - Mooting - Negotiation - Written communication - Drafting	- Work independently - Teamwork - Appreciate race, Gender, culture and socio-economic differences specifically and diversity generally - Time management"

In summarising research done across a wide jurisdiction, the following skills were identified as essential skills law graduates should have or would need when entering the legal profession:²³⁶ ethics; practice management; case management; interviewing skills; the capacity to deal sensitively and effectively with clients, colleagues and others from a range of social, economic and ethnic backgrounds and disabilities; effective communication techniques; recognition of clients' financial, commercial and personal constraints and priorities; effective problem-solving; to be able to use current technologies; legal research; time management and billing; to manage risk; to recognise personal strengths and weaknesses and to develop strategies to enhance personal performance; to manage personal workload and the number of client matters (clinicians must set the example – if you are a teacher, then limit client intake to teach efficiently); work as part of a team (pairing of students or to do some activities in a group in the clinic are therefore valuable); problem solving; legal analysis and reasoning; factual investigation; counseling (to establish a counseling relationship with a client); negotiation; and the skills applicable to litigation and alternative dispute resolution procedure, i.e. trial advocacy.

²³⁵ Kift 2003 : 1, 9.

²³⁶ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44 and CLEO 2007; for the USA and Canada, see MacCrate 1992; Munro 2002 : 232, 234; and Findley 2006 - 2007 : 324; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brucker & 2008 : 579.

In South Africa, the following skills are taught:²³⁷

- 7.2.1 professional and ethical conduct. The teaching of this skill will include the rules of professional ethics,²³⁸ what the term ‘legal practitioner’ entails, what constitutes a fit and proper person to be admitted as a legal practitioner, misconduct, professional negligence, the sources where the rules of professional conduct originate from, practitioners’ relationship with the State, political dissent, criminal conduct, assisting clients in breaking the law, practitioners’ relationship with the court, practitioners’ relationship with clients, practitioners’ relationship with the opposition and other practitioners, the relationship between attorneys and advocates, duties towards the poor: access to justice and rules of etiquette;²³⁹
- 7.2.2 consultation skills. The teaching of this skill will include: aims of the consultation, preparing for the consultation, stages in the consultation, after the consultation, utilising checklists or client instruction sheets and assessing consultation skills;²⁴⁰
- 7.2.3 file and case management. The teaching of this skill will include: file management systems, opening case files, typical file structure, case management and the closing of files;²⁴¹
- 7.2.4 numeracy skills. The teaching will include: use of a calculator, basic numerical writing and reading, addition, subtraction, multiplication, division, averages, exponents, fractions, reading decimal fractions, percentages, conversions, interest, ratios and rates, apportionment of damages, calculating Value Added Tax and combining calculations;²⁴²
- 7.2.5 practice management. The teaching of this skill will include: legal practice and professional ethics, client care and marketing, financial management, trust account management, risk management, personal management, miscellaneous statutory provisions, starting off in a practice and the business plan;²⁴³

²³⁷ De Klerk *et al* 2006 : 29 – 262. This textbook is the only one on CLE written by South African clinicians and is used in the majority of South African university law clinics. The authors describe the skills taught, together with instruction on the teaching of the different skills. These skills are mostly taught, and instructions are aimed at teaching these skills as part of CLE courses, which form part of the LLB curriculum.

²³⁸ For a clinical model as a vehicle for teaching ethics to law students, see Kerrigan 2007 : 7 – 26.

²³⁹ De Klerk 2006(a) : 29 - 54. Also see Swanepoel, Karels & Bezuidenhout 2008 : 104 on the development of this skill.

²⁴⁰ Haupt 2006(a) : 55 - 71.

²⁴¹ Haupt & Boniface 2006 : 73 – 82.

²⁴² Grove 2006 : 83 – 102.

²⁴³ Swanepoel 2006 : 103 – 128.

- 7.2.6 legal research. The teaching will include: legal research in a law clinic, suggested research methods and the drafting of an opinion;²⁴⁴
- 7.2.7 drafting letters. The teaching of this skill will include: format, body of the letter, specific letters and methods of delivery;²⁴⁵
- 7.2.8 drafting pleadings, notices and applications. This will include: important terms and concepts, a general approach to drafting, prior considerations, drafting of pleadings, drafting of motions/applications and drafting of heads of argument;²⁴⁶
- 7.2.9 the drafting of wills. This will include: general approach to drafting, prior considerations, interviewing checklist, contents and order of a will and formalities;²⁴⁷
- 7.2.10 the drafting of contracts. The students will be taught on the law of contract, the art of drafting and exercises in examples;²⁴⁸
- 7.2.11 alternative dispute resolution. The teaching of this skill will include: types of dispute resolution processes, negotiation, mediation and arbitration;²⁴⁹ and
- 7.2.12 trial advocacy. The teaching of this skill will include: the opening address, examination in chief, cross-examination, limitations on cross-examination, technique in cross-examination, re-examination and the closing address. This will also include the practical exercises.²⁵⁰

These skills, which compare well to those identified by other jurisdictions, are taught to both students and candidate attorneys.²⁵¹ The candidate attorneys will, in addition, appear in the Magistrates' courts.²⁵²

Swanepoel raises the issue of an important further skill which is often neglected, namely the use of language both verbally and in writing which is an essential professional skill in almost every branch of legal practice.”²⁵³ Watson, in evaluating social accounts of student learning,

²⁴⁴ Kok 2006 : 129 – 154.

²⁴⁵ Wimpey 2006 : 155 – 172.

²⁴⁶ Steenhuisen 2006(a) : 173 – 192.

²⁴⁷ Bodenstein 2006 : 193 – 218.

²⁴⁸ Stilwell 2006(a) : 219 – 232.

²⁴⁹ Mahomed 2006 : 253 – 262.

²⁵⁰ Stilwell 2006 : 233 – 252.

²⁵¹ How these skills are incorporated within the curriculum will be discussed in paragraph 9 of this chapter.

²⁵² See para 7.2 of this chapter of the study.

²⁵³ Swanepoel, Karels & Bezuidenhout 2008 : 100. Also see Greenbaum 2012 : 34.

observed the poor mastery of basic grammar and writing skills.²⁵⁴ Students with poor language skills are a legacy passed on to universities from the feeder schools. Kate O'Regan, as a Judge of the Constitutional Court, observed that "[t]he bitter truth is that the law is a discursive and analytical discipline. Inadequate language education, particularly in the context of reading and writing skills, in primary and secondary education is an obstacle to the successful acquisition of legal skills."²⁵⁵ McQuoid-Mason proposes that basic lawyering skills of letter and opinion writing and legal drafting, as communication, both written and oral, is the lifeblood of a lawyer's profession.²⁵⁶ Swanepoel views legal writing as only one part of teaching effective advocacy. He addresses the conceptualisation of a writing course, concluding that a substantial part thereof ought to be devoted to language training, that what is taught should be reinforced and inculcated in all theory/content based subjects of the LLB curriculum, and that legal writing should be taught by law teachers.²⁵⁷

In the USA the JD-programme includes legal writing as a core component of the curriculum.²⁵⁸ In South Africa, but for a few exceptions,²⁵⁹ legal writing is absent in the undergraduate LLB. Turning to the USA for guidance on writing skills, Findley states that legal writing courses should do much more than serve remedial needs – they should help students to hone their reasoning and analysis skills. In legal writing instruction, students learn “how to apply the law, learned in their doctrinal courses, toward the resolution of a legal problem, while at the same time deepening their understanding and use of doctrine”.²⁶⁰ In both the US and Germany, foreign language skills and intercultural competencies are considered to be added to the curriculum, in view of internationalisation.²⁶¹

With specific focus on WLC, the 2013 “PRACTICAL LEGAL STUDIES MANUAL” states the aims and skills as set out below.

²⁵⁴ Watson 2003 : 39. Also see Chaskalson 1989 : 1, commenting that “the candidates do not have a good command of English.”

²⁵⁵ O'Regan 2002 : 247.

²⁵⁶ McQuoid-Mason 2003 : 202.

²⁵⁷ Swanepoel 2009 : 3 – 36. Also see Donnelly 2008 : 59.

²⁵⁸ Swanepoel 2009 : 3.

²⁵⁹ Legal writing forms part of the drafting skills components of CLE at the universities reviewed.

²⁶⁰ Findley 2006 - 2007 : 315, 326. Also see Mudd 1986 : 189 – 197.

²⁶¹ Brücker & Woodruff 2008 : 615.

“Aims of the course:

The Practical Legal Studies (PLS) Course is designed to ensure that students acquire a foundation of the fundamental skills and values that all lawyers should possess before assuming fully their roles as practitioners. This is primarily done by learning through doing or what is more specifically termed experiential learning.

The following skills are taught in PLS:

- Fact Investigation and Problem Solving:

The term “problem” includes the entire range of situations in which a lawyer’s assistance is sought. This skill encompasses identifying and diagnosing a problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan and keeping the planning process open to new information and ideas.

- Legal Analysis, Critical Thinking and Reasoning:

This skill encompasses identifying legal issues, formulating legal theories, elaborating and enhancing the theories and evaluating and criticizing the theories.

- Legal Research:

This skill encompasses a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research and the process of devising and implementing a coherent and effective research design.

- Communication Skills:

This skill encompasses the ability to conduct a proper interview and communicating effectively with clients, as well as in a range of other contexts.

- Writing and Drafting Skills:

This skill encompasses the ability to draft legal documents ranging from letters, pleadings, affidavits, opinions and others.

- Case management:

This skill encompasses efficient management of your caseload, including appropriate allocation of time, effort and resources; timely performance and completion of work; co-operation among co-workers and orderly administration of the office.

- Interviewing and Counseling Skills:

This skill encompasses a proper counseling relationship with a client, gathering information relevant to the decision to be made by the client, analysing the decision to be made by the client, counseling the client about the decision and implementing client's instructions.

- Trial Preparation:

This skill encompasses the evaluation of pleadings and issues in dispute, pre-trial procedures and preparation for trial.

- Trial Advocacy:

Opening statements, examination in chief, cross-examination and legal argument.

- Negotiation:

This skill encompasses preparing for a negotiation, conducting a negotiation, counseling a client about the terms proposed by the other side during a negotiation and implementing the client's decision.

- Professional Responsibility and Legal Ethics:

This encompasses a working knowledge of the rules of professional and ethical conduct. It includes the various duties as a practitioner to client, the state and the court, how to recognise conflicts of interests and how to deal with them.

- Knowledge of Procedural and Substantive Law:

This encompasses students being equipped with both the theoretical and practical knowledge of their specialised unit.²⁶²

7.3 Values

In 1992 the MacCrate report identified and published four values as provision of competent representation, striving to promote justice, fairness and morality, strive to improve the profession and professional self-development.²⁶³ The Carnegie Model of legal education supports courses and curricula that integrate three sets of values or 'apprenticeships': knowledge, practice and professionalism.²⁶⁴

²⁶² WITS LAW CLINIC MANUAL 2013 : 10 – 12.

²⁶³ MacCrate report : 1992. Also see Brücker 2008 : 593.

²⁶⁴ <http://educatingtomorrowlawyers.du.edu/about-etl/carnegie-recommendations/>

Chavkin is of the opinion that there are at least three types of values which are critical to the future of the profession.²⁶⁵ The first is a private value, namely the lawyer-client relationship. The second and third are public values, namely the lawyer's relationship to opposing counsel, judges and court administration; and the lawyer's relationship to the profession.

In summarising research done across a wide jurisdiction, the following were identified core values that every competent lawyer must embrace: the provision of competent representation; striving to promote justice, fairness and morality; striving to improve the profession; professional and self-development; judgment; professionalism; civility; and conservation of the resources of the justice system.²⁶⁶

I submit that these values are equally important and embraced in the South African landscape. These values will be apparent in the practical clinical experiences of the students, in the teaching and practice of ethics, professionalism and case- and file management.

8. Curriculum

A curriculum which will serve the clinic's mission and the stated outcomes for the students must have certain characteristics which include focus, coherency and logical coordination, the provision for incremental and developmental formation of student abilities and that all the outcomes should be required for all students.²⁶⁷ The latter characteristic should be heeded when a clinic operates in specialised units where students may be exposed to different styles of practice and different experiences. It is important that valid assessment and continual feedback be an integral part of the curriculum.

Suggestions from foreign jurisdictions were explored in an attempt to find a comprehensive and appropriate curriculum for South Africa.²⁶⁸ As part of the clinical curriculum as it relates to student activity, it is recommended that: students receive formative feedback on

²⁶⁵ Chavkin 2007 : 5.

²⁶⁶ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44 and CLEO 2007; for the USA and Canada, see MacCrate 1992; Munro 2002 : 233, 234; and Findley 2006 - 2007 : 324; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brücker & 2008 : 579.

²⁶⁷ Munro 2002 : 235, 236.

²⁶⁸ For the UK: the Law Society of England and Wales, see Stuckey 2007 : 44 and CLEO 2007; for the USA and Canada, see MacCrate 1992; Munro 2002 : 233, 234; and Findley 2006 - 2007 : 324; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brücker & 2008 : 579.

their clinical work; a minimum of two students be responsible for each client/case;²⁶⁹ students should be involved in group work; the knowledge, skills and expertise of students must be shared with their partner/group; the initial responsibility for the cases should be the students'; and weekly plenary lectures, either to the entire body of students in the clinical course, or to groups of students, in their specialised units.

In analysing the curriculum requirements set by the abovementioned jurisdictions, the following appeared to be common to all those jurisdictions in terms of course content. For CLE, each student should receive substantial instruction in: the substantive law necessary for effective and responsible participation in the legal profession; legal analysis and reasoning; legal research; problem-solving and oral communication; writing in a legal context; professional responsibility; social responsibility; practice management; observance of and reporting on trials, both civil and criminal; interviewing techniques; drafting of pleadings; drafting of letters and other formal documents; professional ethics; trial advocacy; negotiation techniques and writing programmes.

In South Africa, AULAI compiled a manual in 2005 which lists topics that may be covered in the CLE programme. For the setting of a curriculum, volume one of the manual suggests outcomes, content of the topic(s), lists of readings and authorities and suggested assessments. The relevant topics, with submissions thereto, are set out in below.

AULAI MANUAL, VOLUME 1, 2005

CURRICULUM SETTING

Outcomes, content of topic(s), lists of readings and authorities and suggested assessments.

Relevant topics:

- 8.1 Land, housing, business reforms and social justice.²⁷⁰ Legal issues relating to land, housing and evictions can be successfully accommodated in the course, as the content of these procedures are appropriate for student training, both in relation to clinical work and the classroom component.

²⁶⁹ Chavkin 1994 - 1995 : 213 indicates that in pairs, students can filter client life experiences through multiple personal life experiences and thereby potentially develop richer and more accurate understandings of their clients. Du Plessis 2009 : 97 is of the opinion that there are benefits for students working in pairs, such as having a partner to discuss the case with, to plan strategy and the execution thereof together, as well as in drafting the necessary documents and correspondence. Haupt 2006 : 234, 235 is also in favour of students doing the clinical component "initially in groups, later in pairs and eventually as individuals towards the end of the course."

²⁷⁰ Aulai Manual Vol 1 2005 : 15 – 31.

The WLC operates a specialised unit in this field. Aulai suggests assessment as a field trip essay, case studies and role analysis. I submit that assessment can also be conducted in the form of file work, written test and oral examination. I submit that the topic of business reforms (and business rescue in terms of the Companies Act)²⁷¹ does not lend itself to student training and assessment in a clinical environment. I further submit that the concept of social justice, apart from the awareness thereof throughout the clinical experience, is suitable for teaching in a classroom environment as well. This can be assessed successfully by way of written and oral examinations.

8.2 Practice management: file and case management.²⁷²

I submit that these are key topics of a clinical legal education course. Aulai suggests assessments in the form of file evaluations and case reports. These skills can also be developed further when students are tasked to draft business plans when they set up student law firms.²⁷³ These skills can be assessed.

8.3 Financial management.²⁷⁴

The suggested contents cover trust and business accounts, management and accounts, billing of clients and legal costs. Aulai does not suggest the manner of teaching and I submit that this topic can be taught in a classroom environment and simulated on clinic case files. Aulai suggests assessment by way of a written test. I submit that it can also be assessed as part of an oral examination and when students' case file work are assessed.

8.4 Office administration.²⁷⁵ The suggested contents include a general component (consisting of reception, telephone/fax (e-mail can be included here), post, deliveries by couriers and docex and the receipt of monies), staff management, insurance and asset management.

Aulai does not suggest the manner of teaching and I submit that this topic can be taught in a classroom environment, as part of a general lecture on the administration of the clinic. Aulai suggests assessment by way of a written or an oral test.

8.5 Consultation and analysis of facts and law.²⁷⁶ The suggested contents include different types of consultation (first contact session/interview), counseling, telephone consultation

²⁷¹ Companies Act No 71 of 2008.

²⁷² Aulai Manual Vol 1 2005 : 32 – 33.

²⁷³ See discussion of student law firms in chapter four, paragraph six, of this study.

²⁷⁴ Aulai Manual Vol 1 2005 : 34 – 35.

²⁷⁵ Aulai Manual Vol 1 2005 : 36 – 39.

and updates/progress reports by and to clients); interview/counseling; ethical consideration/professionalism; and analysis of facts and law ('sifting' of the facts, identification of the issues or area of the law, identification of the applicable legal principle/rule, research and analysis and application of principles to facts).

Aulai does not suggest the manner of teaching and I submit that this topic can be taught in a classroom environment, during clinic consultations and during weekly tutorials.

For assessment of this topic, Aulai suggests that students be shown a video of a flawed interview which can then be discussed. Students may also simulate a consultation in the presence of the clinician. Students can then be required to write essays on these exercises which can be assessed. Other suggestions on assessment are to assess the entire file (assess the original consultation notes, typed file notes and other documents); to sit in on an actual interview (review with the student, ascertain how s/he experienced it, provide feedback and explore various issues); and/or to provide students with an incomplete set of facts, requiring them to compile a list of additional questions that will complete the picture.

- 8.6 Letter writing.²⁷⁷ The suggested contents include the formal features of letters, the contents of letters, grammar and style, legal principles and devices and types of letters. Aulai does not indicate the method of instruction of this topic.

I submit that these can form part of a formal lecture, as well as continuous training during weekly tutorials. Draft letters submitted to clinicians by students can be assessed on a continuous basis, which will ensure the improvement of their letter writing skills and ensure that clinicians are not repeatedly inundated with poor and inadvertent drafts.

Aulai suggests assessment in the form of a test (written or oral) on theory of letter writing, and/or a written exercise on drafting from a given set of facts, and/or student role-play as assessor of already drafted facts (peer assessment, group assessment and/or individual assessment), and/or assessment of letters on files by the clinician.

- 8.7 Drafting pleadings, notices and applications.²⁷⁸ The suggested contents include the purpose and aim of a pleading, pre-requisites of pleadings, technical requirements of

²⁷⁶ Aulai Manual Vol 1 2005 : 40 – 45.

²⁷⁷ Aulai Manual Vol 1 2005 : 46 – 50.

²⁷⁸ Aulai Manual Vol 1 2005 : 51 – 55.

pleadings, the plea, notices, criminal courts and the construction of draft documents. Aulai does not indicate the method of instruction of this topic.

I submit that these can be taught in formal lectures, as well as continuous training during weekly tutorials.

Aulai suggests assessment in the form of a test (written or oral) on theory of drafting pleadings. It further suggests written exercises on drafting pleadings from given sets of facts, and/or the research and application of case law through simulation exercises or file and case studies. The drafting of different pleadings on actual case files must be assessed by the clinician on a regular basis.

- 8.8 Ethics and professional responsibility.²⁷⁹ Aulai does not indicate the method of instruction of this topic.

I submit that these can be taught in formal lectures, as well as continuous training during weekly tutorials.

Aulai suggests assessment as a combination of oral examinations, written tests, assignments and tutorial discussions.

- 8.9 Labour.²⁸⁰ Aulai does not indicate the method of instruction of this topic.

I submit that legal issues relating to unfair labour practices can be successfully accommodated in the course, as the content of these procedures are appropriate for student training, both in relation to clinical work and the classroom component. WLC operates a specialised unit in this field.

Aulai suggests assessments as a combination of oral examinations, written tests, assignments and file assessments.

- 8.10 Preparation for trial.²⁸¹ Aulai does not indicate the method of instruction of this topic.

I submit that these can be taught in formal lectures, as well as continuous training during weekly tutorials.

Aulai suggests assessments as a combination of drafting tests, file assessment, tutorial assessment, written class tests and oral examination.

- 8.11 Trial advocacy.²⁸² Aulai does not indicate the method of instruction of this topic.

²⁷⁹ Aulai Manual Vol 1 2005 : 56 – 59.

²⁸⁰ Aulai Manual Vol 1 2005 : 60 – 63.

²⁸¹ Aulai Manual Vol 1 2005 : 64 – 67.

I submit that preparation for trial advocacy exercises can be taught in formal lectures, whereafter mock trial exercises can follow.

Aulai suggests assessment as a combination of the review of a videoed mock trial, various written assignments and the planning of cross-examination from a given set of facts – including the listing of relevant questions to be asked and reasons therefor.

- 8.12 Motor vehicle accidents: damage to motor vehicles.²⁸³ Aulai does not indicate the method of instruction of this topic.

I submit that legal issues relating to this topic can be successfully accommodated in the course, as the content of these procedures are appropriate for student training, both in relation to clinical work and the classroom component. The WLC operates a specialised unit in the field of the law of delict (“tort”).

Aulai suggests assessments as a combination of written assignments, written tests, file assessments and oral examinations.

- 8.13 HIV/AIDS.²⁸⁴

Although Aulai discusses this topic, I submit that it will only be possible to teach this through lectures in a classroom setting and not in a live-client environment. I further submit that this should not be an individual component of the CLE course, but should be part of the overall social justice component of the course.

- 8.14 Medical malpractice.²⁸⁵

I submit that legal issues relating to this topic can be successfully accommodated in the course, as the content of these procedures are appropriate for student training, both in relation to clinical work and the classroom component. The WLC operates a specialised unit in the field of the law of delict (“tort”).

Aulai suggests assessments as a combination of a simulation exercise in the form of a moot problem, practical exercises and traditional methods of testing, i.e. written assignments, written tests and written examinations. I submit that file assessments and oral examinations are also appropriate methods of assessment.

²⁸² Aulai Manual Vol 1 2005 : 68 – 70.

²⁸³ Aulai Manual Vol 1 2005 : 73 – 74.

²⁸⁴ Aulai Manual Vol 1 2005 : 75 – 77.

²⁸⁵ Aulai Manual Vol 1 2005 : 78 – 79.

8.15 Environmental law.²⁸⁶

Although Aulai discusses this topic, I submit that it will only be possible to teach this topic through lectures in a classroom setting and not in a live-client environment. The costs to a clinic for such a specialised field (e.g.: the costs of expert witnesses and that of professionals for the investigation of environmental issues), as well as the focus of student training (these types of cases often involve class actions over a number of years), do not make this a viable option for CLE as part of the LLB curriculum. I further submit that environmental law can be practiced in a clinical setting separate from CLE, as part of an endeavour of a University, possibly by LLM students or other designated university staff. This clinic should also be funded separately.

8.16 Welfare.²⁸⁷

I submit that the application of this topic will be limited to assisting clients in the completion of forms, and the writing of letters accompanying clients' applications. The content can be taught through lectures, but does not warrant assessment separate from file assessment. I further submit that this should not be an individual component of the CLE course, but should be part of the overall social justice component of the course.

8.17 Alternative dispute resolution.²⁸⁸

I submit that this topic should not be a separate component, but form part of the labour law component of CLE.

8.19 Family law: divorce, maintenance, access (now referred to as "contact"), custody (now referred to as "care"), guardianship, domestic violence, customary marriages and children's court proceedings.²⁸⁹

I submit that legal issues relating to family law can be successfully accommodated in the course, as the content of these procedures are appropriate for student training, both in relation to clinical work and the classroom component. The WLC operates a specialised unit in this field.

²⁸⁶ Aulai Manual Vol 1 2005 : 80.

²⁸⁷ Aulai Manual Vol 1 2005 : 81 – 82.

²⁸⁸ Aulai Manual Vol 1 2005 : 83 – 86.

²⁸⁹ Aulai Manual Vol 1 2005 : 87 – 106.

Aulai provides valuable checklists and course content for the various components under the broader topic of family law. Aulai recommends assessments in the form of role play, mock trials and written tests.

I submit that this component can also be successfully assessed through oral examinations and the students' case file work.

8.20 Administrative law.²⁹⁰

Although not specifically discussed in the Aulai Manual, I submit that this topic can be taught through lectures in a classroom setting and will find application in the clinical setting in refugee law units (where applications are according to administrative law) and in consumer law units where tribunals and ombuds are approached.

Aulai suggests assessments in the form of drafting exercises, file work assessments, written tests/examinations and role play exercises, which may include real client problems.

8.21 Constitutional litigation.²⁹¹

Although Aulai discusses this topic, I submit that it will only be possible to teach this topic by way of lectures in a classroom setting and not in a live-client environment, as university law clinics will seldom be confronted with this type of litigation. This type of litigation will not specifically focus on student training and is therefore not a viable option for CLE.

8.22 Small Claims Court.²⁹²

Students will never, once qualified as attorneys, appear in the Small Claims Courts. The relevance of this topic will be limited to advice to, and referral of, clients. Students may assist clients in drafting letters of demand on their behalf, which will make for good assessment tools.

8.23 Drafting of contracts.²⁹³ Aulai provides valuable course content.

I submit that the drafting of contracts in the live-client environment should be limited to simple contracts pitched at student level and appropriate for student training.

²⁹⁰ Aulai Manual Vol 1 2005 : 107 – 110.

²⁹¹ Aulai Manual Vol 1 2005 : 111 – 116.

²⁹² Aulai Manual Vol 1 2005 : 117 – 118.

²⁹³ Aulai Manual Vol 1 2005 : 125 – 130.

Aulai recommends assessments in the form of role play and drafting, consultation notes and the contract drafted therefrom.

- 8.24 Enforcement of civil judgments in Magistrate’s courts (debt collection).²⁹⁴ Aulai provides valuable course content.

I submit that clinicians should ensure that these matters are appropriate for student training and that students are not burdened with loads of these types of matters that will amount to “just more of the same”. Enforcement matters are often a financial burden on clinic resources in the form of Sheriffs’ fees.

Aulai recommends assessments in the form of role play, consultation, drafting and a case study.

- 8.25 Consumer law: credit agreements and micro-lenders.²⁹⁵

I submit that legal issues relating to consumer law can be successfully accommodated in the course, as the contents of these procedures are appropriate for student training, both in relation to clinical work and the classroom component. The WLC operates a specialised unit in this field.

The Aulai manual on this component is however outdated.

This component can be assessed by means of written tests, oral examinations and the students’ case file work.

- 8.26 Criminal law.²⁹⁶

I submit that, in CLE, criminal law will only find application in a classroom component, through practical trial advocacy exercises and assignments on attending a criminal trial. This component is however very well suited for the training of candidate attorneys.

It is important that, when designing the curriculum, cognisance be taken that matters or cases that are taken on for litigation be suitable for student training.

²⁹⁴ Aulai Manual Vol 1 2005 : 131 – 136.

²⁹⁵ Aulai Manual Vol 1 2005 : 137 – 142.

²⁹⁶ Aulai Manual Vol 1 2005 : 143 – 152.

9. Review of the CLE Curricula of the Universities of the Witwatersrand, Pretoria, Johannesburg and Free State

All these university law clinics follow the in-house live-client model and students are required to attend weekly clinic duties, supervised by clinicians.

At the WLC students are paired with a partner with whom they work together as a team for the duration of the course. Student pairs are allocated to a clinician who is responsible for managing their weekly clinic intake of cases. Students on duty, in consultation with their clinician(s) who attend the clinics, consult with the clients and identify suitable cases.²⁹⁷ No appointments are made for consultations, as the WLC operates on a 'walk-in' and 'first-come-first-served' basis. Each student pair has to attend weekly designated and compulsory clinic duty for two hours. Student pairs also have to attend compulsory 45-minute tutorials weekly with their supervising clinicians where the cases are discussed in depth, strategies are planned, instructions are given and student progress is monitored.

At the UPLC students form small groups called firms consisting of five or six members called partners. They report to two clinicians who are not attending clinic, but are available. Student firms consult with clients, by appointment only, during their two hour weekly clinic sessions.²⁹⁸ No formal tutorials are scheduled, but clinicians monitor students' activities through messages placed in 'pigeon holes' in clinicians' offices. Students may also approach clinicians for consultations.

At the UFSLC students are only required to do one semester of clinical sessions, which are divided into the following specialised units from which students are allowed to choose: Labour, Evictions, Civil, Family and Appeals. Students, who each have a student partner, have to attend clinical sessions once a week, totaling approximately 20 hours of contact sessions per student per year. The student consultation sessions are pre-arranged with clients. In the Appeals unit, students do not consult with clients, but are taught by way of simulation.²⁹⁹ Regular tutorials are arranged with the clinicians.

At the UJLC students are only required to do one semester of clinical sessions. Students do not work in pairs or firms, but consult on their own. Clients consult by appointment only.

²⁹⁷ Haupt & Mahomed 2008 : 278.

²⁹⁸ Ibid.

²⁹⁹ The UFSLC is situated in Bloemfontein, which is also the seat of the South African Supreme Court of Appeals.

Student assistants and secretaries pre-screen clients telephonically. Clients that my walk in are also pre-screened and appointments are made. Students are allocated specific days for clinic duty, which last from 08h00 until 13h00. No formal tutorials are scheduled and students consult with clinicians as needed. Clinicians evaluate students' work regularly and provide them with written feedback.

In comparing the above four models, the following is evident: at WLC, UJLC and UFSLC, CLE is a compulsory course, which is recommended,³⁰⁰ whereas CLE is an elective course at UPLC. At WLC and UPLC, CLE is taught as a year course, whilst CLE are semester courses at UFSLC and UJLC. The advantage of semester courses and by making CLE an elective course is the reduction in student numbers in the course. However, by limiting CLE to a semester course, it is doubtful that students will reap the full benefits of the potential that a CLE course can offer. It will also be more beneficial to clients when the same student counsellors are available for a longer duration to attend to their cases. Suggestions to overcome large student numbers are proposed in Chapter Four, paragraph 6 below.³⁰¹

The importance of tutorial sessions is discussed in Chapter Two, paragraph 5.3. Tutorials are only compulsory at WLC and USFLC. I suggest that the other two clinics under review consider tutorials where cases can be discussed and students be instructed in a formal and structured setting. These would be less time consuming when students work in groups and firms, as will be indicated later in this study.³⁰²

Only WLC operates a "walk-in" clinic. This is possible as WLC is better staffed than the other clinics. I suggest that the structure of how clinics accept clients should be decided according to the available budgets and staffing for each clinic.

The remainder of this review will focus on the classroom components of the clinical legal education courses.

9.1 University of the Witwatersrand (WLC)

The University of the Witwatersrand teaches CLE in the full-year course, 'Practical Legal Studies', to final year LLB students. The course is presented at the Wits Law Clinic ("WLC"), a

³⁰⁰ See Chapter Two, paragraph 3.

³⁰¹ Note that these proposals are already the practice at UPLC.

³⁰² See Chapter Four, paragraph 6.

unit attached to the School of Law, where this experiential learning³⁰³ is taught in specialised units and where the clinicians specialise in different fields of law.³⁰⁴ They use a combination of the live-client teaching model, plenary lectures, tutorials and simulations. Students are required to consult in the clinic for two hours each week, attend a weekly double lecture of 90 minutes, attend a 45 minute tutorial and work on their case files for at least one to two hours per week. The students' minimum required notional learning hours per week will amount to approximately five and a half hours and monthly approximately 30 hours. Students are advised, during registration for the course, that they will consult with actual clients, open files, draft legal documents, attend court and generally litigate actual cases, all under the close supervision of qualified attorneys, the clinicians, at the law clinic. In this process students receive personal tuition and guidance by their clinician. Students' performances in the course are assessed through tests, assignments, oral examinations and file work.

The aims of the course are to teach students how to apply the law in practice. Solving actual legal problems involve a combination of knowledge, skills and values and the course therefore aims to refresh students' knowledge of selected substantial law and procedure and to teach them certain skills. These skills, including interviewing, drafting, legal analysis and reasoning, problem solving, file management and trial skills are described in detail in the annual Wits Law Clinic Manuals, of which students receive an issue. In the process of assisting the poor and marginalised in society, it is hoped that through this course the students will be infused with a set of values required of well-rounded practitioners.

The course consists of three components, namely plenary sessions, tutorials and clinic duty. This review will focus on the plenary sessions of the course. The plenary sessions comprise of group lectures for all the students and small group sessions where students are taught in their specialised units. These lectures continue throughout the academic year and are taught weekly during a double lecture (90 minutes). Students receive a clinic manual which contains summaries

³⁰³ "Experiential courses ... rely on experiential education as a significant or primary method of instruction. ... [T]his involves using students' experiences in the roles of lawyers or their observations of practicing lawyers ... to guide their learning". Stuckey 2007 : 165

³⁰⁴ These specialised units are: family law; refugee law; consumer law; labour law; land, housing and evictions; the law of delict ("tort"); and a general unit to accommodate cases that can not be allocated to any of the other units.

of the law and procedure relating to the various specialised units, handy hints and some precedents. Students are also presented with prescribed reading lists.³⁰⁵

The curriculum for these classroom components starts with an introductory lecture where students are paired with their partners and the various pairs are allocated to their specialised units. The curriculum for the classroom component is as follows:

WITS LAW CLINIC

PRACTICAL LEGAL STUDIES (“PLS”) CURRICULUM

NOTE: Readings will be prescribed for each lecture.

Week 1:

Topic: INTRODUCTION TO PLS AND REGISTRATION

A plenary session where students are given a general introduction to the course and clinic procedures. Clinicians introduce the various specialised units.

Week 2:

Topic: INTERVIEWING SKILLS

The main plenary session will deal with the structure of client interviews and the stages in the consultation process. This lecture on interviewing skills and statement taking include the aims of a consultation, factors that either inhibit or facilitate communication, preparation for the consultation and the stages in the consultation process.³⁰⁶ This session may be enhanced by the screening of a video on interviewing skills compiled for the use in clinical legal education by Griffith University in Queensland, Australia.³⁰⁷

During the second session, unit-specific interviewing issues are discussed. Each clinician prepares a lecture specifically focused on the needs of the specialised unit he/she supervises. For purposes of this study, all these individual lectures will not be analysed and only general themes

³⁰⁵ WITS LAW CLINIC, PRACTICAL LEGAL STUDIES, COURSE OUTLINE 2013 : 1 - 4.

³⁰⁶ The five stages are: meet and greet, listening, questioning, advising and taking of instructions.

³⁰⁷ A copy is available at the Wits Law Clinic.

will be noted. These include themes such as the five stages of an interview, the organisation of an interview, active and passive listening, role play and simulation exercises. The general outcomes/aims are to align theory relevant to interviewing skills to practice, so that students learn to: design appropriate questions they could ask clients, establish preliminary problems, establish relevant facts in chronological order, identify good merits, take down concise and logical statements, discuss and identify relevant documents that may be required from clients, and advise clients on the course to be taken with their matters.

Week 3:

Topic: ASSESSMENT OF PLS AND GENERAL CLINIC PROCEDURE FILE MANAGEMENT

Students will attend a plenary session on the assessment criteria relevant to PLS as well as the procedure and general rules of the clinic.

For the second session, students will break into their allocated units where the forms required for opening files will be explained, as well as unit-specific issues on file and case management. The typical structure of attorneys' files, confidentiality, the care of file contents, the diary system and the closing of files are discussed. The forms required for legal aid assistance and for the opening of files are explained. Outcomes are that students should understand the various file and case management systems used by practitioners, what records are typically contained in an attorney's files and the management tools used by attorneys to manage their case loads.

Week 4:

Topic: INFORMATION SESSION – COURT REPORT BASIC DRAFTING – LETTERS AND STATEMENTS

The plenary session commences with a brief discussion of the court report which is due on a date that will be announced. Thereafter the lecture will cover the structure of a basic letter, some do's and don'ts and different types of letters.

For the second session, students will break up into unit-based sessions where statement-taking in the various units will be discussed, as well as unit-specific letters.

Weeks 5, 6 and 7:

Topic: BRIEF REFLECTION ON CLINIC EXPERIENCE
UNIT-BASED LAW AND PROCEDURE

Students will attend unit-based sessions where the law and procedure applicable to the various units will be discussed. There will also be a brief discussion reflecting on the clinical experience.

Each clinician prepares lectures specifically focused on the needs of the specialised unit he/she supervises. For purposes of this study, all these individual lectures will not be analysed and only general themes will be noted.

The various topics for the Property and Evictions Unit cover ownership, possession and registration; housing; sale and lease (legislation, double sales, aspects of family law in relation to sale or transfer of land and sales in execution – foreclosure); evictions; deceased estates; and aspects of civil procedure.

The Refugee Unit covers topics such as the historical background to refugee law and its application in a modern society; the current constitutional dispensation; the international refugee mechanisms and protocols to which South Africa is a signatory; migrants; asylum seekers; applicable legislation; forums and tribunals used; fear of persecution; appeals to the Refugee Appeals Board; permanent residence applications; applicable research into conditions in refugees' countries of origin; and litigation processes.

In the General and Consumer Unit topics include: insurance; repossessions; debt counseling; loans and reckless credit; *in duplum*; different forms of pleadings (*rei vindicatio*, spoliation, rescission of judgment, breach of contract); action and application proceedings; role of Sheriff; issuing, serving and filing; contractual litigation (jurisdiction, “mora”, types of breach, damages, *domicilium*); consumer legislation (Consumer Protection Act, National Credit Act, Provincial legislation); National Consumer Commission; National Consumer Tribunal; Consumer Courts; Ombuds and other alternative dispute resolution agents.

The Labour Unit focuses on: statutory institutions (CCMA, Bargaining Council, Department of Labour, Labour Court); definitions (conciliation, con-arb, mediation, arbitration); proceedings at CCMA/Bargaining Council; enforcement of arbitration awards and settlement agreements; types of dismissals; Labour Court processes; trial actions; and applications.

Topics in the Family Unit include: divorce, religious marriages, pension interests, private international law, changes of matrimonial property regime, civil unions, co-habitation (universal partnerships), *actio communo dividendo*, maintenance, the Children's Act and the Domestic Violence Act.

The Delict Unit focuses on: *actio legis aquiliae*, *actio iniuriarum*, *actio de pauperie*; procedures followed in a typical delictual matter; prescription; special notices in actions against the State; separating quantum and merits; quantum of damages: special and general; *locus standi*; vicarious liability; citation; jurisdiction; assessing prospects of success; and content of prescribes notices in terms of legislation.

Week 8:

Topic: UNIT-BASED TEST

Students will write a test based on the contents of weeks 5, 6 and 7.

Week 9:

Topic: LEGAL RESEARCH AND PROBLEM SOLVING

Students will attend a plenary session dealing with legal research, focusing on the main sources and how to use them effectively. The focus is on the main sources to be used when conducting legal research, and how to use them. Topics covered include identification of different subject areas, The Law of South Africa (LAWSA), textbooks, law journals, case law, legislation and the use of computers and the internet (sites such as Jutastat, Sabinet Online and Butterworths).

Week 10:

Topic: DRAFTING COURT DOCUMENTS

The plenary session will commence with a discussion on the general rules regarding the drafting of pleadings, notices and applications.

For the second session students will attend unit-based sessions where the drafting of typical court documents relevant to each unit will be discussed.

Week 11:

Topic: DRAFTING COURT DOCUMENTS

Each clinician prepares lectures specifically focused on the needs of the specialised unit he/she supervises. The drafting of typical court documents relevant to each unit will be discussed and students will participate in drafting exercises in their respective specialised units.

Week 12:

Topic: DRAFTING TEST

Students will write a unit-specific drafting test.

Week 13:

Topic: INTERIM ASSESSMENT AND REFLECTION

Students will attend unit-based sessions where the students will be given an opportunity to reflect through their journals on their clinic experience. Students will also be evaluated on the progress.

Week 14:

Topic: ATTORNEYS' NUMERACY SKILLS FOR LEGAL PRACTICE

Students are required to study the prescribed work. Students may in addition be asked to complete an exercise in class which will then be discussed.

This skill was taught during a formal lecture during previous years. From 2012 numeracy skills were introduced as a self study component,³⁰⁸ for which students are required to study a prescribed work and to complete a problem set and assessed by the clinicians.

Week 15:

Topic: PREPARATION FOR TRIAL

Plenary session dealing with pre-trial procedures, analysis of pleadings and evidence.

Week 16:

Topic: TRIAL SKILLS

³⁰⁸ Grove 2006 : 83 – 102 (Chapter 6 in De Klerk *et al* 2006).

Plenary session dealing with court demeanour, opening statements and examination-in-chief, cross-examination and closing address.

Week 17:

Topic: TRIAL SKILLS
COURTROOM SKILLS

The first plenary lecture will conclude the lecture on trial skills and is to be followed by a guest speaker on courtroom experience.

Weeks 18, 19 and 20:

Topic: TRIAL ADVOCACY

Each specialised unit will attend a workshop on courtroom skills through demonstrations, simulations and group exercises.

Weeks 21 and 22:

Topic: PROFESSIONAL CONDUCT AND ETHICS

Plenary session dealing with the rules of professional conduct and the relationships between attorneys and role-players in the profession.

Week 23:

Topic: THE LEGAL PROFESSION: OPTIONS, OPPORTUNITIES AND GENERAL

Plenary session about the legal profession in general in relation to aspiring legal graduates.

Week 24:

Topic: PROFESSIONAL NEGLIGENCE AND INSURANCE

Plenary session by guest speakers from Glenrand MIB (the insurers of the Attorneys' Indemnity Fund) and others.

Week 25:

Topic: THE LEGAL PROFESSION/SOCIAL JUSTICE

A plenary session by a prominent guest speaker on current issues in the legal profession.

Week 26:

Topic: INFORMATION SESSION: ORAL EXAMS
COURSE ASSESSMENT

Concluding plenary session, information on topics covered in oral examinations, hints on orals, completion of course assessment.

9.2 University of Pretoria (UPLC)

The University of Pretoria Law Clinic (“UPLC”) teaches CLE in the course, ‘Practical Law 410 and 420’, to final year LLB students as an elective. They use a combination of the live-client teaching model, simulations and plenary lectures.³⁰⁹ Students form small groups called firms consisting of five or six partners. As the students progress, they start to work in pairs and towards the end of the course students work individually. Students are reminded that there are five principal ways in which they should learn from the clinical experience: working on “live-client” cases; discussions with staff and at firm meetings; developing skills in lectures, workshops and working on client files; visiting courts, shadowing candidate attorneys, participating in mock trials; and reflecting on and evaluating their experiences. Some of the services provided and matters entertained by the law clinic are: divorces; maintenance matters; housing matters; delictual claims; other civil litigation in magistrates’ and high courts, e.g. claims based on contract; consumer cases; criminal cases; general enquiries and opinions; labour matters; and debt counselling and legal assistance to debtors.

The curriculum for the classroom component is referred to as Study Themes. The lectures are presented over the course of a semester. The curriculum for the classroom component is set out below.

³⁰⁹ UNIVERSITY OF PRETORIA LAW CLINIC, PRACTICAL LAW 410, STUDY GUIDE: 2012 : 7 - 16.

UNIVERSITY OF PRETORIA LAW CLINIC

Curriculum for CLE classroom components

9.2.1 Theme 1 “Introduction to Practical Law 410 and the Law Clinic”.

During this session, the students form firms consisting of six students per firm. These firms are to reflect the gender, cultural and language composition of students as far as is possible. Each firm is to choose a suitable one and a half hour time slot for duty at the clinic. Desired outcomes and the modes of assessment are discussed. Students are handed their first assignment: Shadowing a Candidate Attorney. Students are directed to prescribed reading materials.³¹⁰

9.2.2 Theme 2 “Consultation Skills” (taught over a two week period)

The outcomes are for students to understand the objectives of the consultation i.e. obtaining facts and instructions and to know the five stages of the methodology of: meeting, greeting and establishing a working relationship; listening; questioning; advising; and obtaining instructions. Students must also know and be able to apply to a given set of facts: *locus standi*; cause of action; jurisdiction; and whether the action procedure and/or application procedure should be used.

9.2.3 Theme 3 “Filing, Firm Duty, Clinic Manual, Rules of the Clinic and Means Test”.

The stated outcomes are that students have an understanding of the rules and operations of the Law Clinic; be able to open, diarise, manage and close a file; be able to operate the fax machine, photocopier and telephone; be able to complete the client application form, including the means test.

9.2.4 Theme 4 “Court Procedures – Overview of Pleadings, Notices, Process, Issuing and Service Aspects of Substantive and Procedural Law: Divorce Litigation”.

The outcomes are that students know the function of each of the main pleadings or notices; know where it fits into the “big picture”; know when it is used and for what purpose; know the process involved in issuing and serving of a summons; know how a notice is served; know what substituted service is; have a basic knowledge of substantive and procedural law relating to

³¹⁰ Students have prescribed reading materials for every Study Theme.

divorce cases; have an understanding of how to conduct a consultation with a divorce client; be able to determine one's mandate through the application of consultation skills; and to be able to advise the client based on the mandate given and explain the consequences of same to the client.

9.2.5 Theme 5 is a workshop on "Diversity Issues".

The outcomes/aims of the workshop are to sensitise students to the reality of practising in a multi-cultural society and to provide opportunity to students to reflect on this; and to get to know staff and fellow students better.

9.2.6 Theme 6 is a workshop on "Negotiations".

The outcomes/aims of the workshop are to demonstrate the importance of having a thorough knowledge of the facts of a case prior to entering into negotiations for settlement; to show that settlements that may be achieved by negotiation will vary considerably depending on the skills, knowledge and personal styles of the individuals carrying out the negotiations; to demonstrate that the process of negotiating a settlement may also raise ethical issues that must be dealt with; to investigate the issue of limitations of bargaining power raised by costs, client instructions, and the specific facts of the matter; and to demonstrate the importance of obtaining a clear mandate and to act thereupon.

9.2.7 Theme 7 "Legal Writing" (taught over a four week period).

The legal writing instructions are on letter writing, drafting of pleadings and drafting of affidavits. The outcomes for "Legal Writing – Letters" are that the students should know and be able to apply: the features of a letter; planning a letter; use of grammar and style; legal principles; letters for reporting and letters for recording; letter of demand, elements; and be able to write letters, faxes and emails. Students also participate in a class exercise of the drafting of a legal letter. The outcomes for "Legal Writing – Pleadings" are that students should understand the basic principles relating to the formulation and drafting of summonses and particulars of claim; have a basic understanding of how to cite litigants, formulate a cause of action and request relief; and to draft a complete summons inclusive of a particulars of claim based on any given set of facts. The class exercise comprises of the drafting of a summons for which marks are allocated. The outcomes for "Legal Writing – Affidavits" are that students must be able to draft an affidavit

for any set of facts given. Students are handed a drafting assignment: Drafting of an affidavit for which marks are allocated.

9.2.8 Theme 8 is a feedback session on test and report on cases by students.

9.2.9 Theme 9 “Numeracy Skills” (lectured over a two week period)

The outcomes are that students show proficiency in everyday calculation as presented in a legal practice.

9.3 University of Johannesburg (UJLC)

The University of Johannesburg Law Clinic (“UJLC”) teaches CLE in the compulsory year course, ‘Applied Legal Studies’, as a compulsory year to final year LLB students.³¹¹ They use a combination of the live-client teaching model, simulations and plenary lectures. There are three law clinics, the Auckland Park - Kingsway Campus Clinic, the Soweto Campus Clinic and the Doornfontein Campus Clinic, each headed up by a Clinical Principal. Compulsory lectures are scheduled for every week, throughout the year. All lecture contents find application in clinic sessions. Skills are taught which enable students to deal with work, cases and problems at the clinic. Students are assessed weekly in the clinics on each piece of work done. In depth knowledge on six cognitive levels (knowledge, understanding, application, analysis, synthesis and evaluation), is expected.

The UJLC states the aim of Applied Legal Studies as two fold, namely CLE of final year LLB students, with the focus on analytical skills, the application of theory and an appreciation of the practical nature and consequences of theory; and the rendering of free legal services to the indigent according to the guidelines of the Attorneys Act and the Law Society of the Northern Provinces.

³¹¹ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

The curriculum for the classroom component is arranged into five modules and to be taught over 15 one hour lectures. Students are directed to prescribed reading materials. The curriculum for the classroom component is set out below.

UNIVERSITY OF JOHANNESBURG LAW CLINIC

Curriculum for CLE classroom components

9.3.1 Module 1 “Oral and Written Communication”.

Instructions on “Oral Communication” include telephone calls (greeting and introduction, give/establish reason for telephone call, taking notes of necessary information, summary conclusion, follow up, procedure in clinic and manner). Instructions on “Consultations” include the aim of consultations – the importance of the first consultation; the question technique: a problematic approach; three phases and tasks (listening, questioning and note-taking and advising and note-taking; the approach of Van Loggerenberg; the approach of the Inns of Court: Questioning (aim, types of questions and hostile questioning) and Listening phase (effective listening and 4 types of listening). The outcomes of this Module are to enable students to consult more effectively and confidently, despite their lack of experience; to improve the use of each following consultation as the ideal learning opportunity by learning consultation skills quicker and more effectively; to advise clients about the law in plain language, but still in a professional way; to define the concept consultation; to analyse the three phases or stages indicating the different views of the different writers; to criticise the question approach with specific reference to clinic matters; to evaluate consulting techniques at the clinic and to make and receive telephone calls effectively. Instructions on “Written Communication” include letters (with sub-topics: types, references, date, approval, corrections, filing, Small Claims Court, letters received and follow up of clinic work, copies and original documents and closing letters). Students are also instructed on specific guidelines regarding correspondence, including aims and guidelines on clarity. The outcomes for “Written Communication” are that students must be able to: show and apply their knowledge and comprehension of the content of the lecture/s by writing legal letters to their clients and all third parties, making few and preferably no mistakes; know and apply the definitions of the aims in all their letters; name and discuss the guidelines of clarity; know,

comprehend and apply the three tasks of organisation in all their letters; divide the content of their letters so that their readers will be excellently informed and/or persuaded; and to write closing letters correctly.

9.3.2 Module 2 “Divorces” (three lectures).

The first set of lectures is devoted to High Court divorces, focusing on domicile and jurisdiction, the Marriage Act and the Constitution, the divorce information sheet in statistics form, the parties, what constitutes a marriage, the reasons for the breakdown of the marriage, the position of children during a divorce, parental responsibilities and rights, Section 18 of the Children’s Act, custody, reasonable contact, maintenance, guardianship, assets and liabilities: in/out of community of property, with or without the accrual system, pensions, forfeiture, spousal maintenance, Maintenance of Surviving Spouses Act, applicable case law, deeds of settlement, prayers, and generally on family violence and liabilities. Students are also required to take part in practical exercises. The students are also instructed on divorce proceedings in the Regional Court. This portion of the module covers summonses, differences when the Regional Court is compared to the High Court processes, pleas and counterclaims, replications, pleas to counterclaims, Act 65 of 1997, the rules that are applicable and the “Civil Practice Directives for the Regional Courts in South Africa” that took effect on 15 November 2010. The outcomes for this module are that the students, after studying the lecture/s, pleadings, articles, sections and rules in the Acts and the prescribed articles of writers, must be able to: advise their client/s correctly; draft the different types of particulars of claim and applications based on different sets of facts correctly; fill in forms correctly and completely; reach settlements and draft deeds of settlement; understand the divorce procedure; and complete divorce actions speedily.

9.3.3 Module 3 “Magistrate’s Court Procedure” (three lectures).

The module commences with “Drafting of Pleadings”. Students are introduced to a general approach to drafting, whereafter they are instructed on the purpose of a pleading, the reasons for a pleading and on precision and accuracy. Under the heading of “Pre-requisites of drafting pleadings, notices and applications”, students are instructed on causes of action, *locus standi*, jurisdiction, form and differences of proceedings (action or motion/application) and prescription. Ethical duties regarding pleadings comprise the establishment of reasonable possibility of proof,

the duty to disclose *facta probanda*, relevancy and applications. Instructions on technical legal requirements for pleadings comprise the heading, the action procedure: specific pleadings, the summons and particulars of claim, the plea, the replication (high court) and replication (magistrates' court), counterclaim (claim in reconvention), exceptions and applications to strike out, and the construction of the draft document. Students are also instructed on the Motion/Application procedure, specifically the *Ex parte* application: Notice of motion, the Application with prior notice: Notice of motion, the Interim application: Notice of motion and Affidavits in support of applications. In this module, students are finally instructed in the drafting of Heads of Argument and statutory prescriptions regarding pleadings. The outcomes for students in relation to this section of the module, after studying the lectures, the sections, the court rules and the prescribed work, are that they must be able to: draft pleadings, notices and affidavits correctly within the required time frame; apply the court rules and sections to the relevant pleadings, notices and affidavits; research the case law applicable to the court rules and sections; and apply the formal principles laid down by the case law when they draft pleadings, notices and applications. Module 3 continues with instructions on pleadings, notices and applications by analysing the plaintiff's claim. Different types of High Court summonses, such as a summons in respect of debt or liquidated demand, a combined summons and summons: Provisional sentence, are taught. Teachings on forms of Magistrate's Court summonses include the ordinary summons and provisional sentence. Students are also instructed on the notice of intention to defend, the application for default judgment, the notice of application for summary judgment, exceptions and applications to strike out and discovery. The outcomes for this section of the module, are that students must be able to: draft all simple and selected advanced pleadings correctly; draft given pleadings by applying it to their case studies; and analyse the facts and law which are applicable to their case studies.

9.3.4 Module 4 "Legal Ethics".

The lecture on "Ethics in the Attorney's Profession" covers the attorney's duties towards the State, the court, the opponent, third parties, the public and the attorney's own practice. The lecture also covers the attorney's general duties to a client, followed by a discussion of the profession in general. Relevant case law and academic literature is discussed, with reference to the relationship between attorney and client, honesty (with specific detail to legal advice,

fearlessness, secrecy/privilege and negligence) and the prompt and competent completion of instructions. In discussing conflict of interest, students are instructed on the use of information, doing business with clients, secret commission and donations. The management of trust monies is taught, with reference to bank accounts, prompt settlement and interest. Ethical conduct with correspondence will include prompt replies, proper language and neatness. Students are instructed in ethical conduct pertaining to pleadings, consultations (secrecy and the consultation venue) guarantees and undertakings, when an attorney may withdraw from a matter and/or a client and how to manage instructions from clients with conflicting interests. The relationship between attorneys and third parties is taught with reference to by-laws, the profession, colleagues, the opponent's client, the withdrawal as attorney, technical defenses, touting, liabilities for moneys, interviews with judges and statements of and consultations with witnesses. Part of the lecture is spent on ethics in the advocate's profession. Topics covered are misconduct, duties regarding instructions (duty to accept and duty regarding instruction accepted) and the advocate's duty regarding litigation (to the client, the court and witnesses, specifically with cross examination). The advocate's general professional conduct is discussed, particularly when consulting with clients and witnesses, when witnesses are sworn in, consultation with people who probably will be the opponent's witnesses (in both civil and criminal matters), the acceptance of gifts and when a client admits guilt on a charge, when approached to form a partnership, in relation to advertising and proper robing. The instruction of advocates, their legal opinions to opponents and appeals, as well as their charging of fees are discussed. The outcomes for this module are that students understand that they must be able and especially willing to approach and perform all legal work according to the knowledge they acquired, to show comprehension of this knowledge by applying it to suitable ethical problems and to understand, apply, analyse, criticise and evaluate the study material - not only during examinations, but also at the clinic, and especially in their lives, because legal ethics are a way of living.

9.3.5 Module 5 "Numeracy Skills" (two lectures) and "Legal Costs" (one lecture).

Students are instructed in accordance with the prescribed academic text book and lecture handouts.³¹² The outcomes for the students, after studying the lecture/s, pleadings, articles, sections and rules in the acts and the prescribed articles of writers, pertaining to the "Numeracy

³¹² De Klerk *et al* 2006.

Skills” lectures, are that they must be able to: Identify the correct way to calculate the solution to a numerical problem and the correct formula to be applied; and calculate the solution. For the “Legal Costs” lectures the outcomes are to identify various types of legal costs and the ethical rules regulating legal costs and to draw a simple bill of costs.

9.3.6 Module 6 “The Legal Profession in SA and Practice Management” and “Trial Advocacy” (one lecture each).

The lecture on “The Legal Profession in SA” covers the term “legal profession”, the history of the profession, whereafter the attorneys’ profession is specifically discussed with reference to the nature of the work, admission requirement, professional association and the Attorneys’ Fidelity Fund. The advocates’ profession is discussed with reference to the nature of the work, admission requirements and their professional association. Students are advised of career options and instructed in transformation in the profession and the Legal Practice Bill. The outcomes for this part of the lecture are that students must be able to: show and apply their knowledge and comprehension of the content of the lecture/s by being able to give a broad outline of the views on practical legal skills and values as set forth by Judge Mahomed S Navsa; give a broad overview of the history, developments and roots of South Africa’s legal profession; discuss the attorneys’ profession with relation to the nature of work, admission requirements, professional association and the Attorneys’ Fidelity Fund; discuss the advocates’ profession with relation to the nature of work, admission requirements and professional association; and know career options available to a law student, challenges relating to transformation and the future of the professions proposed in the Legal Practice Bill.

The lecture continues with instruction on “Practice Management” for which students are referred to prescribed readings.³¹³ The outcomes are stated as: after studying the lecture/s and the prescribed work you must be able to set out and evaluate principles of good practice management, and in particular the basic principles and rules applicable to Attorneys’ bookkeeping.

The second lecture of Module 6 covers “Trial Advocacy”. Students are instructed on aspects of trial advocacy. Discussions on the trial include the preparation for the trial, i.e. the first consultation, possible *versus* probable, analyses, witnesses and *subpoenas*. The aims of chief-

³¹³ De Rebus, March 2008 : 26, De Rebus, July 2010 : 25, Bertelsmann v Per 1996 (2) SA 375 (T), Serrurier and Another v Korzia and Another 2010 (3) SA 166 (W) and De Klerk *et al* 2006 : chapter 7).

cross- and re-examination are taught with emphasis on cross-examination, the manner (courtesy, self-control, speech and language) and matter (attentiveness, human desire, human memory and loyalty) thereof. The outcomes for this lecture are that students must be able to: conduct complete consultations with an accused and witness/es; draft a *subpoena* correctly; prepare chief-examination fully; and apply their knowledge about cross-examination to a set of facts.

9.4 University of the Free State (UFSLC)

The University of the Free State Law Clinic (“UFSLC”) teaches CLE as a compulsory course to final year LLB students. They use a combination of the live-client teaching model, simulations and plenary lectures. Students are furthermore required to attend a two-hour practical session in a criminal court, or take part in a community service project, where they work in groups.

Some of the goals and objectives of CLE are (a) collaboration and cooperation with all stakeholders regarding socio economic and legal issues in order to create general access to justice for the community it serves; and (b) to operate within the University of the Free State’s declared policy of community service and service learning to engage with the community in terms of which the community will benefit through access to justice and the student through the attainment of legal skills and the development of a positive attitude to civic responsibility. The curriculum for the classroom component is set out below.

“UNIVERSITY OF THE FREE STATE LAW CLINIC

Curriculum for CLE classroom components

Students are taught by way of compulsory one-hour plenary lectures once a week. There are also six practice orientated guest lectures by senior private practitioners. This process is repeated each semester. The curriculum for the classroom component comprise the following: during the first week of each semester students undergo clinic training in the form of a formal lecture. During this lecture, students are taught how to open a client file, complete the means test, how to take client- and witness statements, how to complete the prescribed action sheet and the completion of the client indemnification. The outcome of this lecture is to provide students with the necessary information to enable them to function in the clinic.

A text book is prescribed on which all lectures are based.³¹⁴ The formal course content of the lectures consist of the following topics which are divided into five units:³¹⁵ consultation skills; file and case management; practice management; writing letters; drafting pleadings, notices and applications; and legal costs.”³¹⁶

The overall outcomes are that, after completion of the course, students should have a thorough knowledge and understanding on a number of subjects that all resort under the practice of law that have traditionally not been offered by faculties of law. The overall ideal course outcome would therefore be to provide students with knowledge and practical skills that will assist them to become competent lawyers.

The UFSLC places a high premium of ‘honesty and integrity’ as a core value. Students have to sign a code of ethics which is based on the Code of the International Bar Association.

The strength of the curricula used by the above four models will be tested below in paragraph 10 of this chapter.

10. Curriculum Summary

Discussion on the surveys conducted by authors in the different jurisdictions indicated that CLE should be a core and mandatory course in the LLB curriculum.³¹⁷ The focus of the clinic should therefore be on the students’ academic needs and their practical training.³¹⁸ Communities’ needs for legal services are acknowledged, but such services should not be rendered at the expense of student training. Clinicians, although they generally are admitted attorneys, are academics for purposes of clinical legal education and their main focus should be the training of the students.

In an in-house live-client clinic students will learn certain skills through exposure, but that is not enough to learn lawyering skills. It is therefore advisable to run a seminar and tutorial programme alongside the live-client work. This will support and expand the legal skills learnt in

³¹⁴ De Klerk *et al* 2006.

³¹⁵ UNIVERSITY OF THE FREE STATE LAW CLINIC, RPK 412 course outline.

³¹⁶ The topic of legal costs is discussed in a study guide handed to the students.

³¹⁷ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44; the State Bar of Wisconsin’s Commission on Legal Education, see Findley 2006 - 2007 : 324; for the USA and Canada, see MacCrate report : 1992; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brucker & Woodruff 2008 : 579.

³¹⁸ McQuoid-Mason 2006(a) : 169. A 2005 survey was conducted to establish students’ expectations, which will be discussed in more detail in chapter 3 of this study. I submit that, apart from student expectations, the needs of the constituencies, which include the profession, as well as needs identified by academics in law schools must be considered.

the clinical environment. Specialised units within the larger clinical setting may make more manageable caseloads possible, but students must be trained within set parameters to ensure that they are assessed in an even-handed manner across the different specialised units.

Surveys across a wide selection of jurisdictions, pertaining to the skills, values and expected outcomes of the course were reviewed, where common requirements for curricula were identified, all of which can be used in the design of an effective and assessable curriculum in clinical legal education.

A summary of the abovementioned jurisdictions' identified outcomes indicate that, when outcomes for clinical legal education are determined, the following should be considered: collaboration with legal practice; the outcomes must be consistent with the mission of the school and the university to ensure consistency; outcomes must be assessable; an outcome must be stated; clinics should consider how many outcomes they can reasonably address and assess during the clinical legal education programme; the demands of the outcomes on the clinic and the students should be reasonable. The outcomes stated by CLEO and that of the seven main goals (outcomes), each with their own sub-goals, identified for South Africa was compared. The results are:

To consider when

determining outcomes:

Multiple jurisdictions³¹⁹

collaboration with legal practice;
responsibility (goal 1)

Outcomes stated for:

CLEO³²⁰

professional conduct

Outcomes stated for:

South Africa

professional

legal ethics (goal 1)

the professional role of legal

practitioners (goal 1)

³¹⁹ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44; the State Bar of Wisconsin's Commission on Legal Education, see Findley 2006 - 2007 : 324; for the USA and Canada, see MacCrate report : 1992; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brücker & Woodruff 2008 : 579.

³²⁰ CLEO 2007.

		the analysis of legal institutions (goal 1)
consistent with the mission of the school and the university		these are consistent with the mission statements of the four SA universities reviewed
consistency		there is consistency in the outcomes stated by of the four
	SA	universities reviewed (as will be indicated later)
assessable		the outcomes stated by the
	four	SA universities reviewed are assessable (as will be indicated later)
must be stated		the outcomes are stated by the four SA universities reviewed
	substantive law	substantive law (goal
	3)	
	procedural law	judgment and analytical abilities (goal 2)
		understanding process and procedure (goal 2)
		synthesis (goal 2)

professional conduct (goal 1)	professional responsibility legal ethics (goal 1) the professional role of legal practitioners (goal 1) the analysis of legal institutions (goal 1)
client care	social awareness (goal 1) legal services to the community (goal 5)
ethics	legal ethics (goal 1)
conduct an initial interview	applied practice skills (goal 4) consultation skills (goal 4) judgment and analytical abilities (goal 2) recognition of relevant facts and applicable law (goal 2) understanding strategy, tactics and decision making (goal 2)
preliminary written advice	applied practice skills (goal 4) judgment and analytical abilities (goal 2) recognition of relevant facts and applicable law (goal 2) understanding strategy, tactics and decision making (goal 2)

appropriate English

the ability to draft letters
(goal 4)

applied practice skills

draft formal documents
(goal 4)

applied practice skills

draft legal documents (goal 4)

the ability to bring a case to
an appropriate resolution
4)

applied practice skills (goal 4)

client counseling (goal

negotiation (goal 4)

trial advocacy (goal 4)

appellate advocacy (goal 4)

legal research (goal 4)

factual investigation (goal 4)

judgment and analytical
abilities (goal 2)

recognition of relevant facts
and applicable law (goal 2)

understanding strategy, tactics
and decision making (goal 2)

to work effectively in a group

learning and working
in groups (goal 6)

the capacity to reflect on his/her
learning and performance.

reflection (goal 2)

office management (goal 4)

From the above it is clear that the goals/outcomes determined for South African CLE, compare favourably with jurisdictions globally.

The skills identified across a number of jurisdictions and those identified for South Africa were also compared. The results are:

**Essential skills identified across
a number of jurisdictions³²¹**

Skills taught in South Africa

ethics	professional and ethical conduct ³²² and professional responsibility ³²³
practice management	practice management, ³²⁴ & ³²⁵ , financial management, ³²⁶ office administration. ³²⁷
case management	file and case management ³²⁸ & ³²⁹
interviewing skills	consultation skills ³³⁰
the capacity to deal sensitively and effectively with HIV/AIDS ³³³	social justice, ³³¹ welfare, ³³²

³²¹ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44; the State Bar of Wisconsin's Commission on Legal Education, see Findley 2006 - 2007 : 324; for the USA and Canada, see MacCrate 1992 and Munro 2002 : 233, 234; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brücker & 2008 : 579.

³²² De Klerk 2006(a) : 29 - 54. Swanepoel, Karels & Bezuidenhout 2008 : 104 .

³²³ Aulai Manual Vol 1 2005 : 56 – 59.

³²⁴ Swanepoel 2006 : 103 – 128.

³²⁵ Aulai Manual Vol 1 2005 : 32 – 33.

³²⁶ Aulai Manual Vol 1 2005 : 34 – 35.

³²⁷ Aulai Manual Vol 1 2005 : 36 – 39.

³²⁸ Haupt and Boniface 2006 : See 73 – 82.

³²⁹ Aulai Manual Vol 1 2005 : 32 – 33.

³³⁰ Haupt 2006(a) : 55 - 72.

³³¹ Aulai Manual Vol 1 2005 : 15 – 31.

clients, colleagues and others from a range of social,
economic and ethnic backgrounds and disabilities

effective communication techniques;

consultation skills,³³⁴ analysis of facts and
law.³³⁵

recognise clients' financial, commercial and
HIV/AIDS.³³⁸

social justice,³³⁶ welfare,³³⁷

personal constraints and priorities

these are mainly taught during tutorial
sessions and may also relate largely to the
focus of clinic and the clinician

effective problem-solving

consultation and analysis of facts and law,³³⁹
legal research³⁴⁰

to be able to use current technologies

...

legal research

legal research³⁴¹

time management and billing

file and case management,³⁴² practice
management³⁴³ financial management,³⁴⁴
office administration³⁴⁵

³³² Aulai Manual Vol 1 2005 : 81 – 82.

³³³ Aulai Manual Vol 1 2005 : 75 – 77.

³³⁴ Haupt 2006(a) : 55 - 72.

³³⁵ Aulai Manual Vol 1 2005 : 40 – 45.

³³⁶ Aulai Manual Vol 1 2005 : 15 – 31.

³³⁷ Aulai Manual Vol 1 2005 : 81 – 82.

³³⁸ Aulai Manual Vol 1 2005 : 75 – 77.

³³⁹ Aulai Manual Vol 1 2005 : 40 – 45.

³⁴⁰ Kok 2006 : 129 – 154.

³⁴¹ Kok 2006 : 129 – 154.

³⁴² Aulai Manual Vol 1 2005 : 32 – 33.

³⁴³ Swanepoel 2006 : 103 – 128.

³⁴⁴ Aulai Manual Vol 1 2005 : 34 – 35.

³⁴⁵ Aulai Manual Vol 1 2005 : 36 – 39.

to manage risk;	practice management ³⁴⁶ file and case management ³⁴⁷ financial management ³⁴⁸ office administration ³⁴⁹
to recognise personal strengths and weaknesses	these are mainly taught during tutorial sessions and may also relate largely to the focus of clinic and the clinician
to develop strategies to enhance personal performance	these are mainly taught during tutorial sessions and may also relate largely to the focus of clinic and the clinician
manage personal workload and the number of client matters	these are mainly taught during tutorial sessions and may also relate largely to the focus of clinic and the clinician
work as part of a team	pairing of students, working in firms and trial advocacy
problem solving	legal research, ³⁵⁰ alternative dispute resolution ³⁵¹ & ³⁵²
legal analysis and reasoning	consultation and analysis of facts and law, ³⁵³ legal research ³⁵⁴

³⁴⁶ Swanepoel 2006 : 103 – 128.

³⁴⁷ Aulai Manual Vol 1 2005 : 32 – 33.

³⁴⁸ Aulai Manual Vol 1 2005 : 34 – 35.

³⁴⁹ Aulai Manual Vol 1 2005 : 36 – 39.

³⁵⁰ Kok 2006 : 129 – 154.

³⁵¹ Mahomed 2006 : 253 – 262.

³⁵² Aulai Manual Vol 1 2005 : 83 – 86.

³⁵³ Aulai Manual Vol 1 2005 : 40 – 45.

³⁵⁴ Kok 2006 : 129 – 154.

factual investigation

these can be taught effectively in matters such as medical malpractice,³⁵⁵ environmental law,³⁵⁶ family law³⁵⁷ and motor vehicle accidents³⁵⁸

counseling

consultation and analysis of facts and law³⁵⁹ and in matters mentioned under ‘factual investigation’

negotiation

alternative dispute resolution³⁶⁰ & ³⁶¹ in most litigation matters

alternative dispute resolution and trial advocacy

alternative dispute resolution³⁶² & ³⁶³, trial advocacy³⁶⁴ & ³⁶⁵, preparation for trial³⁶⁶

In South Africa, the following additional skills are taught:³⁶⁷ numeracy skills,³⁶⁸ drafting letters³⁶⁹ & ³⁷⁰, drafting pleadings, notices and applications,³⁷¹ & ³⁷² drafting wills,³⁷³ drafting contracts³⁷⁴ & ³⁷⁵.

³⁵⁵ Aulai Manual Vol 1 2005 : 78 – 79.
³⁵⁶ Aulai Manual Vol 1 2005 : 80.
³⁵⁷ Aulai Manual Vol 1 2005 : 87 – 106.
³⁵⁸ Aulai Manual Vol 1 2005 : 73 – 74.
³⁵⁹ Aulai Manual Vol 1 2005 : 40 – 45.
³⁶⁰ Mahomed 2006 : 253 – 262.
³⁶¹ Aulai Manual Vol 1 2005 : 83 – 86.
³⁶² Mahomed 2006 : 253 – 262.
³⁶³ Aulai Manual Vol 1 2005 : 83 – 86.
³⁶⁴ Stilwell 2006 : 233 – 252.
³⁶⁵ Aulai Manual Vol 1 2005 : 68 – 70.
³⁶⁶ Aulai Manual Vol 1 2005 : 64 – 67.
³⁶⁷ De Klerk *et al* 2006 : 29 – 262.
³⁶⁸ Grove 2006 : 83 – 102.
³⁶⁹ Wimpey 2006 : 155 – 172.
³⁷⁰ Aulai Manual Vol 1 2005 : 46 – 50.
³⁷¹ Steenhuisen 2006(a) : 173 – 192.
³⁷² Aulai Manual Vol 1 2005 : 51 – 55.
³⁷³ Bodenstein 2006 : 193 – 218.

From the foregoing it is clear that the skills identified for South African CLE courses, compare favourably with jurisdictions globally.

As previously stated, the core values that were identified in foreign jurisdictions are equally important and embraced in the South African landscape, which are apparent in the practical clinical experiences of the students, in the teaching and practice of ethics, professionalism and case- and file management.

The curriculum requirements identified across a number of jurisdiction and the curricula of the four South African universities reviewed in this study were also compared. The results are:

Curriculum requirements identified across a number of jurisdictions³⁷⁶	WLC	UJLC	UPLC	UFSLC
substantive law	yes	yes	yes	yes
legal analysis and reasoning	yes	yes	yes	yes
legal research	yes	yes	yes	no
problem-solving and oral communication	yes	yes	yes	yes
writing in a legal context	yes	yes	yes	yes

³⁷⁴ Stilwell 2006(a) : 219 – 232.

³⁷⁵ Aulai Manual Vol 1 2005 : 125 – 130.

³⁷⁶ Identified and proposed by: the Law Society of England and Wales, see Stuckey 2007 : 44; the State Bar of Wisconsin's Commission on Legal Education, see Findley 2006 - 2007 : 324; for the USA and Canada, see MacCrate 1992 and Munro 2002 : 233, 234; the Bar Council of India, see Bloch & Prasad 2006 : 209 – 212; for Australia, see Giddings 2008 : 12; for Germany, see Brücker & 2008 : 579.

professional responsibility	yes	yes	yes	yes
social responsibility	yes	yes	yes	yes
practice management	yes	yes	yes	yes
observance of and reporting on trials, both civil and criminal elective	on either, not both	on civil court	no structure	criminal, as an
interviewing techniques	yes	yes	yes	yes
drafting of pleadings	yes	yes	yes	yes
drafting of letters	yes	yes	yes	yes
and other formal documents	yes	yes	yes	yes
professional ethics ³⁷⁷	yes	yes	yes	yes
trial advocacy	yes	yes	no	yes
negotiation techniques	yes	yes	yes	yes
writing programmes ³⁷⁸	no	no	no	no

From the foregoing it is clear that the curriculum requirements identified across a number of jurisdiction and the curricula of the four South African universities reviewed in this study compare favourably with jurisdictions globally. What is apparent, however, is that the South African universities neglect the introduction of writing programmes in the curricula. The importance of these programmes was specifically highlighted by South African authors

³⁷⁷ Professional ethics teaching also forms part of substantive courses earlier on in the LLB programme. At the University of the Free State ethics is presented as a separate course in the LLB curriculum and professional ethics teaching also forms part of the Legal Practice 1 course.

³⁷⁸ Writing programmes form part of general training in some LLB programmes. At the University of the Free State writing programmes are presented as skills courses in the LLB curriculum. At the University of the Witwatersrand students are offered these skills at the Law School's Writing Centre, but are not compulsory.

Swanepoel,³⁷⁹ Vawda,³⁸⁰ McQuoid-Mason,³⁸¹ O'Regan,³⁸² and Watson.³⁸³ I suggest that writing programmes be introduced in the LLB curricula from the first year of study already, thereby allowing the clinical courses to focus on the legal drafting skills component.

In reviewing the outcomes, skills, values and CLE curricula of the law clinics of the universities of the Witwatersrand, Pretoria, Johannesburg and the Free State, it can be concluded that the skills and values that are required by the profession and the expected outcomes, as defined for the South African landscape and as adapted by the individual university law clinics, are achieved according to the mission statements of each individual clinic.

In the final instance, in an attempt to formulate an ideal curriculum for South African university law clinics, I compared the curriculum requirements that were identified across the aforementioned number of jurisdictions to those used by the four South African universities under review.³⁸⁴ Once I identified the common, and ideal, components for the curriculum, these were measured against outcomes and skills determined for these components in the South African landscape.

Identified components	Outcomes³⁸⁵	Skills³⁸⁶
substantive law	substantive law (goal 3)	
legal analysis and reasoning	applied practice skills,	consultation and
analysis	legal research, factual investigation, and client counseling (goal 4)	of facts and law and legal research

³⁷⁹ Swanepoel 2009 : 3 – 36. See para 7.2 of this chapter of the study.

³⁸⁰ Vawda 2008 : 87 – 97.

³⁸¹ McQuoid-Mason 2003 : 202.

³⁸² O'Regan 2002 : 247.

³⁸³ Watson 2003 : 39.

³⁸⁴ All these universities follow the in-house live-client model and students are required to attend weekly clinic duties, the formulation of a curriculum will focus on the classroom components of the clinical legal education courses.

³⁸⁵ The references to 'goals' in this column, refer to the goals/outcomes indentified in Steenhuisen 2006 : 266 – 279.

³⁸⁶ The references to 'skills' in this column, refer to the skills indentified in either the AULAI MANUAL : 2005 and/or in De Klerk *et al* : 2006.

	judgment and analytical abilities, recognition of relevant facts and applicable law, and understanding strategy, tactics and decision making (goal 2)	
legal research	legal research (goal 4)	legal research
interviewing techniques consultation skills	consultation skills, and applied practice skills (goal 4)	
problem-solving and skills	recognition of relevant facts	consultation
oral communication	and applicable law, decision making, and judgment and analytical abilities (goal 2) factual investigation, law client counseling, dispute negotiation, legal research, and applied practice skills (goal 4)	and analysis of facts and law, legal research. analysis of facts and and alternative resolution
writing in a legal context letters,	draft legal documents (goal 4)	drafting pleadings, notices, applications, wills and contracts
drafting of pleadings and	draft legal documents	drafting letters,

other formal documents

pleadings, notices

applied practice skills (goal 4)

and applications

drafting of letters

applied practice skills (goal 4)

drafting letters

professional responsibility

management,

professional responsibility (goal 1)

practice

financial management,
office administration,
and file and case
management

practice management

management,

office management (goal 4)

practice

financial management
and office
administration

observance of and reporting

of facts and law

understanding strategy, tactics

analysis

on trials, either civil or criminal

and decision making (goal 2)

trial advocacy (goal 4)

professional ethics

ethical

legal ethics (goal 1)

professional and

conduct and

professional

responsibility

negotiation techniques

dispute

negotiation (goal 4)

alternative

		resolution
trial advocacy advocacy and	trial advocacy (goal 4)	trial
	appellate advocacy (goal 4)	preparation for trial
	learning and working in groups (goal 6)	
social responsibility	social awareness (goal 1)	social justice
	legal services to the community (goal 5)	

Additional components identified within the South African landscape:

the capacity to reflect on learning and performance.	reflection (goal 2)	
to work effectively in a group of students,	learning and working in groups (goal 6)	pairing
		working in firms and trial advocacy
case management	applied practice skills (goal 4)	file and case management, professional responsibility
numeracy skills numeracy skills	applied practice skills (goal 4)	
writing programmes	draft legal documents (goal 4)	drafting letters,

applied practice skills (goal 4)
notices, reflection (goal 2)
applications, wills and

pleadings,

contracts, legal
research,

reflection

I submit that writing programmes should be introduced in the LLB curriculum from the first year, as well as in clinical legal education, but where the focus should be on drafting skills.

The foregoing identifies the required components for a curriculum in CLE. Clinicians may structure the classroom component of the course according to their needs, but I suggest that the above components all form part of the teaching.

The forms of assessment and the assessment of the various components of the suggested curriculum will be reviewed in the subsequent chapters of this study.

CHAPTER THREE

FORMS OF ASSESSMENT, THE SETTING OF PARAMETERS FOR ASSESSMENT AND MARK ALLOCATION

1. Introduction

Assessment has been described as “the systematic collection, review, and use of information about educational programs undertaken for the purpose of improving student learning and development”.³⁸⁷ The different forms of assessment that can be applied successfully in CLE, will be discussed.

In this study clinical assessment models of foreign jurisdictions will be probed and compared. The clinical assessment models and methods of the comparative foreign jurisdictions are by no means superior to those used in South Africa. This is not to say however that there is no point of comparison that could be used to improve our assessment methodology. It is with this narrow point of assessment that it becomes helpful to draw on foreign jurisdictions. I will discuss a wide variety of assessment methods. No specific form of assessment should be regarded as superior to another. The aim of this enquiry into assessment methods is to find assessment methods best suited for CLE courses. In the South African clinical environment the assessment methods that will be suggested need to be, in the final instance, be carefully selected by the respective clinical directors and course co-ordinators of the CLE courses. CLE should also not be seen as a superior pedagogy vis-à-vis routine lecture-based teaching. However, the unique character of the CLE pedagogy, namely having its foundation in practice, must be acknowledged.³⁸⁸ The didactic style is useful in the classroom setting, but “is often employed to demonstrate the law without giving students a basic framework for understanding it”.³⁸⁹ It is good for teaching legal analysis, but neglects to inform on “other basic skills necessary to running a law office”.³⁹⁰ When the lecture is the dominant mode of instruction in CLE, “new lawyers are not fully prepared to undertake the responsibilities of practicing law.”³⁹¹ The Carnegie Foundation, in 2007, recommended a more integrated approach to teaching law which “should emphasize

³⁸⁷ AMERICAN BAR ASSOCIATION OUTCOMES 2008; Fisher 2011 : 2, 15 .

³⁸⁸ Lecture-based teaching is useful in the classroom setting.

³⁸⁹ Chaffe 2007.

³⁹⁰ Ortiz 2011 : 2.

³⁹¹ Ibid 2, 3.

knowledge, skills, and values necessary to successful practice as a lawyer, thereby bridging the gap between understanding and enactment”.³⁹² These lawyering skills are predominantly taught in law clinics. Wizner stated that “[t]he law school clinic is a place where students should learn not only the techniques of advocacy, but also the importance of helping individuals solve their problems, defend their rights, and achieve their goals”.³⁹³ This statement accentuates the unique character of the CLE pedagogy, having its foundation in practice. This CLE pedagogy is firmly embraced by university law clinics in South Africa.³⁹⁴ Having established that South African university law clinics apply the correct pedagogy, the assessment regimes applied in order to test the effectiveness of the pedagogy need to be reviewed.

The University of the Witwatersrand Senate Policy on the Assessment of Student Learning prescribes that the assessment of students should be designed to achieve the following purposes:³⁹⁵

- “To be an educational tool to teach appropriate skills and knowledge
- To encourage continuous learning and detect learning problems
- To determine whether students are meeting, or have met the educational aims and outcomes of a course (including qualification exit-level outcomes where appropriate) and to give students continuous feedback on their progress
- To determine levels of competence and to inform students on their current competence
- To facilitate decisions relating to student progress
- To provide a measure of student ability for future employers
- To inform teachers about the quality of their instruction
- To allow evaluation of a course”

Stuckey indicates that “in many in-house clinics ... grades are based mostly on the subjective opinion of one teacher who supervises the student’s work. Grades in these courses tend to reflect an appraisal of students’ overall performance as lawyers, not necessarily what they

³⁹² Ibid 3.

³⁹³ Wizner 2001 : 327, 328.

³⁹⁴ I confirm my belief (as indicated earlier in Chapter Two) that South African university law clinics are under-recognised globally for their leading methodologies. This is particularly significant in view of a statement by Ortiz that “[c]urrently, few law schools (in the USA) have programs ... to develop the full range of skills needed for law practice to the degree of proficiency expected of practicing lawyers”. See Ortiz 2011 : 4.

³⁹⁵ <http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssessmentOfStudentLearning.doc> at 2.

learned or how their abilities developed during the course”.³⁹⁶ The primary reason to administer assessments should therefore be to find out whether our students are learning what we want them to learn. In designing and using assessment measures one needs to include formative or summative, or preferably both forms of assessment. Determining objective assessment methods within a clinical setting continues to prove challenging, mostly because students learn by doing through active participation. Assessment methods that are able to grade the skills learnt are to be applied. Therefore different methods should be applied in assessing the various components of the course.³⁹⁷

2. Formative and summative assessments

The University of the Witwatersrand Senate Policy on the Assessment of Student Learning describes formative assessment as “any assessment that provides developmental feedback to the students that enhances learning. All assessments that measure progress in a continuous assessment system should have a strong formative element.” It describes summative assessment as “assessment that regulates the progression of students by awarding marks during and at the conclusion of a topic or of a unit of work or of a course. Summative assessments that contribute to a course mark during the course must have a formative feedback element to them. In other words, the marking and comments made by the assessors should be fed back to the students, together with an explanation of the marking in relation to the criteria used.”³⁹⁸

According to Stuckey, formative assessments are used to provide feedback to students and faculty, are purely educational and are not used to assign grades. Summative assessments are used for assigning grades or otherwise indicating students’ levels of achievement.³⁹⁹ Assessments can be norm-referenced or criteria-referenced. Norm-referenced assessments are based on how students perform in relation to other students in a course rather than how well they achieve the educational objectives of the course. These are usually used to ensure that certain grade curves can be achieved – the so-called bell curve. This approach allows law schools to sort students for legal employers.⁴⁰⁰ Criteria-referenced assessments rely on detailed, explicit criteria that identify the abilities students should be demonstrating and the bases on which the instructor will

³⁹⁶ Stuckey 2007 : 238.

³⁹⁷ Haupt & Mahomed 2008 : 276.

³⁹⁸ <http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssessmentOfStudentLearning.doc> at 4.

³⁹⁹ Stuckey 2006 : 12.

⁴⁰⁰ Ibid.

distinguish among excellent, good, competent, or incompetent performances. The use of criteria minimises the risk of unreliability in assigning grades.⁴⁰¹

Stuckey opines that there are at least three types of assessments in CLE: “evaluating overall competency, helping students understand what they learn from individual, unique experiences, and determining whether students are learning what we are trying to teach.”⁴⁰² He illustrates by way of three different questions:

1) “How competent is the student?” This focuses on how well a student performs as a lawyer. CLE allows students to test on a personal level a number of abilities that are essential for lawyers.

2) “What did the student learn?” In CLE students might learn what clinicians intend for them to learn, but they also often learn lessons that are unexpected, unplanned and unique to the particular student. These lessons may be valuable and clinicians can assist in maximising the educational value of these experiences. Students’ self-reflection skills and ability to learn from practice can be assessed if these are goals of the course.

3) “Did the student learn what the clinician intended?” To answer this question, one must assume that the CLE course has clear educational objectives of which both clinicians and students are aware and that assessment tools are employed to test whether those goals were met.⁴⁰³

In answering these questions, Stuckey concluded that some elements are clear, namely: “assessments are important to students and institutions; assessments should be as reliable, valid and as fair as possible; we need to be very precise about our educational objectives; we need to articulate our assessment criteria and communicate them to our students; and we should not profess that students will learn something in our courses if we cannot assess whether such learning occurs.”⁴⁰⁴

Formative assessments should be conducted throughout the semester to enable students to understand and monitor their own learning and to develop, for example: classroom assessment techniques, such as general or pertinent class questions. Several summative assessments should be administered during the semester. This will increase the accuracy of the final grade.

⁴⁰¹ Ibid 13.

⁴⁰² Ibid 10.

⁴⁰³ Ibid 10, 11.

⁴⁰⁴ Ibid 28.

Summative assessments must be both valid (when what was taught is evaluated) and reliable (if it accurately measures who has learned and who has not learned). Students should be evaluated on how well they achieved the outcomes (criteria-referenced assessments) rather than on their own performance relative to other students (norm-referenced assessments). Summative assessment results should be returned to students with comments to enable students to understand how to improve their performances. In this way a summative assessment also serves a formative purpose. The use of rubrics can assist in informing students. The current American Bar Association (ABA) Standards for Approval of Law Schools revisions require law schools to provide “a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students”.⁴⁰⁵

The seven principles of effective formative assessment were described by Duhart and Niedwiecki as:⁴⁰⁶ it helps to clarify what constitutes good performance, it delivers high quality information to students about their learning, it helps to close the gap between current and desired performance, it encourages a dialogue between student and teacher, it facilitates the development of self-assessment, it provides information to the teacher to help shape teaching, and it encourages positive motivational beliefs.⁴⁰⁷

3. Setting the parameters for assessments and mark allocations

The focus of this discussion will be on the WLC with comments on specific challenges experienced by the other three university law clinics under review. Towards the end of each academic year, the clinicians at the WLC meet to review the curriculum and assessment procedures used during that specific year. This meeting also serves as a planning session for the curriculum and assessments to be implemented during the following academic year. During this meeting, cognisance is also taken of written feedback, by way of a set form completed by students at the end of the academic year, where they evaluate the course. As a result, there may be differences in the structure of the curriculum and, specifically assessments, from year to year. The evaluation form is illustrated below.

⁴⁰⁵ Fisher 2011 : 1, 9 – 12; Stuckey 2007 : 239, 241, 243 - 245, 255 – 261.

⁴⁰⁶ Duhart and Niedwiecki 2011 : 2; Nicol & Macfarlane-Dick 2006 : 199.

⁴⁰⁷ In general see Button, Chamberlain, De Groot & Hadingham 2006.

“EVALUATION OF THE PRACTICAL LEGAL STUDIES COURSE

A YOUR UNIT

1. Which unit have you participated in? Please circle your answer.

LABOUR

FAMILY

DELICT

CONSUMER/GENERAL

REFUGEE

HOUSING/LAND

2. Who was your supervisor?

B PLS TEACHING AND CURRICULUM

3. Please comment on the skills training and teaching you received in the following areas.
We welcome your honest comments and suggestions:

a. Interviewing skills

.....

.....

b. Basic drafting/Letter writing

.....

.....

c. Unit-based teaching on law and procedure applicable to the various units

.....

.....

d. Unit-based drafting lectures

.....

.....

e. Numeracy skills

.....

.....

f. Legal research

.....

.....

g. Courtroom skills

.....

.....

h. Legal practice and ethics

.....

.....

4. Did you find the mock trial exercises a useful exercise? Please comment and/or make suggestions

.....

.....

.....

5. Did you find the court report assignment a valuable exercise?

.....

.....

.....

6. Please comment on the guest lectures presented by external persons.

.....

.....

.....

7. Please comment on the assessment methods used in the PLS course

.....

.....

.....

8. Would you like seminars or additional seminars on any area of practice?

.....

.....

.....

C CLINIC AND FILE WORK

9. Please rate your overall experience working in the clinic.

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.....

10. Please comment on your case load (number of cases, variety, complexity, etc)

.....

.....

.....

11. Please comment on the level of the support that you received from clinic staff in the course of your work in the Clinic.

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12. Please comment on the resources available to you at the law clinic and how they may be improved.

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.....

13. What was the single most valuable part of your experience in the Clinic?

.....

.....

.....

D YOUR SUPERVISOR

14. Did you have adequate access to your supervisor?

15. Did you find the tutorial sessions with your supervisor useful? Please comment.

.....

.....

.....

16. How would you evaluate your supervisor's general competence as a teacher/mentor in legal practice?

-
-
-
17. Any other comments or suggestions for improvement would be welcomed.
-
-
-”

In terms of the University of the Witwatersrand Senate Policy and Standing Orders on the Assessment of Students’ Academic Performance, no single assessment may carry a weight of more than fifty percent of the final mark. The principle is that more than two assessments must be used for each course.⁴⁰⁸

During 2007 the assessment was structured as: file assessment, 50%; written test, 20%; written assignment/case report, 10% and oral examination, 20%. The 2008 assessment structure changed to: file assessment, 50%; written test (end of first block on law and procedure), 10%; written test (end of third block on drafting skills), 20%; written assignment/case report, 10% and oral examination, 10%. For the 2009, 2010 and 2011 academic years, a method of assessment was adopted whereby the mark allocation for the year comprised of the following: file work - 50%; written test at the end of the first term (covering the substantial and procedural law pertaining to the specialised unit) -10%; a written assignment on the attendance and review of a court case - 10%; a written test on the drafting of court pleadings - 10%; an oral examination - 15% and trial advocacy skills – 5%.⁴⁰⁹ The assessment structure remained the same for 2012, save for the introduction of spot tests, which counted 10% towards the year mark. File work assessments were reduced to 40%.

At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on assessment of the course ‘practical legal

⁴⁰⁸ <http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssessmentOfStudentLearning.doc>

⁴⁰⁹ Haupt & Mahomed 2008 : 279; Wits Law Clinic Manuals 2007 – 2013; Mahomed 2008 : 59 – 60.

studies'. Students' perceptions of the assessment structure are relevant, as appropriate credit must be granted. Stuckey refers to the principle, reading: "The school grants appropriate credit to students enrolled in experiential education courses."⁴¹⁰ "Experiential education courses should be structured so that students spend approximately the same amount of time per credit hour as they spend in non-experiential courses."⁴¹¹ Stuckey explains it to mean that "[c]redit should be given for all the time that the course requires of students."⁴¹² Giddings holds that "[t]he availability of academic credit ... tends to generate greater student interest in clinics."⁴¹³

For 2009, 27 students, for 2010, 17 students and for 2011, 16 students completed the questionnaire.⁴¹⁴

The question posed, was: "Having completed the various sections of the course for which marks are allocated, do you feel that the allocation of marks for the different components is fair? If not, please explain". For 2009, 15 students found the allocation of marks for the different components to be fair, and 12 students indicated that the allocation was not fair. Reasons provided were: "we study for tests and they count for so little (three students); going to court for the case report is time consuming, for little marks (four students); we put a lot of time, effort and organisation into preparation and execution for trial advocacy, for very small group marks (14 students); the file work assessment should count less, as it does not reflect what we know (three students)". For 2010, eight students found the allocation of marks for the different components to be fair, and nine students indicated that the allocation was not fair. Reasons provided were: "we study for tests and they count for so little (four students); going to court for the case report is time consuming, for little marks (two students); we put a lot of time, effort and organisation into preparation and execution for trial advocacy, for very small group marks (six students); the unit based test is irrelevant (one student); the court report is irrelevant (two students); file work should count more than 50% (two students); the oral should count 10% (one student); the drafting test is too late in the year (two students)". For 2011, nine students found the allocation of marks for the different components to be fair, and seven students indicated that the allocation was not fair. Reasons provided were: "we study for tests and they count for so little (two students); going to court for the case report is time consuming, for little marks and we missed some other

⁴¹⁰ Stuckey *et al* 2007 : 174.

⁴¹¹ Future of the In-House Clinic 1992 : 508, 561.

⁴¹² Stuckey *et al* 2007 : 174.

⁴¹³ Giddings 2013 : 148.

⁴¹⁴ WITS LAW CLINIC : 2009, 2010 & 2011.

lectures (three students); we put a lot of time, effort and organisation into preparation and execution for trial advocacy, for very small group marks (10 students); the unit based test is irrelevant (one student); the file work assessment should count less, as it does not reflect what we know (one student)".

The students were also asked: "Please comment on the criteria for the assessment of the course work, e.g.: are the criteria relevant, are there any outstanding criteria?" For 2009, 20 students replied "yes" and seven students left the question unanswered. Criticisms were: "how do you assess verbal communication skills and sense of responsibility? (three students)." Students viewed the following as outstanding criteria: "there should be sub-categories for the ability to deal with difficult clients (two students) and for trial advocacy (two students)." For 2010, 15 students replied "yes" and two students left the question unanswered. Criticism was: "attendance should be more strictly assessed (one student)." Students viewed the following as outstanding criteria: "there should be sub-categories for the ability to deal with difficult clients (three students) and for trial advocacy (two students)." For 2011, 12 students replied "yes", three students replied "no" and one student left the question unanswered. Criticisms were: "how do you assess verbal communication skills and sense of responsibility? (one student); file assessment seems obscure (one student); there is no evidence that people went to court – they get information from family or friends (one student); explain drafting (one student)." Students viewed the following as outstanding criteria: "there should be a category for client consultations (one student)."

What is the conclusion to be drawn from these results on the above predicate marks? For the period under review, the satisfaction rate with the composition of the predicate mark was 52% and the dissatisfaction rate, 48%. Considering that the various components of the predicate mark that form part of the summative assessment efforts at the WLC, the results can hardly be described as an overall student endorsement of this part of the assessment practice. I wish to highlight two possible interpretations of the survey results described before. The reasons provided for the dissatisfaction, firstly reveals that students are generally unaccustomed to summative assessment of substantial weighting other than the formal test. This, in my view, may attest to the possibility that other than CLE modules, few other modules, if any, in the South African undergraduate LLB program, make use of any other summative assessment methods other than the formal test. In

terms of “cramming” information for “regurgitation” during tests, one cannot but wonder at the overall sensibility of placing too much weight, in terms of predicate composition, on formal tests.

Secondly, the weighting objection to this particular CLE programme’s court report assignment and the trial advocacy mark obtained at mock court assignments, apart from further validating my first interpretation of the survey results, makes one ponder the desirability of cramming too much course content into CLE programmes instead of concentrating on less content but ensuring greater quality of the learning experience. My experience in the South African context of the LLB curriculum is that too much expectation is placed institutionally and from students’ perspectives on CLE programmes. Given the large student numbers,⁴¹⁵ and the unpreparedness for legal studies of learners without any academic background other than a Grade 12 High School certificate in South Africa, these are serious reasons why a CLE programme cannot hope to achieve its objectives within one academic semester, or even an academic year. Clearly CLE programmes need to be “staggered” and be implemented over a number of years to achieve optimum results.⁴¹⁶ Students furthermore often struggle to de-compartmentalise the different subjects of the substantive law as taught to them in their first three years of study.⁴¹⁷

A clinician staff restructuring occurred at WLC at the beginning of 2013, allowing a new course co-ordinator to re-allocate the assessment structure. For the 2013 academic year, a method of assessment was adopted whereby the mark allocation for the year comprised of the following: law and procedure test (relevant to the various specialised units) – 10%; drafting test (relevant to the various specialised units) – 15%; court report – 15%; oral examination – 15%; and course work – 45%. Course work comprises performance and development throughout the year. This will include a mark for trial advocacy.⁴¹⁸ The competencies rubric for assessing the course work is set out below.⁴¹⁹

⁴¹⁵ On large student numbers, see Du Plessis 2008 : 11.

⁴¹⁶ See Swanepoel, Karels and Bezuidenhout 2008 : 99.

⁴¹⁷ Du Plessis 2007 : 59.

⁴¹⁸ The results of the re-allocation of the assessment structure should become evident over the following number of years.

⁴¹⁹ WITS LAW CLINIC 2013: LAWS 4003.

PRACTICAL LEGAL STUDIES, LAWS 4003, ASSESSMENT CRITERIA, 2013

NO	SKILL	MARK	COMMENTS
1	Interviewing/fact investigation and counseling		
2	Critical thinking and analysis		
3	Writing skills (Persuasive/Analytical/Format Grammar, Legal drafting)		
4	Research (Including computer skills and ability to learn unfamiliar areas of law)		
5	Knowledge of Procedural and Substantive Law		
6	File Management		
7	Oral Communication Clinic/Tutorials/Presentations		
8	Journaling (Reflection)		
9	Professional Responsibility (Ethical practice/Social Awareness/ Team Work/Professional Relationships/ Attendance		
10	Initiative/Sense of responsibility/Problem Solving		

I submit that it is unfortunate that no weighting was indicated for the above 10 different skills to be assessed. In the course- and assessment outline it was indicated that the trial advocacy exercises will be incorporated into the course work marks. The percentage of the contribution was however not indicated. Journaling/reflection is a new introduction to the 2013 curriculum,

for which only one lecture session was provided, without instructions or how it will be conducted. I would presume that the weighting for this skill would be less?

At the UPLC the summative student assessment comprises, first semester: written tests - 25%; practical assignment – 10%; attendance and participation – 10%. Practical work done in the clinic is made up as: file assessment and fees written – 30%; peer assessment – 5%; client assessment – 5%; and drafting documents – 15%. The second semester follows a similar pattern, save that peer and client assessment and the practical assignment are substituted with comprehensive research and a written assignment counting twenty percent. The first and second semester marks make up the year mark counting fifty percent. A final oral examination provides a further fifty percent.⁴²⁰

At the UFSLC students who have been exempted from practical legal training or community service write two tests during the semester. Students who do practical legal training or community service write only the second test. These students are continually evaluated on their practical work and their semester mark is composed of the average for the one test and the mark for the practical work or community service. A final examination is conducted at the end of the semester.⁴²¹ The two semester tests described above are replaced by two assignments for off-campus students. The first assignment comprises an essay (minimum 500 and maximum 1 000 words) in which students must describe the main requirements for good and effective practice management of a law office. Marks are awarded for good writing, including source referencing in terms of the *Journal for Juridical Science* (the accredited law journal of the University of the Free State) style. The second assignment comprises the drafting of a bill of costs for taxation in the Magistrate's Court. Students are provided with the necessary information to enable them to complete the assignment.⁴²²

At the UJLC students attend one semester of clinic duty. Clinic and file work make up 50% of the students' year mark. Assessments of these components are continuous, as clinicians assess all work done after every clinic duty attendance. At the end of the semester, these continuous assessment marks are calculated towards a final mark for these components. Students must attend lectures during the entire academic year. Formal tests are written during each

⁴²⁰ Haupt & Mahomed 2008 : 279, 280.

⁴²¹ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: UFSLC RPK412 course outline.

⁴²² Ibid.

semester, i.e.: two tests. Formal examinations are written at the end of each semester. These four assessments count a further 50% towards the final year mark.⁴²³

Bloch and Noone identified three different models of practice used in CLE programmes, namely: a) a relatively open-ended individual service model (as used by WLC);⁴²⁴ b) a specialisation model addressing a particular area of law with a specifically targeted group of clients (integrated by all the university law clinics under review);⁴²⁵ and c) a community model concerned with a local community and utilising a range of approaches (as employed by UFSLC).⁴²⁶ Assessment methods applied are therefore necessarily adapted to advance the range of objectives set for each individual CLE programme. Giddings is in support of this view, stating that “[t]he flexibility of clinical (assessment) methodologies means they can be adapted to support student learning of different kinds”.⁴²⁷ Giddings furthermore refers to an interview with Hyams,⁴²⁸ as part of his review of the Monash clinical programme, where Hyams “notes the problematic nature of assessment if it is ‘handed down like a decision without any constructive comment’ ... as assessment is ‘a vehicle of learning rather than just a handing down. The assessment assists students to do better’”.⁴²⁹

There are different approaches in the assessment methods employed by the four university law clinics under review. WLC uses a wider range of assessment forms and tend to experiment more with different types of assessment, such as the introduction of spot tests, reflective journals and using rubrics. UPLC also use a wide range of assessment forms and is the only clinic allowing for peer- and client assessments and student attendance and participation as separate assessment components. UFSLC employs a more conservative approach, but I submit that this approach is associated with their chosen community service model. The most conservative approach is that of UJLC and I suggest it considers employing alternative forms of assessment as will be indicated in paragraph 4 below.

⁴²³ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

⁴²⁴ Bloch & Noone 2010 : 158 – 162.

⁴²⁵ Ibid.

⁴²⁶ Ibid.

⁴²⁷ Giddings 2013 : 39.

⁴²⁸ Giddings 2003 : 175. Interview conducted at Clayton, 20 November 1996.

⁴²⁹ Giddings 2003 : 175.

Regardless of the forms of assessment, or combinations thereof, chosen by clinics for their CLE courses, cognisance should be taken of the principles of assessment stated by Stuckey.⁴³⁰

These principles are:

- 1) Be clear about the goals of each assessment;⁴³¹
- 2) Assess whether students learn what is taught (validity);⁴³²
- 3) Conduct criteria-referenced assessments, not norm-referenced (reliability);⁴³³
- 4) Use assessments to inform students of their level of professional development;⁴³⁴
- 5) Be sure assessment is feasible;⁴³⁵
- 6) Use multiple methods of assessing student learning;⁴³⁶
- 7) Distinguish between formative and summative assessments;⁴³⁷
- 8) Conduct formative assessments throughout the term;⁴³⁸
- 9) Conduct multiple summative assessments throughout the term, when possible;⁴³⁹
- 10) Ensure that summative assessments are also formative assessments;⁴⁴⁰ and
- 11) Require students to complete educational portfolios.⁴⁴¹

4. Forms of assessment

In evaluating the different forms of assessment, I strongly believe not one form but every form of assessment must be informed by: 1) full possibility of application; and 2) each form of assessment must be selected, through consultation, by those working closely with students, such as the clinical directors, course co-ordinators and clinicians to determine the methods most optimum for the students, the law clinic and law school in general.

Clinical assessment models already used by South African university law clinics as well as those used in foreign jurisdictions will be probed and compared. The clinical assessment models

⁴³⁰ Stuckey *et al* 2007 : 240 – 263.
⁴³¹ Stuckey *et al* 2007 : 240, 241.
⁴³² Stuckey *et al* 2007 : 241 – 243.
⁴³³ Stuckey *et al* 2007 : 243 – 245.
⁴³⁴ Stuckey *et al* 2007 : 245 – 253.
⁴³⁵ Stuckey *et al* 2007 : 253.
⁴³⁶ Stuckey *et al* 2007 : 253 – 255.
⁴³⁷ Stuckey *et al* 2007 : 255.
⁴³⁸ Stuckey *et al* 2007 : 255 – 259.
⁴³⁹ Stuckey *et al* 2007 : 259, 260.
⁴⁴⁰ Stuckey *et al* 2007 : 260, 261.
⁴⁴¹ Stuckey *et al* 2007 : 261 – 263.

and methods of the comparative foreign jurisdictions could be used to improve South African assessment methodologies, as with this narrow point of assessment it becomes helpful to draw on foreign jurisdictions. I will distinguish which of the assessment methods applied in foreign jurisdictions are capable of application in the South African context. I will discuss a wide variety of assessment methods and no specific form of assessment should be regarded as superior to another. The aim of this enquiry into assessment methods is to find assessment methods best suited for CLE courses, particularly for South Africa.

4.1 Written tests

Written tests should be mainly used for summative assessment. In CLE these tests can be applied to evaluate students' knowledge of substantive and procedural laws associated with the work they do in the clinic. Written tests can be effectively applied in testing students' abilities to draft court pleadings, different types of correspondences and opinions. Spot tests or short class tests (which can be effective in the form of multiple choice questions)⁴⁴² can be applied as formative assessment tools to inform the clinician of progress and highlight possible shortcomings. This may also serve as a 'wake-up' call to students. Haupt and Mahomed identified the advantages to be:⁴⁴³ objective, as students are assessed against stated outcomes; encouragement of students to study; and marking is straightforward, as the answers are determined. Challenges include: marking is resource intensive; uneven assessments across the various specialised units; subjectivity in marking by different clinicians; and an overemphasis of memorisation of facts.

At the WLC students are assessed in two written tests, one of which is usually conducted at the end of the first teaching block, comprising the content of unit specific lectures, mainly on substantive and procedural law applicable to the specific specialised unit. The second written test, towards the end of the year, comprises of court pleadings typical to the specialised unit within which students were trained and are assessed by the clinicians heading the specific specialised units. All students, regardless of the specialised unit they were allocated to are required to answer a common set of questions on legal ethics.⁴⁴⁴

⁴⁴² See paragraphs 4.3 and 4.4 of this chapter for a discussion of these forms of assessment.

⁴⁴³ Haupt & Mahomed 2008 : 287.

⁴⁴⁴ Du Plessis 2009 : 105.

At the UPLC students write two written tests per year, aiming to test students' knowledge acquired during plenary lectures and their drafting skills.

At the UFSLC students who have been exempted from practical legal training or community service write two tests during the semester. Students who do practical legal training or community service write only the second test. These students are continually evaluated on their practical work and their semester mark is composed of the average for the one test and the mark for the practical work or community service. A final examination is conducted at the end of the semester.⁴⁴⁵

At the UJLC students write two semester tests and written examinations at the end of each semester, testing their theoretical skills and knowledge acquired during plenary lectures.⁴⁴⁶

Written tests are capable of application to the specific South African context. I suggest that assessment rubrics be designed and used for this type of assessment. The use of assessment rubrics will allow for an even-handed assessment of all the students, whether they are allocated to the same unit or across a number of different specialised units. Rubrics can be used when assessing the drafting of court pleadings, different forms of correspondence and opinions.⁴⁴⁷

4.2 Spot tests, Minute papers and Short essay quizzes

The WLC introduced spot tests during 2012. As CLE is mainly a practical course, the spot tests were conducted on their practical work. Two spot tests were conducted during the year, each contributing five percent towards the final year mark. Clinicians could conduct the spot tests on two of a possible six practical performances. A spot test assessment form and a spot test marking guide is illustrated below.

⁴⁴⁵ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: UFSLC RPK412 course outline.

⁴⁴⁶ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

⁴⁴⁷ For a discussion of assessment rubrics and the process of developing rubrics, see paragraph five of this chapter.

“PLS SPOT TEST ASSESSMENT FORM

DATE:

NAME OF SUPERVISOR:

UNIT:

NAME AND SURNAME OF BOTH STUDENTS:

1)

2)

DESCRIPTION OF DOCUMENT / ACTION ASSESSED.

[Please attach copies of the document(s) relevant to assessment, if possible]

.....

COMMENTS BY SUPERVISOR ON DOCUMENT / ACTION ASSESSED:

.....

MARK: /5 *[refer to assessment guide]*

SUPERVISOR SIGNATURE:

.....

“PLS SPOT TEST ASSESSMENT MARKING GUIDE

1. File opening

- a) Have the students completed the means test correctly? (1)
- b) Have the students obtained the full contact particulars of the client? (1)
- c) Is the indemnity-form completed properly? (1)
- d) Did the students make copies of all the client's necessary documents? (1)
- e) Have the students noted the correct particulars on the running sheet? (1)

TOTAL 5

2. Statement

- a) Form: heading, numbered paragraphs, first person, complete sentences. (2)
- b) Spelling and grammar. (1)
- c) Content: chronological? All relevant detail? Canvass the facts relevant to the cause of action? Do the client's instructions appear from the statement? (2)

TOTAL 5

3. Letters

- a) Form of letter: mode of delivery, correct address, references, subject line, ending. (2)
- b) Spelling and grammar. (1)
- c) Content: logical, accurate, concise, relevant, etc. (2)

TOTAL 5

4. Court document

- a) Form: court heading, document identification (tramlines), dated, ending. (2)
- b) Spelling and grammar. (1)
- c) Content: clear and concise, correct terminology, complies with rules (i.e.: not irregular), discloses cause of action (i.e.: not excipiable), etc. (2)

TOTAL 5

5. Research

- a) Grasping the problem: do the students quickly grasp the exact legal question to be answered, or do they need much prompting? (1)
- b) Research results: did the students consult the correct resources? Is their opinion legally sound? (2)
- c) Presentation of opinion: if in writing, refer to relevant considerations re form, spelling and content above. If verbal, consider oral skills in presentation, e.g. language, terminology, conciseness, relevance. (2)
- d) Turnaround time (if under time constraints, factor in assessment).

TOTAL 5

6. Field trip

- a) Planning: addresses, map books, client accompany? (1)

- b) Execution: gathering relevant information. (2)
- c) Recordal: record info gathered through notes, dictation, photos, etc. (2)
- d) Initiative: finds new/alternative information useful to case (assess if applicable).

TOTAL 5”⁴⁴⁸

The spot tests were discontinued in 2013. Despite the discontinuation thereof by WLC in 2013, I submit that spot tests are capable of application to the specific South African context.

Minute papers are useful assessment tools that focuses on small scale assessments conducted continuously to determine what students are learning. The “one minute paper” or “half sheet response” asks students to, in a few minutes, or on a half sheet of paper, important questions about the cases they are dealing with. These are useful at the start of, or during tutorials. Clinicians can ask students to note answers to questions such as: “what is the most important thing you learned whilst conducting the follow-up interview in this case?” and “what important questions remain unanswered?” This allows the clinician to assess whether students are meeting the learning objectives and what the students understand or do not understand.⁴⁴⁹ The minute papers are ideal formative assessments during tutorials. The spot tests can be used as summative assessment tools, but I submit that they should count towards a relative small percentage of the total year mark. Minute papers are capable of application to the specific South African context, but should not be used during plenary lectures,⁴⁵⁰ and preferably not during focused unit based lectures.⁴⁵¹ I recommend that this form of assessment be limited to tutorials.

⁴⁴⁸ WITS LAW CLINIC Manual 2012.

⁴⁴⁹ Munro 2002 : 241 – 243.

⁴⁵⁰ The use during plenary lectures is discouraged due to large student numbers and the overloading of clinicians with marking. See discussions of the challenges of large student numbers and clinicians’ time constraints in paragraphs 5 and 7 of Chapter Four respectively.

⁴⁵¹ The discouragement is mainly due to limited lecture time and clinicians’ time constraints – see previous foot note.

Short essay quizzes can be used in either a group/firm tutorial or in the classroom component of the CLE course. The short essay quiz is based on a half-page fact pattern to be answered in 20 – 30 minutes. Students grade one another's just-completed quizzes, using a scoring rubric prepared by the clinician. These can be graded as either formative or summative assessments. In the group, the clinician discusses the issues and students are encouraged to ask questions about the sufficiency of the answer they are grading on any particular issue. Students see one another's exam-type answers, and see the 'judgment calls' inherent in grading – two things students are rarely exposed to.⁴⁵² This form of assessment is technically capable of application to the specific South African context, but the general use thereof is discouraged due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.⁴⁵³

4.3 Multiple-Choice quizzes

Multiple-choice quizzes are an effective first step in preparing students to engage in solving complex legal problems. These quizzes assist in student learning and also assess students' understanding of foundational doctrine.⁴⁵⁴ Understanding foundational doctrine, or substantive law, is essential for developing the ability to practice law competently. When students enroll in the CLE course in their final year, clinicians accept that students have certain knowledge of the substantive law, as well as the procedural laws, that will be applied in the clinics they are assigned to. Clinicians can test this knowledge by, at the start of the clinical course, test students' knowledge by way of a multiple-choice quiz. This can take the form of either individual student, or group quizzes. After this process, the clinician provides a mini-lecture, focusing on those multiple-choice questions and topics that were most challenging. These multiple-choice quizzes can be repeated at regular intervals during the course. The benefits of effectively designed multiple-choice quizzes are that they help students learn fundamental concepts by providing multiple opportunities for practice, assessment and feedback, as well as providing clinicians with assessments of students' learning. Sparrow applies firstly the multiple-choice quiz to students individually whereafter students immediately retake the same quiz in small groups, earning grades for both quiz scores. She includes several such quizzes within the course and lists numerous other

⁴⁵² Klein 2011; Krause-Phelan 2011.

⁴⁵³ Ibid.

⁴⁵⁴ Sparrow 2011 : 4 – 9.

benefits, such as helping students develop as professionals and leaders, building a positive [clinical] classroom community, reducing students' isolation and stress, and allowing teachers/clinicians to teach more material.⁴⁵⁵ She makes these quizzes significant by attaching a grade to them.⁴⁵⁶

Chavkin, in assessing students' cognitive development and performance, measures the breadth of substantive issues discussed, by way of 10 multiple-choice examinations, administered each week. Since he believes that assessment should play a teaching role and not merely a sorting role, he not only provides students with immediate feedback regarding the right answer, but also allow students to take each quiz as many times as they wishe in order to obtain a perfect score. He thereby rewards students for wanting to 'get it right' and at the same time, hoping that students would internalise the 'right' answer.⁴⁵⁷

A limitation on multiple-choice quizzes is students guessing the correct answer. Three ways to reduce correct guessing are: to improve the drafting of the questions to eliminate inadvertent clues, to increase the number of distracters, and to increase the test length.⁴⁵⁸

I submit that multiple-choice quizzes are ideal formative assessments and can also be used as summative assessment tools, but I submit that they should count towards a relative small percentage of the total year mark, in view of the abovementioned limitation, i.e.: where students guess the correct answer.

This form of assessment is capable of application to the specific South African context, but may not be optimum for use during classroom instruction due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.⁴⁵⁹ It may however find suitable application during select tutorials.

4.4 In-Class Short-Answer tests

Another way of testing CLE students' grasp of substantive law studies during the previous years is to administer an in-class short-answer test. This can take to form of a number of

⁴⁵⁵ Sparrow 2011 : 2, 3.

⁴⁵⁶ Sparrow 2011 : 6.

⁴⁵⁷ Chavkin 2007 : 7.

⁴⁵⁸ Sergienko 2001 : 487, 488.

⁴⁵⁹ The use during plenary lectures is discouraged due to large student numbers and the overloading of clinicians with marking. See discussions of the challenges of large student numbers and clinicians' time constraints in paragraphs 5 and 7 of Chapter Four respectively.

questions, each presenting a short fact scenario. The test should focus on issue spotting and rule or law application. Students should provide a half page answer.⁴⁶⁰ These tests are quick to grade and feedback should be possible within a week.

I submit that in-class short-answer tests are ideal formative assessments and can also be used as summative assessment tools, but I submit that they should count towards a relative small percentage of the total year mark.⁴⁶¹

This form of assessment is capable of application to the specific South African context, but may not be optimum for use during classroom instruction due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.⁴⁶² It may however find suitable application during select tutorials.

4.5 Written assignments

Written assignments can be used, as a summative assessment, to assess the abilities of students to understand, evaluate and synthesise matters.⁴⁶³ It will test students' abilities to focus (e.g.: to concentrate and follow a court case), analyse and research.

These assignments are not designed as writing projects to test their writing skills, but poor writing skills will become evident. Should the clinician intervene in a student's writing skills? It is submitted that these written assignments can be used as a formative assessment tool by which problems with writing skills are highlighted and remedied, but clinicians need to be intentional and transparent about their interventions into written assignments and writing projects.⁴⁶⁴

Haupt and Mahomed identified the advantages to be:⁴⁶⁵ an assignment question is easy to set; it provides for good grades, as students have control over the outcome; and the assignment is easy to grade. Challenges and limitations include: marking is time consuming; problems with fairness when different clinicians mark; and a lack of authenticity.

⁴⁶⁰ Curcio 2009 : 165.

⁴⁶¹ In paragraphs 14, 21 and 23 of Chapter Four of this study the following challenges are discussed: 'working in student pairs: student pairs with uneven strengths', 'education and experience variances amongst students' and 'differing levels in students' knowledge of substantive and procedural law'. In view of these discussions I recommend that, when in-class short-answer tests are used as summative assessment tools, they should count a small percentage towards the total year mark.

⁴⁶² The use during plenary lectures is discouraged due to large student numbers and the overloading of clinicians with marking. See discussions of the challenges of large student numbers and clinicians' time constraints in paragraphs 5 and 7 of Chapter Four.

⁴⁶³ Haupt & Mahomed 2008 : 288.

⁴⁶⁴ Mlyniec 2012 : 523, 524.

⁴⁶⁵ Haupt & Mahomed 2008 : 289.

At the WLC all the students are required to attend a court case, whether trial or application proceedings, and submit a written case report thereon. Guidelines are drafted by the clinician responsible for the setting of this assignment and are made available to the students. The guidelines and instructions are set out below.

“Case Report

Students will be expected to attend court on their own time to observe a case in progress, and to write a report on the case.

The report shall contain at least the following information.

1. The parties’ names, and the names of the attorneys representing them;
2. The case number and court in which the matter is being heard;
3. The type of procedure adopted by the litigants (action or motion procedure or criminal trial);
4. A summary of the plaintiff’s/applicant’s cause of action, (or the charge against the accused in a criminal matter) and the facts which the plaintiff intends to prove at the trial of the matter;
5. A summary of the defendant’s/respondent’s defence and the facts which the defence intends to prove at the trial;
6. An analysis of the parties’ pleadings, (or in a criminal trial, the statements in the criminal docket) which analysis reveals those issues which are common cause, and those issues which are in dispute;
7. Set out the law on which the plaintiff relies for his cause of action;
8. Set out the law on which the defendant relies for his defence;
9. From your observation of the trial of the matter, give a short summary of which witnesses were called to testify, and what the thrust of their testimony was;
10. Mention how these witnesses were cross examined and what the thrust of this cross examination was;
11. Set out in brief the closing arguments of the respective attorneys or counsel;

12. What was the decision of the court, and summarise the presiding officer's reasons for judgment;

13. Discuss briefly if you agree with the verdict/judgment, or not.

This report is a substantial piece of work, and is worth% of your year mark. Start early to identify a case, and make contact with the attorney representing the plaintiff to find out when the matter has been set down etc. Trials run in the High Court, Labour Court and Magistrate's court nearly every day.

It is suggested that you start by observing a trial in a court, and then working backwards by looking at the pleadings from the court file to see the issues as pleaded by the parties. Then consider the presiding officer's judgment in the light of the evidence you heard at trial and from reading of the pleadings.

Ask your supervising attorney/clinician for help in any aspect of the logistics of this report.

Prof XYZ"

The guidelines, in summary, indicate elements such as, identifying the court, the parties involved, legal representatives, the case number, facts of the case, witness submissions, cross examination and final judgment. An analysis of the judgment is also required. Assessments of these reports prove not to be problematic, due to the guidelines, which serve as marking rubrics. I however suggest that specific rubrics be developed for the assessment of the case report, indicating the weighting of the various components of the case report.⁴⁶⁶ Some students often attend the same court cases. They are required to relay the proceedings in their own words. Their own analysis and opinions are required. There nonetheless exists a danger that the work presented may not be that of the student, that is, lack of authenticity' or plagiarism. Plagiarism needs to be dealt with in terms of the rules of the university.⁴⁶⁷

At UPLC an assignment is set, relevant to a case or cases being handled by the clinic and students are required to draft an appropriate response. The written assignments have potential for measuring understanding, ability to synthesise and evaluate skills. In marking the assignment, the clinicians look at layout and language and the information collected and organised. Assignments

⁴⁶⁶ Some rubrics are suggested towards the end of this paragraph.

⁴⁶⁷ Haupt & Mahomed 2008 : 289; Du Plessis 2009 : 105, 106.

which display insight and develop a coherent argument will be more highly valued than superficial answers.⁴⁶⁸ At the UPLC students are not required to attend court, as these processes are taught by way of simulation.⁴⁶⁹

At the UFSLC the two semester tests described above are replaced by two assignments for off-campus students. The first assignment comprises an essay (minimum 500 and maximum 1 000 words) in which students must describe the main requirements for good and effective practice management of a law office. Marks are awarded for good writing, including source referencing in terms of the *Journal for Juridical Science* (the accredited law journal of the University of the Free State) style. The second assignment comprises the drafting of a bill of costs for taxation in the Magistrate's Court. Students are provided with the necessary information to enable them to complete the assignment.⁴⁷⁰

At the UJLC students are provided with a set of facts that they need to discuss. The assessments of these assignments are incorporated with their file work marks. Students are also required to, instead of one file work session, do a short court visit to familiarise them with the structures of the court and write a report thereon. The assessments are formative.⁴⁷¹

All four of the university law clinics under review use assignments as assessment tools. Although they all focus on legal practice, the trend is to use court processes. I believe that the assignment set by WLC allows for more in-depth learning, as students are exposed to real-life court processes and procedures and are required to learn from cases that they were not previously familiar with. Having said that, I find much value in the simulation processes employed by UPLC where students argue cases they actually worked on, as they are placed in situations where they need to challenge themselves against legal work they have done. I however do suggest that UPLC require their students to visit courts to familiarise themselves with real-life situations. This familiarisation is employed by UJLC, but only to the extent that the structures of courts are observed. I recommend observation of court procedures to UJLC and UFSLC as well, whether as part of assignments or merely for purposes of formative assessments. The assignment practices employed by UFSLC are sound, as they are focused on legal practice.

⁴⁶⁸ Grobler & Keulder 2011 : 1 - 9.

⁴⁶⁹ Haupt & Mohammed 2008 : 289.

⁴⁷⁰ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: UFSLC RPK412 course outline.

⁴⁷¹ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

Assignment as a form of assessment is capable of application to the specific South African context.

I suggest that assessment rubrics be designed and used for this type of assessment to ensure that students are assessed in an even-handed manner by the different clinicians.⁴⁷² Two examples of rubrics to be used for law case analyses are illustrated below.

RUBRICS FOR LAW CASE ANALYSES

Example 1.⁴⁷³

	Exemplary	Effective	Minimal	Unsatisfactory
Statement of facts	All “key” facts are recorded and organised in an extremely neat and orderly fashion (paragraph form)	Relevant facts are recorded legibly and are somewhat organised. However, some key facts are missing	Facts are recorded and legible but are not in paragraph form	Facts are not recorded
What are the relevant issues?	All issues/relevant disputes are addressed (Plaintiff/Defendant)	Some issues/relevant disputes are addressed (e.g. Listing the issues presented by one party instead of both)	Less than half of all issues/relevant disputes are addressed	No issues are cited
What rule of law was involved?	Correct Rule of Law provided and stated accurately when providing rule explanation	Correct Rule of Law provided with inaccuracies in rule explanation	Incorrect Rule of Law provided with inaccurate rule explanation	No Rule of Law cited or legal citation
Rule application/analysis	Analysis provided for each relevant rule and applicable	Analysis provided. However,	Information clearly relates to the main	Information has little or nothing to do with the

⁴⁷²

Also see Walvoord 2010 and 2011.

⁴⁷³

www.rcampus.com/rubricshowc.cfm?code=U5X3AC&sp=true&

	fact	student fails to identify how each rule applies to key facts	topic. No details and/or examples are given	main topic
Conclusion	Student effectively ties analysis to conclusion. Student provides definitive conclusion by transitioning clearly from the analysis provided	Student provides definitive conclusion. However, conclusion does not coincide or effectively transition from the analysis provided	Conclusion provided without explanation or transition	Conclusion not provided

Example 2.⁴⁷⁴

	Exceeds	Competent	Progressing	Not Yet	Missing
Facts of Case	Presents accurate and concise case summary	Presents correct and details summary	Presents most major facts of case, but some important details are missing	Summarises case, but some important facts are missing	Omits all facts
Legal Issues	Correctly identifies and specifically explains legal issues	Correctly identifies and generally explains legal issues	Correctly identifies	Incorrectly identifies	Does not identify
Rule, Precedent or Test	Correctly identifies and specifically explains rule, precedent, or test	Correctly identifies and generally explains rule, precedent, or test	Correctly identifies	Incorrectly identifies	Does not identify
Court's Decision	Develops decision entirely; cites	Accurately identifies and analyses	States decision, but does not	Mistakenly relays incorrect	Does not describe

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www.rcampus.com/rubricshowc.cfm?code=L5W69C&sp=true&

	several relevant legal concepts, details and examples	relevant legal concepts with examples	define or analyse it	court decision as (describe incorrect citation)	
Court's Reasons for Decision	Identifies all reasons and offers some analysis	Identifies at least one reason and offers some analysis	Identifies at least one reason but no analysis	Incorrectly identifies	Does not provide
Significance	Explains significance of case for all parties and society	Describes significance of case for all parties or society	Describe significance of case for one of the parties	Significance of case unclear or inaccurate	Does not explain significance of case

I submit that written assignments are ideal summative assessments for CLE courses, as a number of components can be assessed, such as, for example: insight, legal procedures, substantive law, legal analysis, legal arguments, application of legislation and rules, court procedures, opinions, factual investigations, writing skills and style.

4.6 Essay examination

Strengths of essay examinations include the ability to assess writing skills and to provide limited clues about the desired answers, requiring students to recall material and generate their own answers. Ambiguity in a question may be identified that would remain concealed with forced-choice examinations.⁴⁷⁵ Limitations are that essay examinations are time consuming, both to take and to assess. Their open-ended nature also makes them difficult to grade reliably. These examinations can test only a relatively small sampling of the course, making them prone to sampling error, thereby misrepresenting students' knowledge. They often fail to test the skills taught and the grading is likely to be highly inconsistent.⁴⁷⁶

The reliability of this type of examination, specifically for a CLE course, is reduced and is therefore not ideal.

⁴⁷⁵ Sergienko 2001 : 468.

⁴⁷⁶ Skills taught in CLE are to be applied to practice tools, such as the drafting of court pleadings and the different types of legal correspondences. It will be more difficult and may lead to more inaccuracies when students have to explain what needs to be done in essay narrative, rather than drafting the actual document. This necessarily leads to a higher incidence of inconsistent grading. Also see Sergienko 2001 : 469 - 474.

4.7 Oral examination

Oral examinations can be used, as a summative assessment, to assess the abilities of students to orally express their knowledge gained during the CLE course. Haupt and Mahomed identified the advantages to be:⁴⁷⁷ several aspects of students' knowledge can be assessed; grading is immediate or quicker; immediate student feedback is possible; objectivity when questions are standardised; and students who received poor grades due to a lack in writing skills now have the opportunity to present their knowledge orally. Challenges include: standardised questions may benefit students who are assessed later down the list; the temptation to assess students on previous performances; and the inability of some students to express themselves properly. I submit that the latter should not be regarded as a challenge, as lawyers are expected to be proficient in language skills, communications skills and the ability to think quickly under pressure.

At the WLC oral examinations are conducted towards the end of the academic year. In terms of the University of the Witwatersrand 'Senate standing orders on the assessment of students' academic performance',⁴⁷⁸ "oral assessment must be structured and scored independently by at least two assessors. Standardised questions of varying difficulty should be put, and the answers scored against known criteria." For the oral examinations, the student pairs are split and students are examined individually. These oral examinations are conducted by two clinicians - the student's supervising clinician and another clinician acting as an external examiner. These oral examinations are aimed at assessing a student's ability to verbally express the knowledge gained in his/her case file work and legal processes associated with the case work. A portion of this oral examination is allocated to assessing students on the rules of legal ethics.⁴⁷⁹ No standard questions are set, as individual case work differs. The general tone of the questions relating to file work are however the same. Questions may be recorded in writing by one of the clinicians to motivate the grade allocated to the student. An advantage of this form of assessment is that more aspects of a student's knowledge can be assessed, separate from his/her student partner and the clinician can form an objective opinion of the ability of the individual student. Maintaining relevant, but new sets of questions, specifically when evaluating a student's

⁴⁷⁷ Haupt & Mahomed 2008 : 287.

⁴⁷⁸ <http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssessmentOfStudentLearning.doc> at 3.

⁴⁷⁹ Two 90-minute weekly lectures are allocated for teaching on legal ethics. Another such lecture is presented by the Attorneys Fidelity Fund, a funder of the clinic, on this topic. The funding is conditional upon students receiving training in and assessment of legal ethics.

knowledge of legal ethics, is challenging, as students who completed their oral examinations, tend to pass questions on to students who are still awaiting their turn. Although the majority of questions posed to students would revolve around their case file work, some of the question will relate to the weekly formal 90-minute lectures. As attendance of these lectures is not compulsory,⁴⁸⁰ students are often unable to address question emanating from the lectures. Conducting oral examinations on such a large number of students is time-consuming and clinicians often find them exhausting.⁴⁸¹

At the UPLC oral examinations are conducted annually by a clinician and two external examiners, who are generally members of the profession and not linked to clinic.⁴⁸² In preparation for the oral examinations, students are requested to summarise their case files and provide the clinician with 10 questions, with answers, they would have asked if they were the examiners. In making summaries, the students are compelled to work through their files and the drafting of questions provides an opportunity for the students to think critically.⁴⁸³ For the oral examination, clinicians draft 10 sets of questionnaires containing a series of questions. The first batch of questions relate to the law clinic and consultations. This batch comprises of 10 sets of questions and answers. Each set contains four questions with a mark allocation of one, one question with a mark allocation of three and one question with a mark allocation of two. The question and answer sheets ensure that the same degree of difficulty is maintained throughout the oral examination. The second batch of questions relate to the work covered during lectures. This comprises of eight sets of questions and answers. Each set contains two questions with a mark allocation of three, and four questions with a mark allocation of one. The third batch of questions relate to students' specific case file work, with a 10 mark allocation.⁴⁸⁴ Students select a questionnaire and are required to respond to it. This method allows for some form of standardisation. Students are thereafter examined on their file work and ethics. These examinations are video recorded for the purpose of dealing with possible student queries. I submit that this format of oral examination is preferable, as consistency is maintained. Having

⁴⁸⁰ By 'not compulsory' is meant that no roll-call or attendance register is kept. Attendance registers are kept for the weekly tutorials and clinic duty sessions.

⁴⁸¹ Two clinicians will typically have to conduct 15 – 20 minute individual oral examinations on their combined allocated students, which may be as many as 92 students. These examinations necessarily run over a number of days. Du Plessis 2009 : 106.

⁴⁸² Haupt & Mahomed 2008 : 287, 289.

⁴⁸³ Grobler & Keulder 2011 : 1 – 9.

⁴⁸⁴ Ibid.

two external examiners present during a video recorded examination is preferable, but will only be possible when student numbers are limited.

At the UFSLC students are afforded the opportunity to take their third assessment as either a written or an oral test, or both written and oral.⁴⁸⁵

At the UJLC no formal oral examinations are conducted. Students must however do a formal oral presentation at the end of their clinic semesters. The assessments of these oral presentations form part of the clinic and file work matrix assessment.⁴⁸⁶

I am of the opinion that oral examination is an ideal form of assessment, as a more in-depth and wider scope of what students have actually learnt can be covered. Oral examinations are therefore also an ideal platform for clinicians to determine whether the learning objectives of the CLE course were met. The structured oral examinations employed by UPLC are preferable although one has to bear in mind that their CLE course is an elective, resulting in lower student numbers, and their clients are pre-screened and consult by appointment only. This may not be possible for the larger clinics, such as WLC, where neither the student numbers nor the “walk-in” clients are limited. Although the use of external examiners, not associated with the clinic, may appear to be ideal, the experience at WLC proved to be the opposite.⁴⁸⁷ It was found that another clinician who did not supervise the student being examined, but who is familiar with the style of the clinic, makes for an excellent external examiner.

This form of assessment is capable of application to the specific South African context.

I suggest that assessment rubrics be designed and used for this type of assessment to ensure that students are graded even-handedly. An analytic rubric for the grading of an oral presentation is illustrated in paragraph 5 of this chapter, below.

4.8 Rotation and Interim assessments

Students need feedback regarding their learning. Not only does feedback allow students to understand what they have learned, it gives students the tools they need to improve their

⁴⁸⁵ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: UFSLC RPK412 course outline.

⁴⁸⁶ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

⁴⁸⁷ See discussion in paragraph 4.13 later in this chapter.

knowledge and skills. For the feedback exercise to have merit, the clinician must explain what the students did well and what needs to be improved.⁴⁸⁸

From 2000 to 2002 students at WLC did one rotation within the array of different specialised units. Students served the first semester in one unit, changing units for the second semester. The students were assessed by way of an oral examination and file assessments at the end of the first semester and the process was repeated in their second rotation unit at the end of the year. The advantage of this rotation was to afford students the opportunity of experiencing more than one specialised unit.⁴⁸⁹

Challenges were the increase in student numbers which resulted in shortened time that the clinician had to train a larger number of students during a semester.⁴⁹⁰ This approach also posed a challenge in assisting clients. A semester consists of approximately four months of effective clinic duty. Few cases can be completed during a four-month period and both clients and students were left with an unsatisfactory experience. New sets of students rotating to file work started by students from the first semester, had to study files that they had not opened, often resulting in clients, who can seldom afford the time or expense, to attend on the clinic for additional consultations with the new pairs of students. The new pair of students sometimes needed to consult in order to avail themselves of all, or missing, details in the files they took over. Consultations were sometimes requested by the clients, as they had to form new relationships with their new student counselors and to establish new relationships of trust. A further challenge was in re-training students on files already opened and often leaving the new student intake to deal with mistakes made by the previous group. This resulted in time delays in the finalisation of matters, often leaving the students with even less time to devote to new matters.

A suggestion for the current allocation of students to one specific specialised unit for the academic year is to do a formative assessment of students' file work at the end of the first semester.⁴⁹¹ At the start of the final semester, feedback to students can focus on strengths and weaknesses found in their first semester work. Students may then focus on their strengths and

⁴⁸⁸ Krause-Phelan 2011.

⁴⁸⁹ The clinician : student ratio during that time was between 1 : 20 and 1 : 24. Although that ratio was still more than the recommended ratio of between 1 : 7 and 1 : 12, it was more attainable to do this full mid-year assessment than it would be with the current ratio of between 1 : 38 and 1 : 46.

⁴⁹⁰ Mahomed 2008 : 66 and see the discussion on time constraints in paragraph 7 of chapter four of this study.

⁴⁹¹ Formative assessments of portfolio work (which can be a portfolio of work done during the first semester), is an established practice in Norway. Dysthe & Engelsen 2004 : 239 – 258.

increase their efforts where weaknesses were identified.⁴⁹² As indicated above, interim assessments were introduced in the form of spot tests during 2012. Clinicians were required to do unannounced assessments on student progress according to a pre-designed rubric. These spot tests counted 10 percent towards the year mark. These spot tests were discontinued in 2013.

At the UPLC students are expected to attend lectures prepared. Clinicians occasionally start lectures with multiple question spot tests, the total of which forms a percentage of the year mark. At the UFSLC students write mid-semester tests.⁴⁹³ At the UJLC students are assessed weekly on their file work. Students also write a test every mid-semester and a formal examination at the end of each semester.⁴⁹⁴

Krause-Phelan found that many law students struggle to understand the connection between what clinicians require for content preparation, classroom performance, course assessment and the knowledge, skill and performance they must exhibit as lawyers. Through interim assessments, clinicians can guide students' ability to understand the connection.⁴⁹⁵

4.9 Reflective journals

Reflection is the intentional consideration of an experience in light of particular learning objectives.⁴⁹⁶ Reflective journals by students have been widely adopted as assessment tools.⁴⁹⁷ When students are required to keep regular reflective journals, they need to be assessed rigorously, in order to ensure academic integrity.⁴⁹⁸

A number of law schools in Australia use the reflective journal as a compulsory element in the assessment of the clinical course.⁴⁹⁹ At Deakin University in Geelong 30 percent of the clinical assessment is allocated to the student journal.⁵⁰⁰ The Queensland University of Technology in Brisbane allocates 40 percent of the total mark to a professional journal and

⁴⁹² Du Plessis 2009 : 108, 109.

⁴⁹³ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: UFSLC RPK412 course outline.

⁴⁹⁴ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

⁴⁹⁵ Krause-Phelan 2011 : 1 – 10.

⁴⁹⁶ Bender *et al* 2006 : 58.

⁴⁹⁷ Hyams 2006 : 84, 85. For an in-depth discussion on reflection and assessment, see Ledvinka 2006 : 29 – 56.

⁴⁹⁸ Bender *et al* 2006 : 78.

⁴⁹⁹ Hyams 2006 : 84; Clinical Legal Education Guides 2009 – 2012.

⁵⁰⁰ The remaining 70 percent is for clinical performance in the course Law Clinic MLL351, which is a unit of approximately 20 students each trimester. See Clinical Legal Education Guide 2009/2010 : 9.

essay.⁵⁰¹ At Sydney's Macquarie University the reflective report counts for 40 percent⁵⁰² and at the University of Western Sydney 50 percent is allocated to the reflective journal, which is described as 'a reflective diary which requires students to critically consider his or her actions, experiences and responses in light of the objectives of the unit.'⁵⁰³ At Monash University in Melbourne, students were offered the option of writing a reflective journal in place of an assignment, counting for 20 percent of the assessment mark.⁵⁰⁴ The following questions must be posed as part of the reflective process: how and why does the client find himself/herself in this situation; what is the policy rationale for this that might explain it?; how can the effects be mitigated?; what can I do to ensure that the injustice does not happen again?; from whose perspective is it unjust?; how and why did this affect me so much?; or why didn't it affect me at all?⁵⁰⁵

Although the benefits, especially for aspiring lawyers are plenty, the risk of students manipulating entries in pre-empting what the clinician may want to hear,⁵⁰⁶ or entries being made in a mechanical fashion, remains. The main problem may be that it is difficult to determine how to assess insight.⁵⁰⁷ In the Australian setting, these journals are to be updated and submitted either weekly or fortnightly. The students submit their reflections of about 500 words per entry via email and the clinicians generally respond by way of email.⁵⁰⁸

⁵⁰¹ Five percent is allocated for attendance at seminars, 15 percent for performance in clinic, and 40 percent for a further item of assessment to be negotiated between the facilitators and each student. Their legal clinic (organised program) runs over a standard semester. See Clinical Legal Education Guide 2009/2010 : 25.

⁵⁰² An assignment makes up the remaining 60 percent. The additional components are assessed on a scale of 'satisfactory/fail'. The Legal Centre Program runs for a period of 10 weeks during a semester, where attendance is required on a designated day. See Clinical Legal Education Guide 2009 - 2013.

⁵⁰³ 20 percent is allocated for a seminar presentation and 30 percent for a research paper. The clinical legal education program is undertaken in partnership with the Macquarie Legal Centre. See Clinical Legal Education Guide 2009/2010 : 41.

⁵⁰⁴ Hyams 2006 : 85.

⁵⁰⁵ Hyams 2006 : 85.

⁵⁰⁶ Mennon indicates that, when substantive knowledge is assessed, 'exams follow fairly standard formats that are not dependent upon the sort of 'insider', tacit, or inchoate knowledge that the legal practitioner possesses.' These exams are usually administered anonymously, cushioning teachers from subjectivity. He points out that 'this protection is absent in a clinical setting.' See Mennon 1998 : 286 – 287. Students may then rather want to please the clinician with their entries and thereby disguise their true experiences.

⁵⁰⁷ Hyams 2006 : 85.

⁵⁰⁸ Hyams 2006 : 85. This information was confirmed by Hyams as still correct for 2009/2010 in an email by Hyams to the author dated 7 October 2009. (Copy of email on file with author), and confirmed as still valid during a discussion with author in Brisbane during July 2013.

4.9.1 South African student feedback

Reflective journals were never used by the WLC prior to 2013. At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on assessment of the course ‘practical legal studies’. For 2009, 27 students, for 2010, 17 students and for 2011, 16 students completed the questionnaire.⁵⁰⁹ Students were asked: “Do you feel that a reflective journal, where you e.g. set out your strategies for cases or e.g. note how a specific case impacted on you, will merit the allocation of marks towards your year mark?” For 2009, seven students replied “yes” and 20 students replied “no”. For 2010, six students replied “yes” and 11 students replied “no”. For 2011, seven students replied “yes” and seven students replied “no”. Two students left the answer blank.

In 2012 two of the WLC clinicians introduced reflective journals informally and voluntarily within their specialised units. These were not assessed. This informal introduction proved to reveal more than expected, as well as insightful. A student commented on her first two weeks in the clinic: “If I had to describe my first two weeks in the law clinic in a word, that word would be INTENSE. I walked in on day one with my nerves forcing my heart somewhere in the vicinity of my shoes, and was already taken aback by the number of people still in the waiting area at 10 am. It struck me that these people had either had to wake up early, take a day off work (if they had any) or make transport arrangements so that they could get to the clinic on time. All that effort, just to get to a bunch of nervous fourth years with minimal real-world experience? They really think we can help them? Wow. The thought of that alone is enough to make me want to turn tail and run! But, I didn’t. [My partner] and I met with our first client, and initially my confidence failed me. I tried to remember what we’d been taught in lectures about interviewing skills. Don’t ask too many questions at first. Listen actively. Try not to interrupt. All of that went out of the window pretty quickly, as instinct kicked in. Our client didn’t need prompting to tell his story. I’ve noticed that many of them are so desperate for help that you barely get to sit down before they start giving you details of their situation.”

Students commented on the emotional aspects of clinic duty: “I also had a bit of difficulty with having to inform clients that we cannot take on their cases. It’s hard not to get a bit emotional when clients detail how badly they’ve been treated by someone who owes them money, or by the legal system itself. Even though you know you have to be objective and focus on the

⁵⁰⁹ WITS LAW CLINIC : 2009, 2010 & 2011.

issues, these are still real people, with real problems. I feel like we owe them a duty to do as much as we can for them. Having to tell them that we can't help them has hit me hard." A further comment: "The emotional aspect is giving me the greatest difficulty at the moment. I know that a sense of detachment will be developed with experience and exposure to more clients over the weeks. I just hope that I don't become too detached – focused so much on getting a good mark that I forget that we're dealing with real lives here." And: "Our clients come stressed, scared, worried, desperately seeking for someone to help. ... We really get heartsore, listening to all and hearing their problems. Yet, as students, we realize there is only so much we can do."

Students were not shy to comment on mistakes that were made: "Mr X's' (a candidate attorney) nonchalance concerned me a bit. He didn't seem bothered that he had in his hands a closed file that was missing an important piece of documentation. We've had quite a few clients who had had bad experiences with legal representatives before they came to the clinic. ... To think that the law clinic could be guilty of similar crimes frustrates me just as much."

Students also showed appreciation: "The best part of being in the consumer [clinic] unit is that we are open to a lot of scenarios and learn more than average about cases. We are taught by our Professor to see more into cases, to cross question and most importantly to read in between the lines and not only go on the initial word of the client. ... We learnt that life is practical, not a textbook, and facing day to day problems, no book can teach you how to solve."

Reflective journals were formally introduced at WLC during 2013, as part of the course work assessment. The attempt proved to be unsuccessful and does not form part of the 2014 assessment regime. The introduction of reflective journals were however, not properly structured.

At the UPLC these journals were referred to as student diaries.⁵¹⁰ These reflected a record of students' work and experiences and was only used from 2003 – 2006 for assessment purposes. The use of these diaries for summative assessment is discouraged "to avoid students censoring their entries or reporting only on those experiences where they are shown in a good light or to best advantage".⁵¹¹

The UJLC and the UFSLC do not use reflective journals.⁵¹²

⁵¹⁰ Haupt & Mahomed 2008 : 286.

⁵¹¹ Ibid.

⁵¹² UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30; UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: RPK412 course outline.

4.9.2 Probing the essence behind the use of a reflective journal

Reflection can help to supplement mediated learning (where there is aid by a teacher) by helping the individual to make connections between the theory and constructs what they have learnt formally.⁵¹³ Prompt questions in a personal development journal help students to reflect and to make sense of their understanding.

At the Gloucestershire Business School, University of Gloucestershire three simple questions prompt students to reflect: (1) Description of event/experience (2) How it made me feel/how I responded to the event or the experience (3) How I might respond to a similar event in the future/what I would do differently?⁵¹⁴ Questions generally comprise of four types: (1) development of supposition and hypothesis, (2) development of personal feelings, (3) focusing on future action or projection and (4) aiming at the development of critical assessment or value judgments.⁵¹⁵

Dewey, Kolb and Boud developed a model of experiential learning following four basic stages:⁵¹⁶ (1) taking stock of existing knowledge (What do I know?), (2) identifying the gaps in learning (What do I need to know?), (3) feedback and evaluation (how does what I now know contribute to what I already knew?), and (4) evaluation of the integration of new knowledge into existing knowledge (how well and how much do I now understand?)

In probing reflection as a method for the development of deeper learning, Moon highlights that the language involved in reflection correlates with a deep approach.⁵¹⁷ In her 'map of learning' Moon identifies five stages; noticing, making sense, making meaning, working with meaning and transformative learning. Students are aided in clarifying and making sense of what has been learned and to locate it within an individual framework, forcing them to be self-sufficient and to rely on their own investigative powers. Through reflection, what may have appeared to be acceptable situations are transformed into problems requiring further investigation and finding an

⁵¹³ Laurillard "Rethinking university teaching: a framework for the effective use of educational technology" 1993 (London: Routledge)

⁵¹⁴ <http://www.glos.ac.uk/uogabout/content.asp?rid=1>. These are very similar to the kinds of questions used by a number of personal development schemes (see the LTSN Generic Centre website for more details: <http://www.ltsn.ac.uk/genericcentre/index.asp?id=16911>).

⁵¹⁵ Morgan & Saxon "Teaching Questioning and Learning" 1991 (London: Routledge)

⁵¹⁶ <http://www.infed.org/biblio/b-reflect.htm>

⁵¹⁷ Moon "Reflection in Learning and Professional Development, Theory and Practice" 1999 (London: Kogan Page). "In its use of words and phrases such as 'relating ideas', 'looking for patterns', 'checking' and 'examining cautiously and critically', it implies the involvement of reflective activity in the process of learning."

answer to a question.⁵¹⁸ Reflection also aids deep learning by promoting independent thought, as students are required to provide evidence of their reflection, meaning that they have to focus their thoughts and articulate the results of their reflection.⁵¹⁹

4.9.3 Designing a workable and progressive structure for a student reflection and progress journal in CLE

A suggested draft of an instructive reflective journal that may be used in clinics is set out below.⁵²⁰

STUDENT NAME	STUDENT NUMBER	DATE
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Dear Student - Your reflective journal serves as a regular, written communication to your clinician, related to your clinical and other experiences in CLE. Your clinician may respond in writing. The purpose of your journal is to record observations and reflections and to encourage a deeper, more critical thinking about your subject matter. Your reflections in this journal should empower you to take more responsibility for your own learning and offer you a safe environment for raising your questions and concerns. Your clinician may provide you with periodic feedback. The benefits for you are: improvement of your problem-solving skills, more and higher quality introspections, self-awareness, stress release, the nurturing of a lifetime of self-directed learning and the enhancement of your transfer of learning to new contexts and assignments.

CLE PROGRESS JOURNAL

For Consideration:	Your	Case no & details:	Case no & details:	Case no & details:
Lawyering Across the Dimensions:				
- Facts - Rules - Goals - Context - Professional Role and Responsibility		<i>Student reply (suggestion):</i> <i>Three aspects of this case challenged me: firstly,</i> <i>.....,</i> <i>but I had difficulty with</i> <i>..... and</i> <i>.....,</i>	<i>Student reply (suggestion):</i> <i>I struggled to distinguish</i> <i>I included unnecessary</i> <i>.....</i> <i>...</i>	<i>Student reply (suggestion):</i> <i>I was challenged during the interview, in that the client</i> <i>.....</i>

⁵¹⁸ Ibid.

⁵¹⁹ Hinett "Improving learning through reflection – part one"
www.heacademy.ac.uk/.../id485_improving_learning_part_one.pdf

⁵²⁰ For further reference, see Balsam : 2011.

s Keep in mind the Lawyering Dimensions: a) What about the exercise challenged you the most? What about the exercise seemed to most intuitive or easy to you?	but <i>The most intuitive part was developing arguments and</i> <i>I managed to</i> <i>I struggled with.....</i> 	Going forward, I need to	<i>I was able to draw from my experiences in ABC's case where I had to distinguish a</i>
Skills Acquisition: - Managing interpersonal interactions - Strategic planning for each phase of the exercise/case - Developing descriptions and the sequence of events - Developing legal analysis and writing - Using appropriate voice for the context and audience - Collegial collaboration - Critical thinking about issues of difference raised by the exercise/case	Student reply (suggestion): <i>After this case, I feel more comfortable to critique</i> , <i>I feel that I am more prepared to accept others in</i> <i>I developed skills that will assist my legal writing skills after the blunder with</i> <i>I want to improve in the following areas after my exposure to this matter.</i> <i>Firstly,</i> 	Student reply (suggestion): <i>My biggest improvement after being exposed to this case, is my ability to think critically, in that the client</i> <i>I moved forward in my time management as a result of the consequences I may have faced if I did</i> Not and <i>I still need to develop my ability to participate</i>	Student reply (suggestion): <i>My research ability was tested. My skills improved dramatically when I had to</i> <i>However, I would still like to be able to improve my skills in time management,</i> and , but <i>I was thrilled when I discovered that I could also</i>

• Organising tasks & time management • Critiquing your own work and others' • Participating in class, clinic and tutorials • Anything else? Keeping in mind the above skills, or any others you find relevant: a) Identify a skill or an area explored in this exercise or case in which you feel that you improved the most since your last exercise or case. b) Identify a skill or an area explored in this exercise or case in which you think you made the most improvement.	<i>Secondly,.....</i> <i>.....</i> <i>.....</i>	<i>in.....</i> <i>.... and although I managed to</i> <i>.....</i> <i>.....I see that I still have to</i> <i>.....</i>	
Clinician's Response			

The manner in which the student is guided in his/her reflection is of utmost importance. What follows below, is a draft of an instructive reflective journal, designed for use in South African CLE courses and incorporating the elements identified when the essence behind the use of a reflective journal was probed.⁵²¹

STUDENT NAME

STUDENT NUMBER

DATE

Dear Student - Your reflective journal serves as a regular, written communication with your clinician, related to your clinical and other experiences in CLE. Your clinician will respond in writing. The purpose of your journal is to record observations and reflections and to encourage a deeper, more critical thinking about the work and cases that you deal with at the clinic. Your reflections in this journal should help you to take more responsibility for your own learning and offer you an environment for raising your questions and concerns. Your clinician will provide you with periodic feedback. You are dealing with a number of cases. You have to make journal entries to answer the following five questions: what, why, reaction, learned and goal setting in relation to each case you deal with every week.

CLE PROGRESS and REFLECTIVE JOURNAL

For Your Consideration:	Case no & details:	Case no & details:	Case no & details:
WHAT Make brief notes of what you did: the consultations you had with your client or any of the other parties involved with the case, letters you wrote, telephone calls you made, documents and correspondence you perused, research and reading you have done and/or any other attendances pertaining	<u>Student reply</u>	<u>Student reply</u>	<u>Student reply</u>

⁵²¹ For further reference, see Balsam "Reflecting well: guided journaling to improve transfer of learning" 2011 *Institute for Law Teaching and Learning*. Summer Conference, New York Law School, New York, NY "Engaging and assessing our students" Conference paper 1 – 10. Also see *Essential Study Skills*, Third Edition © Tom Burns and Sandra Sinfield, 2012 (SAGE) <http://www.sagepub.com/burnsandsinfield3e/study/Chapter%2023/Reflective%20learning%20diary%20template.pdf>

to the specific case.			
WHY Make brief analytical notes: why did you do it? How was it useful? What learning outcomes did it cover? What part of the case is it helping you with? <i>Knowing why you are doing something helps you move from being a passive to an active student.</i>	<u>Student reply</u>	<u>Student reply</u>	<u>Student reply</u>
REACTION Make brief notes on your emotional response to the activity: notice the affective dimension to your learning. It allows you to build a picture of yourself as a learner and as a student. NB: This reflection allows you to notice what and how you like to learn: the aspects of the case and the topics that you enjoy – and the ones that you do not like so much; whether you like clinic duty, case file work, lectures or research and reading, whether you enjoy group work or independent study.	<u>Student reply</u>	<u>Student reply</u>	<u>Student reply</u>
LEARNED	<u>Student reply</u>	<u>Student reply</u>	<u>Student reply</u>

Make brief notes on all that you think that you learned from clinical experience, the lecture, consultation or research and reading and/or anything related to your case that you have done. These notes are where you make your learning conscious, which improves both the quantity and quality of your learning. When we do not do this we are in danger of leaving the learning behind as we walk away from that clinic consultation, lecture or close that book. You can make this section of your review as detailed and/or concise as you wish.			
GOAL SETTING Make brief notes about what you will do next... nothing will ever give you 'all you need to know' on a subject. Therefore, you should always be thinking: What next?	<u>Student reply</u>	<u>Student reply</u>	<u>Student reply</u>
<u>Clinician's response</u>			

“Educational theory supports the notion that the formula for learning begins with experience plus reflection.”⁵²² Reflection will allow students to discover methods for merging their personal and professional identities without the need to compartmentalise views and perspectives.⁵²³

Reflection is an effective learning tool as it allows the students to identify any problems and identify how they can improve. Macfarlane & McKeown warn that, even though students often say that they struggle with reflection, their experience shows that most students were able to demonstrate deep learning in their reflection papers, showing maturity and insight.⁵²⁴

4.9.4 Feedback on reflection

It is essential to provide students with feedback on the assessment of their reflective journals, whether such assessment is formative or summative, as it will increase their understanding of professionalism, which in itself is a valuable pedagogical tool. Hyams insists that reflective work should be assessed as graded assessment provides a structure for feedback. Feedback will increase students’ skills as insightful learners.⁵²⁵

In discussing the challenges for legal clinics in Argentina, Puga assumes the clinical experience to be a three-phase cycle: planning-action-reflection, as “the aim of adding a [c]linical component to legal education is ... to offer a true reflective training academy on th[e] [legal] practice, in a structured legal education laboratory, with academic supervision of students’ reflective practice.”⁵²⁶

4.9.5 Should reflection be assessed?

I submit that Ledvinka’s view that, for many students, learning is driven largely by assessment and students will view it as less important and potentially expendable if not assessed. She explains: “Not only are we assessing the student’s substantive knowledge and skills, but also the learning journey he or she has taken from the beginning to the end of the course. In order to

⁵²² Levy-pounds & Tyner 2008 : 18.

⁵²³ Ibid.

⁵²⁴ Macfarlane & McKeown 2008 : 69.

⁵²⁵ Hyams 2008 : 30.

⁵²⁶ Puga 2003 : 245, 246.

assess the learning journey we must have some evidence that it took place and what it encompassed. [Written] reflection provides this evidence.”⁵²⁷

This form of assessment is capable of application to the specific South African context, but with the proviso that the challenges of large student numbers and clinicians’ time constraints be heeded.⁵²⁸

I submit that the percentage that this form of assessment should count towards the year mark should be decided by the clinical director and the course co-ordinator, as it will be dependent on the aims and objectives of the specific CLE course as well as the clinical model.

4.10 Self evaluation, peer evaluation, feedback and peer editing

4.10.1 Self evaluation, peer evaluation and feedback

It has been suggested that students assess themselves against a set of given or negotiated criteria and that it be conducted privately between the clinician and student. Advantages include the improvement in student motivation and confidence, addressing the problems of student development, identifying students’ strengths and weaknesses and allowing for reflection. This process may however be flawed should students not be honest in this assessment.⁵²⁹

The main justification for self assessment is an educational one, namely that the process of assessment is itself an inherently valuable learning experience. There is criticism or concerns on its reliability for certification purposes. An obvious benefit is that it relates closely to the aims of personal development planning, (“PDP”) which involves students engaging in critical self reflection. The primary objective for PDP is to improve the capacity of individuals to understand what and how they are learning and to review, plan and take responsibility for their own learning. The essential characteristic that PDP seeks to develop amongst students is reflection. An example of a PDP element of a formal assessment might be a requirement for each student to keep a reflective account identifying the skills and substantive knowledge they anticipated developing in undertaking the assessment. This could be followed by an appraisal of how well these anticipated outcomes were achieved. Such an exercise provides a formal opportunity for students to reflect on their performance in a critical way, allowing them to identify their strengths and weaknesses

⁵²⁷ Ledvinka 2006 : 39, 40.

⁵²⁸ See discussions of the challenges of large student numbers and clinicians’ time constraints in paragraphs 5 and 7 of Chapter Four. Clinicians may consider viewing the journals with students during tutorials.

⁵²⁹ Haupt & Mahomed 2008 : 289.

and, consequently, where there is a need to improve.⁵³⁰ Self evaluation can be used effectively as a formative assessment tool.

A memo to students on self assessment is illustrated below.

MEMO: SELF ASSESSMENT.⁵³¹

STUDENT NAME:

Answer questions 1 and 2 **before** reading the critique of your assignment. Answer the remaining questions after your read and analyse the critique of your assignment.

1. After re-reading your paper, list the three most significant mistakes you made in your paper.
 - a.
 - b.
 - c.
2. After re-reading your paper, list the three strongest parts of your paper.
 - a.
 - b.
 - c.
3. After reading the critique of your paper, what do you now consider to be the three most important areas that need improvement?
 - a.
 - b.
 - c,
4. What steps will you take to address these areas that need improvement?

.....
.....

⁵³⁰ UKCLE <http://www.ukcle.ac.uk/resources/trns/fortfolios/three.html>
⁵³¹ Duhart & Niedwiecki 2011.

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Clinician's Critique

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Proper feedback to students on their self-assessment is of the utmost importance. Blaustone identifies a number of causes for feedback failures. These are negative feedback, negative tone and style of delivery, student passivity and hidden methods.⁵³² As a core learning theory, she discusses the basis for the six-step feedback model she developed. This model has certain core principles of theory, namely that the feedback process should be structured as a source of learning; self-generated observations deepen and expand learning; careful, rigorous, guided and structured reflection on performance increases the learning of both skill and substance; without a structured feedback process, self-assessment is an after-thought rather than an assimilated aspect of the conduct of professional work; repetition anchors knowledge and fosters movement from simplistic to complex understanding of knowledge; and safety in self-assessment motivates improvement.⁵³³

Blaustone's six-step feedback model, which she uses in both simulation and clinical supervision, comprises the following:

Step one: the student identifies strengths of the performance;

⁵³² Blaustone 2006 : 147 – 151.

⁵³³ Blaustone 2006 : 152 – 154.

Step two: the clinician responds solely to those items raised by the student (only positive feedback should be given at this point);

Step three: the clinician identifies other strengths of the performance;

Step four: the student identifies difficulties and/or changes to be made;

Step five: the clinician responds to the identified difficulties; and

Step six: the clinician identifies additional difficulties.⁵³⁴

Blaustone indicates that optimal use of the model also requires that the clinician make careful, sound judgments about what aspects of a performance should be reviewed with a structured feedback methodology. If too many aspects of a performance in too exacting a manner are covered, the result may be that the student feels overwhelmed and perhaps even demoralised.⁵³⁵ This six-step model was received well by colleagues as the clinician's role and obligations in feedback are now viewed as a larger part of the supervision relationship with students.⁵³⁶ I submit and am in agreement that, in following the six-step feedback model, clinicians will have the ability to stay objective and adhere to a structure, rather than impulsively reacting negatively in discussions with difficult students. Better performing students will also appreciate the rigorous feedback discussion.

Peer evaluation has been proposed as a manner of assisting a clinician to validate their judgment of student achievement and to re-enforce with students the role of collegial decision-making in professional life.⁵³⁷

Self- and peer evaluation is used successfully at the Department of Political Science at the University of the Witwatersrand.⁵³⁸ "Essays are returned with evaluative comments, but no marks. The lecturer has read and assigned marks and recorded them, but withholds this for the time being. Students are then required to complete a self evaluation. Each student reads the essay of two peers in the class and then writes a one page appraisal of his/her paper in the light of the other two. Peer reading is regarded as a powerful tactic, as it enlarges students' experience in the

⁵³⁴ Blaustone 2006 : 154 – 159.

⁵³⁵ Blaustone 2006 : 162.

⁵³⁶ Blaustone 2006 : 163.

⁵³⁷ Mennon 1998 : 277 - 278.

⁵³⁸ <http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssessmentOfStudentLearning.doc>

same way as it enlarges [academics'] own as scholars.”⁵³⁹ As students have no idea of the range of work that teachers see, and partly as a consequence, they do not understand why grades are distributed as they are. This exercise is therefore also a helpful tool in teaching students how to achieve the stated learning outcomes.

There are however certain risks in self and peer evaluations as a form of assessment when measured against the phenomenographic model where learning is studied from the perspective of the learner, not that of the teacher.⁵⁴⁰ The object of this type of assessment is to see how students construe the content and phenomenography takes as the only reality the student's immediate perception of the task, ruling out another student's or the teacher's perceptions.⁵⁴¹ Biggs indicates two consequences: Firstly, “a bright student will see things differently from a dumb student; the importance is the perception itself in each case, not the brightness or the dumbness which may affect the perception. The student's perspective is adopted as the only reality: brightness is a category used by an outsider, not by the experience.” The second consequence is that “it becomes impossible to generalize across teaching/learning situations. If each individual's perspective is unique, you are left with an infinite number of perspectives.”⁵⁴² In phenomenography there is a hint of a prescriptive return to the one-correct-theory: that this is the way to construe learning and that any other way is simply wrong.⁵⁴³ This would imply that, during self-evaluation, the student's interpretation of what he/she has learnt and done, is correct and not what the clinician intended him/her to learn or do. The outcome of this assessment will necessarily be good.

Sergienko views the obstacles to good peer or self assessment as formidable and opines that they need to be carefully considered and minimised. The same deficiencies that make people poor performers often make them poor judges.⁵⁴⁴ He identifies a bias in favour of own work, as people are likely to confuse what they said with what they meant to say. Students then want to defend their work instead of learning from its limitations. Although biases are diminished with peer assessment, bias may still exist, because students assess their peers leniently, hoping for future lenient assessment in return.⁵⁴⁵

⁵³⁹ Ibid.

⁵⁴⁰ Biggs 1994 : 8. Phenomenography ‘is based on the idea that the learner's perspective defines what is learned, not what the teacher intends should be learned.’ See Biggs 2003 : 12.

⁵⁴¹ Biggs 1994 : 9.

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ Sergienko 2001 : 480.

⁵⁴⁵ Ibid 482.

I submit that, where students work in pairs or firms, peer evaluation appears to be more appropriate, bearing in mind the consequences explained in the phenomenographic model in the discussion above. The criteria are already circumscribed by the lecture plans and a clinic manual,⁵⁴⁶ indicating outcomes, methodology, assessment methods and prescribed and recommended material for all lectures and file work.

Self evaluation and peer evaluation is not used as a form of assessment at the WLC. At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on assessment of the course ‘practical legal studies’. For 2009, 27 students, for 2010, 17 students and for 2011, 16 students completed the questionnaire.⁵⁴⁷ Students were asked: “What are your views on self-evaluation? Should marks be allocated for such an evaluation?” For 2009, five students replied “yes” and 22 students replied “no”. Two students left the answer blank. For 2010, four students replied “yes” and 12 students replied “no”. One student left the answer blank. For 2011, two students replied “yes” and 12 students replied “no”. Two students left the answer blank.

Students were also asked: “What are your views on peer-evaluation? Should marks be allocated for such an evaluation?” For 2009, seven students replied “yes” and 19 students replied “no”. One student left the answer blank. For 2010, six students replied “yes” and ten students replied “no”. One student left the answer blank. For 2011, seven students replied “yes” and nine students replied “no”.

I submit that, upon balancing the suggested advantages and challenges,⁵⁴⁸ these forms of assessments should not bear a credit towards a year mark, as the standard of these assessments may fluctuate, specifically within clinics, such as the WLC, accommodating large student numbers operating in different specialised units. I suggest however, that both these forms of assessment, without attracting a percentage towards the year mark, may be accommodated during the formative assessment of students’ file work at the end of the first semester and serve towards student self-development.

⁵⁴⁶ At the WLC all students receive a clinic manual at the start of the course where all criteria, including assessment requirements are indicated.

⁵⁴⁷ WITS LAW CLINIC : 2009, 2010 & 2011.

⁵⁴⁸ ‘Advantages include the development of students’ evaluative thinking skills and motivating students, as they “own the process”. Challenges include issues of personal anxiety and exposure which could have a negative effect on the process. It remains a challenge to determine objective summative results, as students may tend to grade those components that are easier to measure or they may tend to grade towards the middle to avoid obvious offence.’ Haupt & Mahomed 2008 : 291.

At the UPLC self assessment is generally conducted privately between clinician and student which can result in increased motivation and confidence. When interviewing skills are taught, students are required to participate in a self assessment process to make students aware of their own development.⁵⁴⁹ A summative grade is allocated to peer assessment which adds 3,75% to the year mark. It is however important to note that, due to a different teaching model used, this assessment method can be more readily adopted. Standard self and peer evaluation forms are used. The same rubric, illustrated below, is used for both self- and peer assessments.

Firm: **PEER ASSESSMENT⁵⁵⁰**

Please rate the team effectiveness of your team member by placing an “x” in the appropriate block

	Name of team member to be rated:	Seldom	Some of the time	Most of the time	All of the time
1	Attended all group activities and meetings				
2	Participated in all group activities and meetings				
3	Shared responsibilities for assigned tasks				
4	Provided effective and efficient assistance				
5	Provided constructive feedback during projects				
6	Exerted a significant effort to achieve project goals				
7	Acted in a trustworthy way				
8	Motivated other group members				
9	Controlled temper during group activities				
10	Criticised ideas, not people				
	Name of team member to be rated:	Seldom	Some of the time	Most of the time	All of the time
1	Attended all group activities and meetings				
2	Participated in all group activities and meetings				
3	Shared responsibilities for assigned tasks				
4	Provided effective and efficient assistance				
5	Provided constructive feedback during projects				
6	Exerted a significant effort to achieve project goals				
7	Acted in a trustworthy way				
8	Motivated other group members				
9	Controlled temper during group activities				
10	Criticised ideas, not people				

⁵⁴⁹ Haupt & Mahomed 2008 : 289, 290.

⁵⁵⁰ UNIVERSITY OF PRETORIA LAW CLINIC 2012: Peer Assessment rubric. Note that the same rubric is used for self evaluation.

A UPLC clinician noted that the more mature students tend to be honest and critical of their own performances, while the less mature students tend to value themselves high. This view aligns with a study of Cornell undergraduates concluded that “‘incompetent’ people are likely to overrate their performance and give their performance higher ratings than competent people give their own performance”.⁵⁵¹ The UPLC clinician indicated that, although these evaluations do not count much, they have the factor of “beware”!⁵⁵²

Peer- and self assessments are not used neither at the UJLC, nor at the UFSLC.⁵⁵³

An analytic rubric for peer assessment is illustrated in paragraph five of this chapter.

Self- and Peer evaluations are forms of assessment capable of application in the South African context, but with the proviso that the challenges of large student numbers and clinicians’ time constraints be heeded.⁵⁵⁴ Self evaluations can be useful for both students and clinicians, particularly in a tutorial context where students work in pairs or firms and the challenges of “education and experience variances amongst students” and the “differing levels in students’ knowledge of substantive and procedural law” are encountered.⁵⁵⁵

Although capable of application, peer reviews should be applied with caution in the South African context, particularly where student pairs were grouped by clinicians and where underlying tensions may be present.⁵⁵⁶ In conducting these peer assessments in the South African environment, clinicians need to take cognisance of diversity issues and multiculturalism.⁵⁵⁷

I recommend that peer evaluations only be applied where students work in groups in activities such as trial advocacy exercises where group marks are awarded, or where students operate in firms. The aim of such peer evaluations will be to ensure cohesion during group work,

⁵⁵¹ Sergienko 2001 : 480.

⁵⁵² Haupt & Mahomed 2008 : 282.

⁵⁵³ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30; UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: RPK412 course outline.

⁵⁵⁴ See discussions of the challenges of large student numbers and clinicians’ time constraints in paragraphs 5 and 7 of Chapter Four.

⁵⁵⁵ See discussions of these challenges in paragraphs 5 and 7 of Chapter Four.

⁵⁵⁶ These underlying tensions may be as a result of students’ different languages or backgrounds. Vawda recommends that where pairings occur that involve different languages or backgrounds, “the solution is not to discard such pairings”, as “allocating students within the same groups does not eliminate many of the problems” and “it amounts to segregation ... which can ... reinforce isolation and alienation, and does nothing to prepare students for the real world”. See Vawda 2006 : 304.

⁵⁵⁷ See discussion in paragraph 21 of chapter four. For a full discussion on diversity and multiculturalism, see Vawda 2006.

or alternatively, the indication of group member(s) failing in participation in group work. The peer evaluation should serve as a formative assessment.

4.10.2 Peer editing / peer review

Distinct from peer assessment, but with similar characteristics, is peer editing, also referred to as peer review. With the ABA's review of current law school accreditation standards, the recommendation is that the focus must be on what students take away from the course, therefore outcomes based. Assessments must be valid and reliable measures must be employed. Peer editing can be used successfully for large class sizes and is particularly useful in legal writing courses.⁵⁵⁸

Peer editing is a form of collaborative learning in which students review and critique each other's work.⁵⁵⁹ Peer editing makes student learning outcomes, feedback and formative assessment both feasible and effective.⁵⁶⁰ It provides for immediate feedback and with an opportunity to improve their learning and develop working relationships with their peers.⁵⁶¹ It will furthermore improve writing skills, increase confidence levels, develop strong peer relationships and perceive the writing process as a positive and useful experience.⁵⁶² Clinicians must take a methodical approach to incorporate peer editing in the CLE course and consider projected outcomes and assessment needs.⁵⁶³ Peer editing will allow students to become more practice ready with improved teamwork, writing and editing skills and clinicians will receive helpful assessment information. Peer editing is specifically suited for small group projects, such as will be used within student firms.⁵⁶⁴

The advantages of peer editing proved to be cooperative experiences and relationships, editing, writing skills, self confidence, mutual support, sense of community, trusting relationships and the development of greater respect for others.⁵⁶⁵ Students will receive constructive feedback, be receptive to hearing and receiving comments from colleagues, develop the ability to carefully review and evaluate constructive criticism, resolve any conflicting suggestions and integrate

⁵⁵⁸ Hill 2011 : 668, 669.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid.

⁵⁶² Ibid.

⁵⁶³ Ibid.

⁵⁶⁴ Ibid 671.

⁵⁶⁵ Ibid.

specific feedback into their own papers.⁵⁶⁶ They will have open minds to other possibilities when they see how different writers approach and analyse the same problem or task and consider other reasons and arguments.⁵⁶⁷ Students will realise they have their own unique and personal writing styles, their abilities to engage in critical thinking and legal analysis will improve and will become more aware that legal professionals prepare documents for an actual audience.⁵⁶⁸ Peer editing constitutes a viable internal assessment method and clinicians can provide more student feedback.⁵⁶⁹

Challenges include that students don't take it seriously - therefore clinicians must provide clear and adequate directions and guidance. They must provide constructive feedback to overcome students' inherent competitive nature and desire to receive the highest grade.⁵⁷⁰ Clinicians must guard against students' perceptions that weaker students will simply benefit at the expense of stronger students.⁵⁷¹

When employing peer editing, course goals must be met. Lawyering skills developed using this process, were identified as problem solving, legal analysis and reasoning, legal research, factual investigation, communication and recognising and resolving ethical dilemmas.⁵⁷²

Hill suggests that clinicians can outline more detailed learning objectives or tasks that serve as subsidiary goals. The learning objectives could include a number of proficiencies which is a sampling of tasks. For example, "students will be able to:

- 1) identify the legal issues presented by the facts;
- 2) derive the rules from relevant authority;
- 3) use the relevant authority to explain the rules and related policy;
- 4) identify the ... rules, reasoning, and key facts in relevant authority accurately;
- 5) use relevant authority to make arguments employing rule-based and analogical reasoning;
- 6) predict the likely outcome given the facts and relevant authority;

⁵⁶⁶ Ibid.

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid 671 - 674.

⁵⁶⁹ Ibid 677.

⁵⁷⁰ Ibid.

⁵⁷¹ Enquist 2008 : 657 – 659.

⁵⁷² Munro 2002 : 232, 233.

- 7) communicate the likely outcome and analysis in writing by drafting and editing a legal memorandum effectively;
- 8) evaluate a peer's writing critically and provide constructive feedback for improvement; and
- 9) receive input and constructive criticism from a colleague and incorporate needed suggestions.”⁵⁷³

The above can form the basis of a course-planning chart and assessment rubric.⁵⁷⁴ Clinicians should prepare a peer editing checklist which can reflect the grading rubric for the assignment. It should list the concepts or material expected to be seen in the product or identify specific criteria students should use to critique their partners' work. Peer editing can be optional or mandatory or even graded.⁵⁷⁵

To assess whether students can demonstrate a proper use of relevant authority, clinicians may eventually require students to prepare a multiple issue predictive memorandum using case authority. They can use a variety of classroom instructional activities. This exercise notably also serves as an assessment method for other learning objectives and to gauge students' development⁵⁷⁶.

Peer editing assignments can effectively be done in teams, groups or firms. This will allow students the opportunity to review and critique more than one paper and receive feedback from more than one peer.⁵⁷⁷ There is disagreement regarding anonymity of the peer editing. Some authors believe anonymity yields better and more honest feedback,⁵⁷⁸ whilst others feel that anonymous reviews compromise students' abilities to exchange ideas and to become accustomed to both giving and receiving constructive criticism.⁵⁷⁹ A debriefing session after the peer review is an important continuation of the learning and assessment process. When students work in groups the clinician can call on any student to answer specific questions, share team/firm discussions or comment on the collaborative experience. The shyest student will come to appreciate the opportunity to work collaboratively with classmates and appreciate the many

⁵⁷³ Hill 2011 : 680.

⁵⁷⁴ Ibid 682, 710 – 717.

⁵⁷⁵ Ibid 690, 691.

⁵⁷⁶ Ibid 680 – 682.

⁵⁷⁷ Ibid 684 – 687.

⁵⁷⁸ Durako *et al* 1997 : 743, 744.

⁵⁷⁹ Parker 1997 : 587.

advantages of learning from their peers. Peer editing is seen as an optimal way to increase formative assessment.⁵⁸⁰

I submit that peer editing can be used effectively for formative assessment within student firms.⁵⁸¹ Firms may then discuss their experiences during student firm conferences with the clinician.

Peer editing is capable of application in the South African context, but with the proviso that the challenges of large student numbers and clinicians' time constraints be heeded.⁵⁸²

4.11 Client evaluation

Advantages of client evaluations of students' work were suggested to be: assistance to the clinic with quality control and allowing clinicians the opportunity to provide students with feedback, which in turn will allow them to reflect on their developmental skills.⁵⁸³ I submit that such assessment results may not be conclusive when weighed against the challenges,⁵⁸⁴ which include that clients could possibly be confused or even deceitful in their responses to the questionnaires; clients may be illiterate, thus defeating the purpose of the exercise; and clients may be intimidated by the process. I further submit that client evaluation exercises are time consuming and are not sensible when weighed against the large volumes of students and clients that are to be accommodated on a daily basis.

I submit that within the typical profile of clinic clients,⁵⁸⁵ who are not educated in law or the practice thereof, no particular insight into the operation or application of the law can be reasonably expected. Chavkin posits that "clients have enough to deal with in their lives" and they might view participation in reviews "as a condition of future service by the clinic".⁵⁸⁶ Clients may therefore complete questionnaires in a manner that is not intended to offend the student counselors to whom they entrust their legal problems.⁵⁸⁷

⁵⁸⁰ Hill 2011 : 689 - 708.

⁵⁸¹ See the discussion of students working in firms in paragraph 6 of chapter 4 of this study.

⁵⁸² See discussions of the challenges of large student numbers and clinicians' time constraints in paragraphs 5 and 7 of Chapter Four.

⁵⁸³ Haupt & Mahomed 2008 : 291 - 292.

⁵⁸⁴ Ibid.

⁵⁸⁵ De Klerk 2007 : 97 on the profile and education of typical clinic clients.

⁵⁸⁶ Chavkin 1994 -1995 : 203.

⁵⁸⁷ Haupt & Mahomed 2008 : 292.

I further submit that the success of the application of the law is measured by the clinician during tutorial sessions. In agreement with De Klerk: “[c]lients can merely comment on non-legal components such as students’ punctuality, friendliness and courtesy and communication in understandable language. Whilst these characteristics are not unimportant, clients’ ultimate requirement in clinical legal practice is often simply to ‘put right what is wrong’, irrespective of legal complexities or the duration it might take.”⁵⁸⁸

Client evaluations are not part of the WLC’s assessment regime. At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on assessment of the course ‘practical legal studies’. For 2009, 27 students, for 2010, 17 students and for 2011, 16 students completed the questionnaire.⁵⁸⁹ Students were asked: “What are your views on client-evaluation? Should marks be allocated for such an evaluation?” For 2009, eight students replied “yes” and 18 students replied “no”. One student left the answer blank. For 2010, nine students replied “yes” and eight students replied “no”. For 2011, seven students replied “yes” and nine students replied “no”.

The UPLC employs this method for which they have a standard client evaluation form and for which summative grades are allocated.⁵⁹⁰

Client assessment – questions

	STRONG- LY DIS- AGREE (1)	DISA- GREE (2)	DON'T KNOW (3)	AGREE (4)	STRONG- LY AGREE (5)
Made me feel comfortable					
Treated me with respect					
Was interested in me as a person					
Listened to me					
Understood what was most important to me					
Understood why I needed legal help					
I understood everything					

⁵⁸⁸ De Klerk 2007 : 97.

⁵⁸⁹ WITS LAW CLINIC : 2009, 2010 & 2011.

⁵⁹⁰ UNIVERSITY OF PRETORIA LAW CLINIC 2012: client assessment questions.

Did explain what he/she would do next for me					
Was someone I could trust					
I will recommend the clinic to my friends					
TOTAL					
TOTAL / 50					

The UPLC clinicians indicated that client satisfaction is generally considered to be at the core of good business practice. They view the initial interview with the client to be the best opportunity to conduct the assessment, as it affords the clinicians opportunity to provide feedback to students to reflect upon. They indicate that it would be useful to assess client satisfaction at the conclusion of the case, but acknowledge that problems may arise when a client is “influenced by the outcome of his case.”⁵⁹¹ The UPLC clinician interviewed commented that, although it does not count much, it has a psychological factor to keep students alert.⁵⁹²

At the UJLC records are kept of clients’ compliments and complaints, but no formal client evaluations are conducted. No formal client evaluations are conducted at the UFSLC.⁵⁹³

Client evaluation is a form of assessment capable of application in the South African context, but is not recommended, as the disadvantages and lack of usefulness outweigh any possible advantages.

4.12 Case file work assessment / case file work portfolio

At the WLC a percentage of a student’s year mark is allocated to the file work assessment. Case file work refers to the clients’ cases (whether litigation or administrative) that the student pairs worked on during the year. Although students work in pairs, individual marks must be allocated. The assessment criteria were adapted during the last number of years. During 2007 the nine criteria that were taken into account when files were assessed were: the quality of the statement

⁵⁹¹ Grobler & Keulder 2011 : 6, 7.

⁵⁹² Haupt & Mahomed 2008 : 282.

⁵⁹³ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30; UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: RPK412 course outline.

taken from the client, analysis of the problem, ability to assess and plan strategy, execution of strategy, drafting, verbal communication skills, and sense of responsibility/attendance.⁵⁹⁴ During 2008 the last criterium (sense of responsibility/attendance) was more defined. Attendances specifically referred to those in the clinic (compulsory weekly clinic duty), compulsory weekly tutorials and compulsory skills exercises that may have been presented. The sense of responsibility criterium was more defined to reflect upon students' files' appearances and order and the management of their cases.⁵⁹⁵ These criteria remained until 2012.⁵⁹⁶ During 2012, five criteria were used as a guide to awarding marks. These were:

- 1) Professional relationships: Did the student – keep clients advised of progress on files; assist clients to make good decisions; communicate effectively with clients, the opposition and with supervisors; interact well with clinic staff; interact well with student partners; observe punctuality?
- 2) Problem solving: Did the student – identify legal problems; consider alternative solutions; assess various alternatives; develop a plan to solve the problem; reliably implement the plan and remain open to adapting the plan?
- 3) Professional responsibility: Did the student – take initiative to raise issues and plan strategies; take responsibility for actions and consequences; learn from feedback, observations and experience; help his/her partner improve?
- 4) Ethical practice: Did the student – identify ethical issues; observe client confidentiality; inform the supervisor about ethical issues and generally follow ethical rules? and
- 5) Organising and managing file work: Did the student – meet deadlines; follow office procedures; keep files organised and updated; ask for guidance on case management and manage time effectively?⁵⁹⁷

The criteria changed again in 2013. The 10 criteria now are:

- 1) interviewing/fact investigation and counseling;
- 2) critical thinking and analysis;
- 3) writing skills (persuasive/analytical/format/grammar, and legal drafting);
- 4) research (including computer skills and ability to learn unfamiliar areas of law);

⁵⁹⁴ Haupt & Mahomed 2008 : 284.

⁵⁹⁵ Wits Law Clinic Manual 2008 :12.

⁵⁹⁶ Wits Law Clinic Manuals 2008 – 2011.

⁵⁹⁷ Wits Law Clinic Manual 2012.

- 5) knowledge of procedural and substantive law;
- 6) file management;
- 7) oral communication - clinic/tutorials/presentations;
- 8) journaling (reflection);
- 9) professional responsibility (ethical practice/social awareness/team work/professional relationships/attendance); and
- 10) initiative/sense of responsibility/problem solving.

Upon analysis of the above criteria from 2007 until 2010, specific challenges for the clinician can be identified.⁵⁹⁸

When the quality of a statement, the first criterium, is assessed, it often becomes difficult to distinguish which of the students forming the specific pair formulated and took down the statement. Students often indicate that it was a combined effort, where one dictates and the other writes it down. Unless the students specifically indicate who was responsible for a specific statement, the clinician has no option but to award the same mark to both the students.

The clinician will find it less problematic to distinguish between the abilities of the students in the pair when assessing criteria two and three, namely the analysis of the problem and the ability to assess and plan strategy. The analysis and strategy planning are normally done during the weekly tutorials where the clinician can better observe the abilities of the individual students. Although the clinician gets to know the students under his/her supervision well during the course of the year, it is advisable for the clinician to keep separate notes regarding individual students' tutorial performances throughout the year as formative assessments. This will ensure objectivity when assessing the large number of students' performances on an individual basis.

The problem of distinguishing the individual performances of students when they work in pairs becomes evident again when the fourth and fifth criteria, namely execution of strategy and drafting ability are assessed. It will not always be clear which student, for example, made the telephone calls, made the file notes or drafted the pleadings. The same reasoning apply in that students often indicate that these efforts were combined attempts, leaving the clinician with no option but to award the same mark to both the students.

⁵⁹⁸ Every student pair may have between six to 10 case files per year. Statistics are available from the Wits Law Clinic.

Individual assessment of the sixth criterium, namely verbal communication skills and sense of responsibility and attendance is possible. 'Verbal communication skills' refer to more than a student's command of the English language. The use and application of legal terminology are considered. Students also need to learn how to 'pitch' their communication, for example: a student is required to use the correct legal terminology and referencing when communicating with a colleague, whereas the same information needs to be transferred into plain language when communicating with a less sophisticated client.

The assessment of the seventh criterium, attendances, poses no specific challenges.

Assessment of the last two criteria, namely file appearance and order and case management may become challenging. It often is difficult to distinguish the percentage of input, or lack thereof, of the students forming the specific pair.

Upon analysis of the criteria for 2012, a distinct deviation from previous criteria becomes apparent. Although the categories are much wider, leaving the clinician more scope to interpret and to award marks, the opposite is also evident. The previous criteria 'verbal communication skills' and 'sense of responsibility/attendance' are, in terms of the 2012 criteria, assessed as 'professional relationships' and 'organising and managing file work' respectively. Previous criteria 'analysis of the problem, ability to assess and plan strategy and execution of strategy' are, in terms of the 2012 criteria, assessed as 'problem solving' and 'professional responsibility'. The 2012 criteria do not make specific provision for assessing 'the quality of the statement taken from the client' and 'drafting skills'. Although these can be accommodated under the 'problem solving' criterium, the neglect of specifically highlighting these, accentuates one of the most important challenges faced, namely writing skills, which will be incorporated in these. The statement furthermore forms the basis of the client's case, making it one of the key skills to be assessed. The statement will also reflect the student's interviewing skills, the assessment of which was identified as a key challenge. The challenges identified when assessing students working in pairs, will also be applicable to the 2012 criteria.

The analysis of the criteria for 2013 reveals distinctive planning by the clinicians and the course-coordinator. It seems to encompass the better elements of the criteria since 2007. Although the criteria are listed in detail, no weighting is allocated, which I submit should be reviewed. To illustrate: journaling (reflection) is a new component added to the curriculum, although provision is only made for one such opportunity – in week 13 during a double lecture

session. No evidence on how it should be structured, or student guidelines, other than “students will be given an opportunity to reflect through their journals on their clinic experience” could be obtained. This reflection nonetheless seems to carry the same assessment weight as the other criteria. The same train of argument can be used for most of the criteria when they are compared. An example of an assessment rubric will be offered at the end of this discussion. The challenges identified when assessing students working in pairs, will also be applicable to the 2013 criteria.

The apparent assessment difficulties when students work in pairs, seem to be the drafting of client statements, execution of strategy and drafting of court pleadings, file appearance and order, and case management. The statement taking and drafting difficulties can be overcome by requiring each student to draft these separately. But for file appearance and order, the remaining challenges may be overcome by requiring students to make file notes, under their own names, of activities undertaken in their file work. They may also indicate on these notes instances where these were combined efforts.⁵⁹⁹ Although file work assessment is summative, it necessarily includes elements of formative assessments which were conducted throughout the year. The seven principles of effective formative assessment described in paragraph 2 above, should be followed rigorously during student tutorials to validate the element of formative assessment that may influence a clinician’s summative mark.

Chavkin recognises the difficulties when “joint efforts” must be evaluated and suggests one of two models a clinician can choose from when evaluating students’ casework.⁶⁰⁰ Students are held liable jointly and severally for team work under the first model. Under the second model, students bear individual liability to the extent in which the clinician can identify individual work.⁶⁰¹ The procedure followed at the WLC when assessing students’ case file work, corresponds with Chavkin’s second model.

The UPLC does not conduct case file work assessments individually. Their practice is to do a summative assessment of a portfolio which consists of a student diary in which all activities in the clinic is recorded and a collection of the clients’ files that the student has worked on. Clinicians are paired for purposes of assessment, to ensure objectivity and reliability and facilitate a grade on a biannual basis. Criteria are the correct opening of files, neatness, evidence of an

⁵⁹⁹ Du Plessis 2009 : 103 – 105.

⁶⁰⁰ Chavkin 1994 - 1995 : 227, 235 and 236.

⁶⁰¹ For discussion of these models, see Chavkin 1994 - 1995 : 236.

understanding of the diary system, correct application of the means test, and the quality of the statement taken from the client.⁶⁰²

The UPLC file assessment rubric,⁶⁰³ which forms part of the portfolio assessment, is illustrated below.

FILE ASSESSMENT

FIRM:

FILE NO:

ITEM	MARK (1 = poor – 5 = great)	COMMENTS
Cover		
Diarising		
Activity sheet		
Arrangement of money		
Subfolders		
Application form		
Nature of legal aid		
Approval of file		
Consultation notes		
Correspondence		

The remainder of the portfolio consists of the oral examination, described in paragraph 4.7 above.⁶⁰⁴

In comparing the above two clinics, I am in agreement with Haupt and Mahomed, who submitted “that the criteria employed by the UPLC are limited as the focus is on testing the

⁶⁰² Haupt & Mahomed 2008 : 283, 284.

⁶⁰³ UNIVERSITY OF PRETORIA LAW CLINIC 2012: File Assessment Rubric.

⁶⁰⁴ On portfolios in general, see Baume 2001, Baume 2008 and Webb 2002.

development of specific skills whereas at the WLC clinicians are required to reflect, not only on skills development, but also on the ability of students to analyse and act upon their matters.”⁶⁰⁵

At the UJLC students attend one semester of clinic duty. Clinic and file work make up 50% of the students’ year mark. Assessments of these components are continuous, as clinicians will assess all work done after every clinic duty. At the end of the semester, these continuous assessment marks are calculated towards a final mark for these components. Students must attend lectures during the entire academic year. Formal tests are written during each semester, i.e.: two tests. Formal exams are written at the end of each semester. These four assessments count a further 50% towards the final year mark.⁶⁰⁶

I recommended that rubrics be used during these assessments to ensure an even-handed assessment of all the students. An example of rubrics for assessment of a letter addressed to a client, a rubric that serves as an example for assessing students’ attendances to civil complaints, an example rubric for assessing students’ interviewing skills and of a client’s complaint and subsequent client consultations as well as an assessment rubric to be used when assessing students’ general clinic competencies are illustrated below.

RUBRIC CLIENT LETTER⁶⁰⁷

NAME:

DATE:

LEVELS OF QUALITY

	Exemplary Advanced work for student at this time in the course – the work would need very little revision from a clinician.	Competent Proficient work for a student at this time in the course – the work would need to be revised with input from a clinician.	Developing Work needs additional content or skills to be competent – the work would not be helpful and a clinician would need to start over.
SUMMARY PARAGRAPH The purpose of the summary is to let the client know the most	* Clearly communicates most important legal analysis in layperson’s terms.	* Analysis is generally clear; may contain portions where there is too much legalese or where the language is	* Analysis is unclear because legalese or language or writing mechanics and grammar make it too difficult to follow.

⁶⁰⁵ Haupt & Mahomed 2008 : 283, 284.

⁶⁰⁶ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

⁶⁰⁷ <http://lawteaching.org/teaching/assessment/rubrics/index.php>

essential points of the analysis. This is what you might want the client to read as the client is waiting to meet with you.	* Includes recommended course of action – what are the next steps? * Applies law to facts to show support for the recommended course of action.	too formal. * Includes somewhat clear recommended course of action. * Somewhat applies law to facts to show support for the recommended course of action, but may lack clear connections.	* Refers to course of action, but client would be confused about what he/she is being counseled to do. * Minimally applies law to client facts OR relies too much on law OR relies entirely on facts to summarise the explanation.
FACTS Facts should be stated specifically in letters to avoid confusion by the client. Facts that are unknown, but critical to the case, are often identified.	* Clearly states dispositive facts in an organised way, notes absence of necessary facts (if applicable). * Clearly states that opinion was formed based on facts in letter. * Asks client to review closely and report any discrepancies. * Clearly identifies additional facts that might be helpful or facts that need further development	* Facts are identified but may include minimal irrelevant facts or omit a couple of dispositive facts. * States that opinion was formed based on facts in letter. * Asks client to review facts. * Somewhat reference to developing additional facts.	* Facts are identified but include several irrelevant facts or omit several dispositive facts or are overly general. * Omits that opinion was formed based on facts in letter. * Does not ask client to review facts closely and report any discrepancies. * Little reference to developing additional facts.

LEGAL ANALYSIS (EXPLANATION) Client letters must include the relevant legal analysis necessary to answer the client's question.	* Identifies all relevant steps in legal analysis in a way that the client can easily understand. * Clearly articulates applicable rule.	* Identifies the most relevant steps in legal analysis in a way that the client can understand. * Articulates applicable rule somewhat clearly.	* Identifies some of the legal analysis but omits important points. * Unclearly or inaccurately articulates rules
--	---	--	--

	* Client's facts are woven into analysis so that client can clearly understand how the student attorney made the prediction. * Notes any uncertainty or unsettled aspects of the law, weaknesses, and resolves them.	* Client's facts are woven into analysis but may have one area where relationship between law and fact is unclear. * Notes some uncertainty or unsettled aspects of the law, as well as weaknesses, but may not resolve them.	and/or tests. * Client's facts are woven into analysis but relationship between law and fact is unclear or client's facts not woven into analysis. * Fails to note uncertainty or unsettled aspects of the law, as well as weaknesses, or notes them but ineffectively resolves them.
ORGANISATION Like all legal writing, the client letters require organisation around central points of analysis.	* Large-scale organisation is evident in clearly written, plain English, concise topic sentences. * Organisation within paragraphs is evident in clear, concise sentences logically ordered. * Sentences are clear and concise. * Headings are effective.	* Large-scale organisation is somewhat evident in clearly written, plain English, concise topic sentences. * Organisation within paragraphs is mostly evident but some sentence sequences may be difficult to follow. * Sentences are mostly clear and concise. * Headings somewhat effective.	* Large-scale organisation is hard to follow; topic sentences mostly lacking. * Organisation within paragraphs is confusing. * Sentences are unclear and fail to communicate efficiently or logically. * Headings mostly ineffective.
WRITING MECHANICS	* Uses correct grammar, punctuation and spelling.	* There are some errors to fix, but generally uses correct conventions.	* Errors distract the reader and make letter difficult to read.

Overall comments:

.....

.....

.....

RUBRIC: CIVIL COMPLAINTS⁶⁰⁸

NAME:

DATE:

EXEMPLARY Advanced work at this time in the course. Very little revision by clinician required.	COMPETENT Proficient work this time in the course. Revision by clinician required.	DEVELOPING Work needs additional content or skills to be competent. Student work would not be helpful and clinician would need to start over.
Correctly joined and named all appropriate parties.*	Missed one appropriate party (or did not correctly name a party).*	Missed more than one appropriate party and/or did not correctly name an appropriate party.*
Correctly identified the proper court.	Correctly identified the proper court.	Did not correctly identify the proper court.
Correctly pled the necessary facts to establish jurisdiction and identified the jurisdictional basis.	Correctly pled the necessary facts to establish jurisdiction and identified the jurisdictional basis.	Did not plead the necessary facts to establish jurisdiction and/or correctly identified the jurisdictional basis.
Identified all potentially viable claims against each party and did not have any claims that were not viable.*	Identified all but one potentially viable claim against each party and did not have any claims that were not potentially viable.*	Did not identify two or more potentially viable claims and/or had claims that were not potentially viable.*
Pled all necessary facts to support each element of each claim and did not plead immaterial facts.	Pled most necessary facts to support each element of each claim and pled few, if any, immaterial facts.	Did not plead many facts necessary to support each element of each claim and/or pled many immaterial or unnecessary facts.
Pled all necessary elements of each potential claim.	Missed one or two necessary elements in potential claims.	Did not plead a number of elements necessary for each claim.
Had sound/logical/tactical reasons why parties/claims were excluded.*	Had sound/logical/tactical reasons why parties/claims were excluded.*	Failed to identify valid reason(s) for excluding parties/claims or reasons were

⁶⁰⁸

ILTL Sparrow 2011 : 1 – 3.

		not based upon sound legal/tactical grounds.*
Clearly and logically organised and easy to follow; allegations were concise – whenever possible, allegations contained only one fact per allegation.	Generally clearly and logically organised; allegations were generally concise.	Claims and facts organised in a way that made it difficult to follow the story of what happened; allegations often contained multiple facts per allegation.
No grammatical, typographical or spelling errors – presentation professional.	One or two grammatical, typographical or spelling errors.	Numerous grammatical, typographical or spelling errors – presentation unprofessional.

* Should the student decide not to sue certain parties or file certain claims, he/she should briefly explain why in a short memo attached to the complaint.

RUBRIC CLIENT COMPLAINT⁶⁰⁹

This rubric can be used to assess students' interviewing skills and client consultations

PERFORMANCE GOAL	EXCEEDS	MEETS	APPROACHES
Complaint Individual Work Working in pairs Working in student firm or student team Goal: exposure, using facts from client interview notes, documents, researching law and providing coherent and concise complaint	Complaint includes facts and law and is well organised, coherent and concise. Clinician would be confident that the student(s) understood and appropriately analysed issues.	Complaint includes facts and law and is generally well organised, coherent and concise. Clinician would require some additional clarification, reorganisation and/or analysis.	Complaint lacks clear organisation, coherence and conciseness. Clinician would require significant clarification, reorganisation and/or analysis.

⁶⁰⁹ ILTL Sparrow 2011 : 1 – 3.

RUBRIC – COMPETENCIES: CLINIC⁶¹⁰

DATE: _____

NAME: _____

Competencies: Clinic

This shows your progress in acquiring desired learning skills.

Assessed levels of competency - to successfully pass the clinical component of the course, you must meet or exceed competent levels clinical performance in at least the final two months of your clinical placement.

Your levels of competency may not exactly correlate with the course grade you earn.

E = Exemplary – The work meets all exemplary or mostly exemplary and some competent criteria. A student performing **exemplary** work requires minimal supervision.

C = Competent – the work meets all competent or mostly competent and some exemplary criteria. A student performing **competent** work would need some input from a clinician.

D = Developing - The work has one or more areas that do not yet meet competent criteria. A student performing work at this level needs to develop additional knowledge, skills or values to be competent. A clinician would need to start over or fix mistakes.

	Weeks ... to ... First Block	Weeks ... to ... Second Block	Weeks ... to ... Third Block	Weeks ... to ... Fourth Block
Professional Relationships				
Problem Solving				
Professional Identity				
Ethical Practice				
Organising and Managing Work				

⁶¹⁰

<http://lawteaching.org/teaching/assessment/rubrics/index.php>

Clinical Work – Performance Competencies⁶¹¹

NAME: _____

DATE: _____

LEVELS OF QUALITY

	Exemplary – score 2 for each exemplary criterion met	Competent – score 1 for each competent criterion met	Developing – score 0 for each developing criterion met
--	--	--	--

PROFESSIONAL RELATIONSHIPS (8 Criteria)

Clients Adversaries Staff Classmates Clinician	* Keeps clients advised of case developments	* Usually keeps clients advised of case developments	* Sometimes keeps clients advised of case developments
	* Helps clients make well-informed decisions	* Usually helps clients make well-informed decisions	* Sometimes helps clients make well-informed decisions
	* Communicates effectively and respectfully with clients without using legalese	* Usually communicates effectively and respectfully with clients without using legalese	* Sometimes communicates effectively and respectfully with clients without using legalese
	* Interacts effectively and respectfully with adversaries	* Usually interacts effectively and respectfully with adversaries	* Sometimes interacts effectively and respectfully with adversaries
	* Interacts effectively and respectfully with clinic- and other staff	* Usually interacts effectively and respectfully with clinic- and other staff	* Sometimes interacts effectively and respectfully with clinic- and other staff
	* Interacts effectively and respectfully with classmates	* Usually interacts effectively and respectfully with classmates	* Sometimes interacts effectively and respectfully with classmates
	* On time and prepared for all tutorials and meetings with clinician	* Usually interacts effectively and respectfully with classmates	* Sometimes interacts effectively and respectfully with classmates
	* Open and honest with clinician; keeps clinician informed of all pertinent case developments	* Almost always on time and prepared for all tutorials and meetings with clinician	* Sometimes on time and prepared for all tutorials and meetings

		* Open and honest with clinician; keeps clinician informed of all pertinent case developments	with clinician * Not always open and honest with clinician; does not keep clinician informed of all pertinent case developments
--	--	---	--

PROBLEM SOLVING (6 criteria)

Issue Spotting Generating alternatives Planning Executing	* Identifies and diagnoses legal problems * Generates alternative solutions and strategies * Thoroughly assesses alternative strategies * Develops a detailed plan of action * Reliably implements a plan of action * Regularly seeks out and keeps the planning process open to new information and ideas	* Identifies and diagnoses legal problems * Generates some alternative solutions and strategies * Assesses alternative strategies * Develops a coherent plan of action * Implements a plan of action * Keeps the planning process open to new information and ideas	* Identifies and diagnoses some legal problems * Generates few alternative solutions and strategies * Somewhat assesses alternative strategies * Somewhat develops a plan of action * Somewhat implements a plan of action * Somewhat keeps the planning process open to new information and ideas
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DEVELOPING PROFESSIONAL IDENTITY AND INDEPENDENT LEARNING (6 criteria)

Taking initiative Learning from experience Contributing to others' growth Self-reflection	* Takes the initiative to be resourceful, raise issues, strategise * Takes responsibility for actions and consequences * Learns from feedback, critique, observations and	* Sometimes takes the initiative to be resourceful, raise issues, strategise * Usually takes responsibility for actions and consequences	* Infrequently takes the initiative to be resourceful, raise issues, strategise * Sometimes takes responsibility for actions and consequences
--	---	---	--

and evaluation Developing independence	experience *Reflects critically and honestly about own performance *Helps classmates improve their performances *Experiments and tries new ways of doing things – willing to take risks	*Usually learns from feedback, critique, observations and experience *Usually reflects critically and honestly about own performance *Usually helps classmates improve their performances *Sometimes experiments and tries new ways of doing things – willing to take risks	*Sometimes learns from feedback, critique, observations and experience *Sometimes reflects critically and honestly about own performance *Occasionally helps classmates improve their performances *Rarely experiments and tries new ways of doing things – willing to take risks
---	---	---	---

ETHICAL PRACTICE (4 criteria)

Issues Rules Communication Performance	* Identifies and analyses ethical issues * Observes client confidentiality * Informs clinician about ethical issues as they arise * Follows ethical rules	* Usually identifies and analyses ethical issues * Observes client confidentiality * Usually informs clinician about ethical issues as they arise * Follows ethical rules	* Sometimes identifies and analyses ethical issues * Usually observes client confidentiality * Sometimes informs clinician about ethical issues as they arise * Sometimes follows ethical rules
---	---	---	---

ORGANISING AND MANAGING LEGAL WORK (5 criteria)

Case monitoring Files Office- procedures Time- management	* Tracks case development and meets all deadlines * Follows office procedures	* Tracks case development and meets deadlines, but need reminders * Generally follows office procedures	* Ineffectively tracks case development and meets all deadlines * Does not follow office procedures
--	---	---	---

	*Keeps files organised and updated *Asks for guidance about unsettled case management issues * Manages time effectively	*Usually keeps files organised and updated *Usually asks for guidance about unsettled case management issues * Usually manages time effectively	*Sometimes keeps files organised and updated *Sometimes asks for guidance about unsettled case management issues * Sometimes manages time effectively
--	---	---	---

Score: _____

Case file work assessment is a form of assessment capable of application in the South African context and I submit that it is an essential form of assessment, as it covers a wide range of skills on which students' capabilities can be evaluated.

4.13 Trial advocacy skills

In many countries more advanced students are permitted to represent clients in lower courts under the supervision of an experienced lawyer. Advantages are two-fold in that the students gain experience and it allows for increased representation for indigent litigants. There are no such student practice rules in South Africa and clinicians tend to have mixed reactions to it, the most prominent being concerns about the increased amount of supervision required, as clinicians currently perceive themselves to be overloaded.⁶¹² McQuoid-Mason correctly indicates that lawyers require training in litigation even if they subsequently decide to engage in non-litigious work. Although litigation skills can be fine-tuned at a practical training school or during compulsory training as candidate attorneys, well rounded students need to know how litigation works in order to provide them with a proper picture of the legal process.⁶¹³

At the WLC trial advocacy skills form part of the CLE course as a skill of practice. A percentage of the year mark was in some years allocated to trial advocacy skills.⁶¹⁴ The teaching and assessment of this module of the course has proved to be the most challenging. The

⁶¹² Vawda 2004 : 125.

⁶¹³ McQuoid-Mason 2003 : 203.

⁶¹⁴ Du Plessis 2009 : 106, 107.

techniques are taught during the weekly 90 minutes lecture session. The challenge arises when the students need to be assessed, preferably in a practical environment. For the past number of years more than 300 students were registered annually for CLE,⁶¹⁵ making meaningful individual assessment problematic. Each student should ideally be assessed on his/her litigation skills when representing both a plaintiff and a defendant. Proper assessment requires each student to be evaluated in both roles for a reasonable length of time. Large student numbers and time constraints render this impossible.

At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on assessment of the course 'practical legal studies'. For 2009, 27 students, for 2010, 17 students and for 2011, 16 students completed the questionnaire. On trial advocacy, the students were asked the following set of questions:⁶¹⁶

1. "Do you feel that awarding a group mark for trial advocacy skills is fair?" For 2009, nine students found it to be fair and 17 students felt it was unfair. One student left the answer blank. For 2010, 10 students found it to be fair and seven students felt it was unfair. For 2011, 13 students found it to be fair and three students felt it was unfair. One student left the answer blank.

2. "Should you feel that trial advocacy skills should be assessed individually, do you feel that: trial advocacy should be a separate course?" For 2009, 12 students replied "yes" and nine students replied "no". Six students left the answer blank. For 2010, 11 students replied "yes" and five students replied "no". One student left the answer blank. For 2011, seven students replied "yes" and seven students replied "no". Two students left the answer blank.

3. "Should you feel that trial advocacy skills should be assessed individually, do you feel that: trial advocacy should be conducted over a longer period?" For 2009, 14 students replied "yes" and seven students replied "no". Six students left the answer blank. For 2010, 11 students replied "yes" and four students replied "no". Two students left the answer blank. For 2011, nine students replied "yes" and three students replied "no". Four students left the answer blank.

4. "Should you feel that trial advocacy skills should be assessed individually, do you feel that: trial advocacy exercises should replace some of the lectures? If so, please indicate which

⁶¹⁵ See statistical data relating to student registrations in paragraph 5.1 of chapter four.

⁶¹⁶ WITS LAW CLINIC : 2009, 2010 & 2011.

lectures may be replaced. Please indicate the value of the lectures you find replaceable.” For 2009, 11 students replied “yes” and seven students replied “no”. Ten students left the answer blank. Lectures that were found to be replaceable, were: ethics (one student), legal research (one student), all lectures (seven students), guest lectures (two students), numeracy and practice management (one student) and all double lectures to become one lecture and so add up lecture times to allocate to trial advocacy (one student). For 2010, 10 students replied “yes” and five students replied “no”. Two students left the answer blank. Lectures that were found to be replaceable, were: ethics (one student), legal research (two students), all lectures (seven students), numeracy and practice management (one student) and all double lectures to become one lecture and so add up lecture times to allocate to trial advocacy (one student). One student felt that unit based lectures should be retained. For 2011, 11 students replied “yes” and two students replied “no”. Three students left the answer blank. Lectures that were found to be replaceable, were: all lectures (seven students), numeracy and practice management (four students), drafting lectures (three students), to shorten trial advocacy lectures (one student) and all double lectures to become one lecture and so add up lecture times to allocate to trial advocacy (one student).

In preparation for a trial, students are provided with a set of facts, containing statements of all the parties, including witnesses, court pleadings, and other details necessary for them to build a case and prepare for a trial. The trials are simulations in a courtroom environment. On completion of the trial exercise, students are assessed according to a guide (rubric). The first such assessment rubric was used during 2005.⁶¹⁷

ASSESSMENT REPORT

PRACTICAL LEGAL STUDIES TRIAL ADVOCACY COURSE 2005

Name of student: **Student number:**

Guide to assessment: Outstanding 18 – 20; Excellent 16 – 17½; Very Good 14 – 15½; Good 12 – 13½; Average 10 – 11½; Poor 8 – 9½; Unacceptable 0 – 7½.

1. Examination in chief

√

Full oral account obtained?	
Introduced witnesses?	

⁶¹⁷ WITS LAW CLINIC 2005: PLS Trial Advocacy.

Set the scene?	
Describe the action?	
Use of open ended questions?	
Use of leading questions when issues common cause?	
Short simple questions, not multiple questions?	
Use of carefully thought out questions, not rote questions?	
General success of examination in chief	
Used short, simple questions?	
Posture? Use of gestures? Voice? Habitual use of “OK” and “Right	
TOTAL:	

2. Cross examination and closing

√

Used leading questions and statement put to the witness?	
Took written notes of examination in chief?	
Based cross examination on oral evidence of witness?	
Had purpose / theme in questions asked?	
Used short, simple questions?	
Good control of witness / (Did not argue and cut short rambling)?	
No pointless repetition of evidence in chief?	
Put to witness version of own client in so far as they differ?	
General success of cross examination	
Posture? Use of gestures? Voice? Habitual use of “OK” and “Right	
Listened to witness answers?	
Bonus points for total success performance (max 2)	
TOTAL:	

Grand total of 1 and 2:

/40

A new rubric was designed and employed since 2012.⁶¹⁸

ASSESSMENT: TRIAL ADVOCACY

NAME OF STUDENT/S:

TEAM NUMBER:

ROUND 1, DATE:

PROSECUTION ☐ / **DEFENCE ATTORNEY** ☐

OUTCOME	Achieved (2)	Partly Achieved (1)	Not Achieved (0)
<u>OPENING ARGUMENT</u>			
Clearly audible			
Indication that the student understands the process			
Court addressed and evidence adduced in terms of the rules of the court			
<u>EXAMINATION IN CHIEF</u>			
Student avoids leading questions			
No irrelevant questions asked			
All essential facts placed before the court			
<u>CROSS EXAMINATION</u>			
Aimless questions avoided			
Questions asked in examination in chief were not repeated			
Misleading questions avoided			
Student is in control of examination			
Student puts his/her witness' version to the current witness			
Contradictions/discrepancies pointed out			
<u>OBJECTION</u>			
Relevant objections are noted and the student can provide grounds for the particular objection			
Objections against the student are handled in a satisfactory manner			
Student provides reasons for the particular question or line of questioning			
<u>RE-EXAMINATION</u>			

⁶¹⁸

WITS LAW CLINIC 2012: PLS Trial Advocacy.

Unclear evidence cleared up			
No new evidence adduced			
<u>CLOSING ARGUMENT</u>			
Knowledge of criminal law is applied to the facts			
Clear and relevant argument is formulated and presented			
<u>GENERAL</u>			
Student maintained good court etiquette			
Student addressed the Presiding Officer correctly			
Witness and opposing team handled with respect			
Legal terms are used correctly			
Participation of team members equally divided			
General impression of student is satisfying			

TOTAL

/50

COMMENTS

Various scenarios have played out over the years. For example: dividing the students into groups and allocating a group mark, which proved to be unfair, as the efforts of the individuals in the group varied; or, students being provided with a case study, leaving them to allocate roles to different individuals – however, the students (the majority of them) who assumed roles of witnesses could not prove their abilities as litigators (this method was adopted during 2009). During some years, The Black Lawyers Association was contracted to run the trial advocacy programme, (during 2006) whilst the Johannesburg Bar Council assisted by seconding junior advocates to assist with conducting mock trials during other years (2007 and 2008). Videotaping student performances for criticism and comment were suggested, but proved to be even more time consuming. The most effective method proved to be to divide the students in groups in which they all play different roles during a mock trial (2009 onwards). However, this method ultimately remains unsatisfactory as a proper measure of performance and knowledge applied in practice.

Some years no marks were awarded, whereas when marks were awarded, it counted no more than 5% towards the year mark. Marks were not individual, but were awarded for group work.⁶¹⁹

Trial advocacy does not form part of the curriculum at UPLC. At the UFSLC the trial advocacy programme is adapted every year. For 2013, the students were required to stage a mock trial based in criminal law.⁶²⁰ In addition, students had to follow the bail application in the criminal case of the State versus Oscar Pistorius on the internet. Students were required to critically analyse, research and discuss the application and the judgment.⁶²¹ Trial advocacy does not form part of the CLE curriculum at UJLC. These types of exercises are however linked to the oral case presentation at the end of students' clinical semester. These presentations are on specific problems encountered in an actual case they dealt with in the clinic. Trial advocacy is a separate course during students' third year of LLB studies.⁶²² The trial advocacy programme at WLC will remain problematic whilst the student numbers remain extremely high.⁶²³ The innovative approach by UFSLC in linking the mock trials and analyses to high-profile cases is commendable. I recommend that UPLC explore the opportunity of developing students' trial skills, as the student numbers are limited.

Zlotnick suggests that students should develop basic trial skills in direct and cross examination techniques and organisation and delivery of opening and closing statements. Students should also change roles during these exercises, such as co-counsel in one trial and a supportive role in another. In order to effect some realism, students should dress in appropriate courtroom attire. He advises that students can only absorb a critique that encompasses one or two of their errors at a time – any more results in overload and discouragement. Students should critique one another and they must therefore pay attention to every student performance, not just their own.⁶²⁴

⁶¹⁹ For conducting trial advocacy exercises and moot court with exceptionally large student numbers (Nigeria), see Ordor 2007.

⁶²⁰ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: RPK412 course outline, and as advised by the clinical director.

⁶²¹ Oscar Pistorius, a South African Olympic and Paralympic athlete, is facing a murder charge after he allegedly shot and killed his girlfriend, Reeva Steenkamp, at his Pretoria home on 14 February 2013. <http://www.bbc.co.uk/news/world-africa-21459240>.

⁶²² UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

⁶²³ The problem of large student numbers may be curtailed in the foreseeable future, as from 2015, the University of the Witwatersrand, Johannesburg will offer the LLB as a post-graduate degree only.

⁶²⁴ Zlotnick 2011 : 1, 2.

Below is a suggested rubric indicating the skills required for oral argument in trial advocacy, as well as an assessment and oral argument feedback rubric.⁶²⁵

ORAL ARGUMENT FEEDBACK

TRIAL ADVOCACY

ORAL ARGUMENT SKILLS

Persuasive emphasis of important issues; using reason, motivating argument, policy and logic	Counsel persuasively emphasises the issues important to his/her case Uses reason, policy, logic and motivating arguments in support of position, rather than relying solely on precedents
Incorporating relevant questions into overall analysis	Throughout the argument, counsel incorporates and weaves relevant questions into overall analysis Uses questions to make points persuasive to his/her side of issue
Responsiveness to questions; using authority to answer questions	Counsel answers questions directly the first time and does not evade difficult questions Counsel is able to answer questions with authority, by direct reference to authorities
Clarity and directness of arguments; addressing weak points	Throughout the argument, counsel develops arguments to a level of clarity that is easy to understand, and addresses the issue as directly and succinctly as possible Counsel understands weak points of argument and addresses weak points persuasively
Knowledge of record or decision, understanding and use of the facts	Throughout the argument, counsel shows thorough knowledge of the record and the facts in the case Counsel can explain the details and subtleties of the court's decision
Speaking ability	Throughout the argument, counsel uses correct grammar and talks in complete, audible sentences Counsel's voice is loud (but not overbearing) Counsel varies pitch and tone and uses a conversational approach Counsel makes no distracting sounds
Courtroom demeanor	Throughout the argument, counsel maintains good eye contact and has an obvious knowledge of his/her argument without notes Counsel has no distracting mannerisms Counsel is courteous and professional

⁶²⁵

Ibid.

ORAL ARGUMENT FEEDBACK

OPENING	Excellent 5	Good 4	Average 3	Fair 2	Poor 1
Begins with prepared opening					
Begins with good eye contact					
Begins with appropriate factual context					
Identifies disputed issues before moving into argument					
ARGUMENT & CONCLUSION	Excellent 5	Good 4	Average 3	Fair 2	Poor 1
Argument is conversational, not scripted					
Argument demonstrates sound knowledge or cases					
Argument demonstrates sound knowledge of facts					
Counsel stops speaking when the judge speaks					
Questions are regarded with anticipation, not fear or annoyance					
Counsel listens carefully to questions and pauses if needed					
Questions answered clearly and directly, no evasion, refers to authority					
Counsel makes reasonable points					
Counsel returns to argument after answering questions					
Argument ends with strong conclusion					
PRESENTATION	Excellent 5	Good 4	Average 3	Fair 2	Poor 1
Dress and appearance are conservative and professional					
Keeps eye contact throughout argument					
Avoids using distracting mannerisms					
Voice is clear and firm; pace is measured					
Keeps respectful demeanour and is prepared					
TOTALS					

Trial advocacy and trial skills need not necessarily form part of CLE. Tarr indicates that one objective of clinical education is to teach skills. She uses the example of “a litigation clinic would have as one of its goals learning the skill of direct examination.” The practice of this skill need however not be part of the CLE course taught by a clinician. She opines that “a simulation, using role playing, might be effective for teaching the student how to organize a direct examination and ask non-leading questions. In addition, contrary to the traditional clinical

program, a professor in a simulation course can teach more students than a clinical professor because the role playing is more controlled.”⁶²⁶ I submit that these skills can form part of the practical skills component of courses such as civil- and/or criminal procedure.

On a practical level, trial skills can also be learnt outside the CLE course through moot programmes. At the National University of Ireland, Galway, emphasis was placed on the development of practical skills which led to expanded participation in moot court competitions. Mooting exercises are assessed components of one of their modules from the first year of the LL.B and B.C.L. programmes.⁶²⁷ At the University of the Witwatersrand, LLB students participate in international moot competitions annually.

Trial advocacy teaching in the law school curriculum has been criticised: “[l]aw schools are above all academic institutions, and the academy has two responsibilities: to teach the practices of the real world *and* to submit those practices to vigorous challenge and examination. The academy must provide more than experience and insight: it must nourish conscience ... [t]he academic program is not designed as a bar cram course. Instructors do not just teach cases – they subject them to sharp analysis and critique”.⁶²⁸ It was suggested that trial advocacy is done in a classroom setting through the use of controlled experiments in which students would be directed to use, or not to use, certain techniques. Criticism on this suggestion lies with the difficulty in the integration of trial advocacy courses and CLE successfully, as it will be important to integrate the teaching and the research agendas to ensure that the course meets students’ educational needs.⁶²⁹

I submit that CLE comprises an extremely full curriculum programme. Trial advocacy exercises are time consuming, with a relatively small student input, often combined with freeloading students. The effective participation of a single student when large student numbers pose to be problematic is so negligible in comparison with other components of CLE, that trial advocacy exercises may possibly not meet the required educational needs and outcomes. I suggest that trial advocacy be a separate course, properly taught in depth and accompanied by moot competitions in the LLB curriculum.⁶³⁰ Should trial advocacy however form part of the

⁶²⁶ Tarr 1993 : 36.

⁶²⁷ Donnelly 2008 : 59.

⁶²⁸ Hegland 1982 : 71, 72.

⁶²⁹ Geraghty 1990 – 1991 : 701, 702.

⁶³⁰ See Watson & Klaaren 2002 : 548 – 559, who conducted an investigation into the impact of learning in moot court in the legal education curriculum.

CLE course, I suggest that students perform these exercises within their student firms/teams, on cases that they are managing to enhance their skills output.

4.14 Computerised Assessment Tools

The videotaped performance test, such as with interviewing skills and trial advocacy assessments, can now be made available either on line or via CDs or DVDs. Multiple choice questions and journal entries are assessment devices that may now be used via the computer on line. The technology can be used either as formative or summative assessment tools or as a self-learning device for students. Grosberg correctly asks “[t]o what extent can students develop the necessary lawyering skills (legal reasoning and analysis and writing, as well as skills such as interviewing and counseling) simply by sitting next to a computer? Has the law school Socratic discussion become an anachronism?” I agree with his conclusion that, just as the video assessments and multiple choice test questions can have some benefit in students’ learning, the computerized versions of those methods might do the same – although they cannot be a replacement of interpersonal live interactions.⁶³¹

Computerised assessment tools are capable of application in the South African context, provided that the law clinics and their students have access to the required resources. I acknowledge that the lack of resources are problematic for the majority of South African law clinics, but propose that this assessment method be considered for future use.

5. Assessment Rubrics

5.1 Introduction

Rubrics have become a hallmark of good assessment practices in the USA and are also used extensively in the UK and Canada.⁶³² The use of rubrics becomes more significant as clinicians strive to provide more formative assessment and more meaningful evaluation of student performance.⁶³³ Rubrics provide clear direction for students and a more focused classroom experience. They help students and clinicians work from a common understanding of what

⁶³¹ Grosberg 2006 : 70, 71.

⁶³² <http://bestpracticeslegaled.albanylawblogs.org/rubrics-discussion/>; Clark & DeSanctis 2012; Simpson 2012.

⁶³³ <http://bestpracticeslegaled.albanylawblogs.org/rubrics-discussion/>

is expected.⁶³⁴ A rubric is a set of detailed written criteria used to assess student performance.⁶³⁵ Rubric creation is not an exact science. Generally rubrics used for scoring students' performances tend to be more detailed, whereas rubrics handed to students in advance, indicating how their work will be assessed, are more generic. Rubrics can be used for almost any form of assessment and can be used for formative as well as summative assessments and self- and peer assessments.⁶³⁶

5.2 Advantages to Using Rubrics

Rubrics provide guidance for students about what skills, knowledge and values are important for them to be learning, as these are the ones they will be graded on, particularly when the criteria are provided in advance.⁶³⁷ Rubrics provide students with feedback and they can learn their strengths and weaknesses.⁶³⁸ Clinicians will be more focused on learning objectives and grading will be more consistent.⁶³⁹ Rubrics may take time to develop, but once created, grading and feedback will be more efficient.⁶⁴⁰

A rubric was defined as “a scoring tool that lays out the specific expectations for an assignment. Rubrics divide an assignment into its component parts and provide a detailed description of what constitutes acceptable or unacceptable levels of performance for each of those parts.”⁶⁴¹

Students learn more effectively when they are provided with evaluation criteria. This can be done by providing them with rubrics which describe both what students should learn and how they will be evaluated.⁶⁴² A rubric is a scoring guide that seeks to evaluate a student's performance based on a range of criteria. It may be used for formative feedback, to determine grades, or for assessment on a specific student learning outcome. Rubrics are criterion referenced, rather than norm referenced. Rubrics are working guides for students. They assist in clarifying the expectations clinicians have for student performances by providing detailed descriptions of

⁶³⁴ <http://bestpracticeslegaled.albanylawblogs.org/rubrics-discussion/>

⁶³⁵ <http://lawteaching.org/teaching/assessment/rubrics/>

⁶³⁶ <http://lawteaching.org/teaching/assessment/rubrics/>

⁶³⁷ <http://lawteaching.org/teaching/assessment/rubrics/>

⁶³⁸ <http://lawteaching.org/teaching/assessment/rubrics/>

⁶³⁹ <http://lawteaching.org/teaching/assessment/rubrics/>

⁶⁴⁰ <http://lawteaching.org/teaching/assessment/rubrics/> Also see Simpson 2012; Clark & De Sanctis 2012.

⁶⁴¹ Suskie 2009.

⁶⁴² Sparrow 2004 : 6.

those expectations. They provide focus and emphasis on important criteria, giving students an explicit guideline as to clinician expectations.⁶⁴³

5.3 Why should clinicians use rubrics?⁶⁴⁴

Rubrics enhance teaching and learning as it focuses on student learning and clinician teaching. A rubric helps clinicians with identifying course goals and to allocate priorities among them. In teaching to these goals, and then evaluating students based on a rubric also helps clinicians to be more consistent in evaluating students on what was taught.⁶⁴⁵ Using rubrics will cause clinicians to focus on the goals and help them to refine their teaching skills. Rubrics that show students' continued improvements or weaknesses, or showing development over time, can provide a clearer view of blind spots, omissions and strengths in the clinical programme and the teaching.⁶⁴⁶ Rubrics also reveal a course's complexities.⁶⁴⁷

Grading and graders are faulted for being arbitrary, inconsistent and promoting an unfair ranking system. Providing students with a rubric that explains the criteria for one grade alone enhances learning. The rubric will be used as a teaching tool.⁶⁴⁸

Rubrics provide valuable feedback to students. Students learn more effectively when their teachers provide them with the criteria by which they are evaluated. One way to do this is to provide students with rubrics, or detailed written grading criteria, which describe what students should learn and how they will be evaluated. These criteria are based on the learning goals of the course.⁶⁴⁹ Rubrics prepare students for detailed feedback. In the rubric, the highest level descriptions are the highest level of possible achievement. The remaining levels which are circled or checked off, are typed versions of the notes or comments a clinician or teacher regularly writes on student work, indicating the failures to meet the highest level. The student therefore obtains details of where the assignment did or did not achieve its goal, with suggestions on how it can be improved.⁶⁵⁰

⁶⁴³ Cianciarulo, Lynch, Mayer & Pistone 2011 : 5.

⁶⁴⁴ Suskie 2009.

⁶⁴⁵ Sparrow 2004 : 19.

⁶⁴⁶ Suskie 2009.

⁶⁴⁷ Sparrow 2004 : 21.

⁶⁴⁸ Sparrow 2004 : 1 – 9.

⁶⁴⁹ Sparrow 2004 : 6, 22.

⁶⁵⁰ Suskie 2009.

Detailed grading criteria help students become more aware of their learning.⁶⁵¹ Rubrics provide timely feedback, as grading can be done more quickly. Students often make similar mistakes on assignments. A rubric may incorporate predictable notes, which can simplify grading by circling or checking off all comments that may apply to the student.⁶⁵²

Rubrics communicate high expectations and using rubrics is intellectually engaging.⁶⁵³ They encourage critical thinking. Students are able to notice their patterns of recurring problems or the ongoing improvement in their work. Rubrics also facilitate communication with others. People to whom the student turn for assistance, can benefit from the information contained in the rubric and therefore help to level the playing field. Especially for weaker students, or students with previous disadvantages, rubrics can help them understand what clinicians are talking about.⁶⁵⁴

Rubrics allow clinicians to engage in the fundamental questions about what students should learn, how to measure it, and how to “prove” that the teaching is working. They therefore provide helpful data about teaching effectiveness.⁶⁵⁵ Using a rubric enables clinicians to grade with greater consistency and it enhances conversations between students and clinicians about grades, especially when grades are challenged.⁶⁵⁶

Rubrics eventually ease the burden on clinicians, as creating and using a rubric is efficient. While the initial investment of time is high, that time is worth it. When rubrics are set well before grading, time management flexibility is gained.⁶⁵⁷

5.4 The process of developing rubrics

There is no one specific way to develop a rubric. Time need to be taken to identify the goals of the course and to determine what activities will be used to measure whether the goals were met. Sparrow suggests that one may start with a completed assignment or test.⁶⁵⁸ When reading, checklists can be made for what was effective and ineffective. Notes of what is a “highly proficient” answer and what was not one can be made. Material can now be developed that can

⁶⁵¹ Sparrow 2004 : 23.

⁶⁵² Suskie 2009.

⁶⁵³ Sparrow 2004 : 25, 26.

⁶⁵⁴ Suskie 2009.

⁶⁵⁵ Sparrow 2004 : 28.

⁶⁵⁶ Sparrow 2004 : 30, 31.

⁶⁵⁷ Sparrow 2004 : 29.

⁶⁵⁸ Sparrow 2004 : 32 – 37.

later be refined. Answer your own question and compile a list of what the answer should contain. Identify obvious issues, the more complex issues, the analytical steps students would need to apply to the hypothetical and how students could use the facts and law to make effective arguments. Then determine how much emphasis to give each part of the answer. With this preliminary rubric, mark ten exam papers without grading.⁶⁵⁹ Modify your rubric by redistributing the weighting of some categories that corresponds to students' answers. Continuous adapting, tweaking or refining may be required.⁶⁶⁰ Sparrow further suggests that one should work with existing models as it is easier than trying to design from scratch. She further suggests that students should not be provided with rubrics in advance until the clinician has used them at least once.⁶⁶¹ The first time when the rubrics are handed out in advance, it should be called 'draft rubrics' with a disclaimer that it may be modified during the grading process. Sparrow is of the opinion that even if they are adapted it still gives students valuable guidance.⁶⁶²

5.5 Types of rubrics

There are two types of rubrics: holistic and analytic. A holistic rubric consists of a set of descriptors that generate a single, overall score. When holistic rating scales are applied, the following guidelines are useful. Do not have a list of the 'things you are looking for'; and include short narrative descriptions of the characteristics of outstanding work, acceptable work and unacceptable work.⁶⁶³ A holistic rubric for assessing student essays is offered below. This can be applied to a number of student assessments in CLE, such as reflective journals, research projects, and all written assignments, including court reports.

HOLISTIC RUBRIC for assessing student essays⁶⁶⁴

Inadequate	The essay has at least one serious weakness. It may be unfocused, underdeveloped, or rambling. Problems with the use of language seriously interfere with the reader's ability to understand what is being communicated.
Developing Competence	The essay may be somewhat unfocused, underdeveloped, or rambling, but it does have some coherence. Problems with the use of language occasionally

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid. On the development of rubrics, also see Simpson 2012.

⁶⁶¹ Ibid.

⁶⁶² Ibid.

⁶⁶³ Suskie 2009.

⁶⁶⁴ Suskie 2009.

	interfere with the reader's ability to understand what is being communicated.
Acceptable	The essay is generally focused and contains some development of ideas, but the discussion may be simplistic or repetitive. The language lacks syntactic complexity and may contain occasional grammatical errors, but the reader is able to understand what is being communicated.
Sophisticated	The essay is focused and clearly organised, and it shows depth of development. The language is precise and shows syntactic variety, and ideas are clearly communicated to the reader.

A further example for the use of a holistic rubric: open an online discussion forum on a project/case. The clinician will post questions that the students must respond to. The student postings will be evaluated according to a rubric.⁶⁶⁵

Points	Performance Criteria
4 Points	The comment is original, relevant and demonstrates that you reflected upon the assigned material and is well written. Four point comments add substantial discussion to the course and stimulate additional thought about the case. Authority for sources considered beyond the reading is provided.
3 Points	The comment lacks at least one of the above qualities, but is above average in quality. A three point comment makes a significant contribution to our understanding of the case issue being discussed.
2 Points	The comment lacks two or three of the required qualities. Comments which are based solely upon personal opinion or personal experience without reference to assigned readings and other authoritative sources often fall within this category.
1 Point	The comment fails to demonstrate analysis and/or reflection on assigned readings and/or posts of colleagues. However, one point comments may provide important class or student firm participation and contribute to a collegial atmosphere.
0 Points	The comment adds no value to the discussion.

With descriptive or analytic rubrics,⁶⁶⁶ the checkboxes of rating scale rubrics are replaced with brief descriptions of the performance that merits the possible rating. Descriptions of each performance level states exactly what is expected from the student. Descriptive rubrics should be used when more than one clinician assess student work, when outside audiences will be examining rubric scores, when substantial feedback to students or faculty is required and when

⁶⁶⁵ Cianciarulo, Lynch, Mayer & Pistone 2011 : 6.

⁶⁶⁶ University of Connecticut: <http://assessment.uconn.edu/primer/how1.html>;
<http://www.uni.edu/chfasoa/analyticholisticrubrics.pdf>;
University of Minnesota: <http://www.carla.umn.edu/assessment/VAC/Evaluation/rubrics/types/analyticRubrics.html>;
Suskie 2009.

profiles of specific strengths and/or weaknesses are required. Descriptive/analytic rubrics are offered below. These can be applied to a number of student assessments in CLE.

DESCRIPTIVE/ANALYTIC RUBRIC for a slide presentation on findings from research sources⁶⁶⁷

	Well done (5)	Satisfactory (4 – 3)	Needs Improvement (2 – 1)	Incomplete (0)
Organisation	Clearly, concisely written. Logical, intuitive progression of ideas and supporting information. Clear and direct cues to all information.	Logical progression of ideas and supporting information. Most cues to information are clear and direct.	Vague in conveying viewpoint and purpose. Some logical progression of ideas and supporting information but cues are confusing or flawed.	Lacks a clear point of view and logical sequence of information. Cues to information are not evident.
Introduction	Presents overall topic. Draws in audience with compelling questions or by relating audience's interest or goals.	Clear, coherent, and related to topic.	Some structure but does not create a sense of what follows. May be overly detailed or incomplete. Somewhat appealing.	Does not orient audience to what will follow
Etc.				

ANALYTIC rubric for peer assessment of team project members⁶⁶⁸

	Below expectation	Good	Exceptional
Project contributions	Made few substantive contributions to the team's final product	Contributed to a "fair share" of substance to the team's final	Contributed considerable substance to the team's final

⁶⁶⁷ Suskie 2009.

⁶⁶⁸ Ibid.

		product	product
Leadership	Rarely or never exercised leadership	Accepted a “fair share” of leadership responsibilities	Routinely provided excellent leadership
Collaboration	Undermined group discussion or often failed to participate	Respected others’ opinions and contributed to the group’s discussion	Respected others’ opinions and made major contributions to the group’s discussion

Cianciarulo, in his description of an analytic rubric, makes provision for a specific score or rating. He describes an analytic rubric as comprising of a set of focused holistic rubrics for specific components which will be evaluated independently. There are typically three or four components in a rubric:⁶⁶⁹

- performance elements, which refer to the activities the clinician wants to assess, based on what the student was expected to learn;
- level of quality of the performance, for example, ‘Beginning’, ‘Developing’, ‘Accomplished’ and ‘Exemplary’;
- a description of the criteria used to classify work in a particular category. The description should include the characteristics of the performance or work that must be present to be assigned to a particular level of achievement; and
- a rating/point/grade.

Example of an Analytic Rubric for an Oral Presentation⁶⁷⁰

Performance Elements or Criteria	Beginning	Acceptable	Exemplary	Points earned
Organisation	No apparent organisation; evidence is not used to support assertions (0 – 3)	Presentation has a focus and provides some evidence which support conclusions (4 – 7)	Presentation is carefully organised and provides convincing evidence to support conclusions (8 – 10)	

⁶⁶⁹ Cianciarulo, Lynch, Mayer & Pistone 2011 : 2. Their description of an analytic rubric largely overlaps that of Suskie.

⁶⁷⁰ Cianciarulo, Lynch, Mayer & Pistone 2011 : 2.

Content	Inaccurate or overly general. Listeners unlikely to learn anything or may be misled (0 – 6)	Content is generally accurate but incomplete. Listeners may learn some isolated facts but they are unlikely to gain new insights about the topic (7 – 13)	Content is accurate and complete. Listeners are likely to gain new insights about the topic (14 – 20)	
Delivery	Speaker appears anxious and uncomfortable; reads notes, little or no eye contact (0 – 3)	Speaker is generally relaxed and comfortable, but too often relies on notes. Some eye contact (4 – 7)	Speaker is relaxed and comfortable, speaks without undue reliance on notes, and interacts effectively with listeners (8 – 10)	

5.6 Group work rubrics

Care should be taken when developing rubrics for group work assessments. For effective assessment students must have several opportunities to practice what they have learned and thereafter clear evaluative criteria must be applied to their work. This will enable clinicians to grade numerous assignments consistently and fairly.⁶⁷¹

In assessing group work, students can work through case files in their groups/student firms, which are discussed in tutorials. Students can then peer evaluate their partners' responses. The clinician allows for a group discussion to comment and further analyse the questions that may arise. With peer instruction, the partners must defend their positions to others in the student firm.⁶⁷² Suggested rubrics of evaluation of class participation and for assessing portfolios are provided below.

RUBRIC OF EVALUATION OF CLASS PARTICIPATION⁶⁷³

Performance elements or criteria	Inadequate (0 point)	Developing but below expectations (1 point)	Accomplished/ Meets Expectations (2 points)	Exemplary/ Displays Leadership (3 points)	Score
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⁶⁷¹ Hemingway, Anthon, Smith, Desanctisc & Clark 2011.

⁶⁷² Colon-Navarro 2011 : 5, 6.

⁶⁷³ Cianciarulo, Lynch, Mayer & Pistone 2011 : 7, with acknowledgement to Professor Connie Mayer, Albany Law School, Legal Profession – Spring 2011.

Level of engagement and active participation	Student never contributes to class discussion; fails to respond to direct questions	Few contributions to class discussion; seldom volunteers but responds to direct questions	Proactively contributes to class discussion, asking questions and respond to direct questions	Proactively and regularly contributes to class discussion; initiates discussion on issues related to class topic	
Listening Skills	Does not listen when others talk, interrupts, or makes inappropriate comments	Does not listen carefully and comments are often nonresponsive to discussion	Listens and appropriately responds to the contributions of others	Listens without interrupting and incorporates and expands on the contributions of other students	
Relevance of contribution to topic under discussion	Contributions, when made, are off-topic or distract class from discussion	Contributions are sometimes off-topic or distracting	Contributions are always relevant	Contributions are relevant and promote deeper analysis of the topic	
Preparation	Student is not adequately prepared; does not appear to have read the material in advance of class	Student has read the material but not closely or has read only some of the assigned material in advance of class	Student has read and thought about the material in advance of the class	Student is consistently well-prepared; frequently raises questions or comments on material outside the assignment	

GENERIC rubric for assessing portfolios⁶⁷⁴

	Unacceptable	Marginal	Acceptable	Exceptional
	Evidence that the student has mastered this objective is not	Evidence that the student has mastered this objective is	Evidence shows that the student has generally attained this	Evidence demonstrates that the student has mastered

⁶⁷⁴

Ibid.

	provided, unconvincing, or very incomplete.	provided, but it is weak or incomplete.	objective.	this objective at a high level.
Learning objective 1				
Learning objective 2				
Etc.				

A focus of this study is to find assessment methods for application in the South African clinical environment. In Chapter Five I will indicate that the assessment methods mostly applied and recommended for the current South African scenario are case file assessments. Below I illustrate a ‘model’ assessment rubric which I recommend for South African university law clinics. This rubric sets out the criteria to be applied when case file work and clinic competencies, which include professional responsibility and ethics, are assessed.

STUDENT:

STUDENT NO:

FILE DETAILS:

Levels of quality:

0 = Fail; 1 = Poor; 2 = Developing; 3 = Competent; 4 = Very competent; 5 = Exemplary

CASE FILE ASSESMENT

	MARK	CLINICIAN'S COMMENTS
<u>File cover</u>	-----	
Case Identified:		
LASA Ref no:		
<u>On run sheet:</u>	-----	
Attendance entries		
File diarising		
Time keeping		

Fees entered		
<u>File contents</u>	-----	
Client details recorded on record sheet		
LASA: legal aid application completed Means test completed correctly		
LASA: legal aid approved		
Client waiver completed and signed		
Sub-folders created		
<u>Subfolders:</u> Statement Consultation notes Correspondence and telephone calls Legal process Evidence Research Other		
CORRESPONDENCE	-----	
<u>Letters to client:</u>	-----	
“Pitched at correct level”		
Style		
Salutation		
Subject matter		
Facts		

Organisation		
Legal analysis		
Contents on point		
Writing mechanics		
Ending		
<u>Letters to adversaries:</u>	-----	
“Pitched at correct level”		
Style		
Salutation		
Subject matter		
Facts		
Organisation		
Legal analysis		
Contents on point		
Writing mechanics		
Ending		
PLEADINGS	-----	
Identified court		
Identified sheriff		
Plaintiff’s details		
Defendant’ details		
Plead facts necessary for jurisdiction		

Identified claims		
Discarded non-viable claims		
Plead facts to support element of each claim		
Did not plead immaterial facts		
Correct paragraphing and sequencing		
Plead necessary elements of each claim		
Provided sound reasons for excluding certain claims		
Clearly and logically organised		
Allegations contained only one fact per allegation where possible		
Legal drafting skills		
Grammar and spelling		
RESEARCH	-----	
Critical thinking and analysis		
Writing skills on research report		
Ability to learn unfamiliar areas of law		
Initiative		
Problem solving		
Sense of responsibility		
FILE MANAGEMENT		
WRITING SKILLS		
Persuasive/analytical/format/grammar/spelling		

ORAL COMMUNICATION	-----	
During tutorials		
At presentations		
CLINIC COMPETENCIES	-----	
Interviewing		
Fact investigation		
Counselling		
<u>Problem solving:</u>		
Identifies legal problems		
Generates alternative solutions and strategies		
Develops a detailed plan of action		
Reliably implements a plan of action		
Seeks out and keeps planning process open to new ideas		
<u>Organising and managing work:</u>	-----	
Tracks case development		
Meets deadlines		
Follows office procedure		
File management		
Asks for guidance		
Time management		

<u>Professional identity and independent learning</u>	-----	
Resourceful/raise issues/strategise		
Responsibility for actions and consequences		
Learns from feedback, critique, observations and experience		
Reflects critically and honestly on own performance		
Assist colleagues/partner in improving performance		
Experiments – willing to take risks		
PROFESSIONAL RESPONSIBILITY	-----	
<u>Ethical practice:</u>	-----	
Identifies and analyses ethical issues		
Observes client confidentiality		
Informs clinician about ethical issues		
Follows ethical rules		
On time and prepared for tutorials and meetings		
Open and honest with clinician and keeping clinician informed of case developments		
Social awareness		
ADDITIONAL COMPETENCIES:		
E.g.: Oral examinations		
E.g.: Reflective journal entries		
E.g.: Self evaluation		
E.g.: Peer evaluation		
E.g.: Group work assessment		

6. Moderation systems

At the University of the Witwatersrand (“Wits”), as with other universities, a certain percentage of student assessments need to be reviewed by external examiners. The moderation systems, which include internal assessors, internal moderators and external examiners, are regulated by the Wits Senate Policy and Standing Orders on the Assessment of Students’ Academic Performance.⁶⁷⁵ In terms of this policy, the staff member responsible for teaching and/or coordination of a course ... and who is responsible for conducting the different assessments that make up the course mark, as well as providing feedback to the students (the clinician heading up each specialised clinical unit), will be the internal assessor. The internal moderator is an assessor drawn from the same department or school (another designated clinician or the director) who has not been involved in the teaching of that cohort of students in that course of study. The external examiner is an assessor normally drawn from outside the University or from an appropriate professional institution, to examine in particular the final marks of a course and/or the exit level outcomes of a qualification. These may be clinicians or directors from another university or legal practitioners. In terms of this policy at least thirty per cent of the CLE course must be examined externally.

To assist with these processes, guideline rubrics are offered below.

GUIDELINES FOR INTERNAL AND EXTERNAL MODERATION OF THE ASSESSMENT PROCESS⁶⁷⁶

Internal moderator’s report

Title and name of internal moderator:

Name of course/module:

Date of examination:

The following documentation is annexed for reporting by the internal moderator:

Examination paper

Memorandum

Course material

⁶⁷⁵ <http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssessmentOfStudentLearning.doc> at

6.

⁶⁷⁶ With gratitude to Professor C F Swanepoel, University of the Free State, 2007.

Evaluation of the attached examination paper and memorandum

	Excellent	Good	Acceptable	Unacceptable
The assessment paper				
Validity				
1. Were the outcomes, as set out in the course material, covered in the paper?				
2. Comment on the use of language				
Practicality				
3. Was the time allocation appropriate?				
4. Were the marks distributed evenly?				
5. Was there an appropriate balance in the different levels of competency (knowledge of facts, insight, application of principles, analysis and innovative thinking)?				
6. Reasonableness of the questions				
The memorandum				
7. Is the memorandum adequate?				
8. Was the memorandum drafted according to the outcomes of the course?				

Remarks:

Signature:

Date:

GUIDELINES FOR INTERNAL AND EXTERNAL MODERATION OF THE ASSESSMENT PROCESS⁶⁷⁷

External moderator's report

Title and name of external moderator:

Institution of external moderator:

Contact details:

Position:

Name of course/module:

Code of course/module:

Date of examination:

⁶⁷⁷

Ibid.

The following documentation is annexed for reporting by the internal moderator:

Examination paper

Memorandum

Examination answering scripts – (amount)

Evaluation of the attached examination paper, memorandum and examination paper

	Good	Acceptable	Unsatisfactory
1. Quality and fairness of questions			
2. Fairness, accuracy and consistency in assessing			
3. Quality of answers in terms of language and presentation			
4. Standard of knowledge and quality of arguments			

Remarks:

Signature:

Date:

GUIDELINES FOR CLINICIANS' SELF-EVALUATION OF THE ASSESSMENT PROCESS⁶⁷⁸

Self-evaluation of the assessment process

1. Assessment date:
2. Subject/module/course:
3. Name of assessor:
4. Type of assessment:
5. Date of moderation:
6. Name of moderator:

Were my assessment goals 100% clear to myself prior to assessment?

Yes

No

⁶⁷⁸

Ibid.

Did I communicate my assessment goals to the students clearly prior to assessment?	Yes	No
How did I explain my assessment goals to my students?	Lecture	Other
Did I prepare a clear memorandum prior to the assessment?	Yes	No
Did I prepare an assessment rubric prior to the assessment?	Yes	No
If not, why?		
Did I prepare my assessment instrument with reference to the course outcomes?	Yes	No
Did I communicate the course outcomes to the students throughout?	Yes	No
Is there room for personal improvement?	Specify	

Biggs opines that the use of external examiners may constrain the nature of the assessment tasks to ones that an outsider to the teaching process can handle.⁶⁷⁹ I submit that clinicians of other universities will be able to serve as external examiners for all the forms of assessment discussed above. WLC used legal practitioners as external examiners in the past, but experience proved two major difficulties. Firstly, the practices of these practitioners often were extremely busy during the key periods for the examinations and meeting the deadlines for entering marks into the university system became problematic. Secondly, some of these practitioners were unable to pitch the students' work at the appropriate level, causing the external marks to be either too generous or too low.

With the foundations of different forms of assessment determined in this chapter, factors that influence assessments in CLE, with proposed solutions, will be discussed in chapter four.

⁶⁷⁹ Biggs 1994 : 13.

CHAPTER FOUR

FACTORS THAT INFLUENCE AND CHALLENGE ASSESSMENT IN CLE, WITH PROPOSED SOLUTIONS

1. Introduction

Attention should be paid to factors that may influence assessments in CLE courses. These factors will be explored and solutions to challenges that they pose will be suggested.

2. Background

CLE is the primary mode of instruction in various law school courses – particularly courses that are described as “clinical”, such as simulation-based courses (students assume professional roles in hypothetical situations), in-house clinics (students represent clients or perform other professional roles under supervision of a member of the faculty, who is an attorney), and externships (students represent clients or perform other professional roles under supervision of an attorney who is not a member of the faculty).⁶⁸⁰

CLE, also referred to as experiential learning, is mainly a practical course, which may include training in the substantive law. It was described as: “students are encouraged, after proper instruction and briefing, to undertake legal tasks with increasing degrees of independence. Properly supervised, these students come to develop confidence in their abilities to perform their roles as lawyers”.⁶⁸¹ In South Africa CLE serves a two-fold purpose, namely practical legal training of students and providing free legal services to the (indigent) community.⁶⁸²

CLE at the WLC is currently taught in the following manner (in brief): students are divided into groups and allocated to different clinicians, who specialise in different fields of law and head up different specialised clinical units.⁶⁸³ Students, working in pairs as a result of large student numbers,⁶⁸⁴ interview clients, represented by the indigent in the community and qualifying

⁶⁸⁰ Stuckey 2007 : 165 - 166.

⁶⁸¹ Vawda 2004 : 120, 121.

⁶⁸² South African universities have identified their objectives as three-fold, namely teaching, community service and academic research. Wimpey & Mahomed 2006 : 17. University law clinics generally have to satisfy two main objectives, namely teaching of the students and service to the community. Du Plessis 2008 : 2.

⁶⁸³ On specialisation in the law clinic see: De Klerk & Mahomed 2006 : 318.

⁶⁸⁴ The ideal ratio between clinician and students in clinical courses has been suggested to be between 1 : 7 and 1 : 12. Shrag 1996 : 175. The UK model proposes a maximum of 1:12 and the US models advocate 1 : 8. Grimes & Brayne 2004 : 86. WLC ratio over the past number of years ranged between 1 : 38 and 1 : 46. Du Plessis 2009 : 92.

for legal aid in terms of a means test,⁶⁸⁵ in the law clinic. This ‘real-client in-house’ model is described as: “in this model the clinic is based in the law school (hence ‘in-house’) and the unit is offered, monitored and controlled in-house too. The clients are real, with problems requiring actual solutions (hence ‘real-client’). The client base may be selected from the general public at large or from a section of the public ...”⁶⁸⁶ A clinical programme must consider distinguishable types of cases that will serve as good learning vehicles for their students.⁶⁸⁷ Simple service cases, which students can see from initial interview to resolution, make for the best learning tools.⁶⁸⁸ When cases are presented that have the potential to lead to impact litigation, factors, other than suitability for student teaching, may be considered.

In the clinic the cases presented by clients to the students are screened by the clinician for suitability.⁶⁸⁹ After the screening process appropriate legal matters are taken on – many for litigation through the courts.⁶⁹⁰ Clients are not consulted by appointment, as consultation numbers are not capped. Clients are consulted in this ‘walk-in’ clinic on a ‘first-come-first-served’ basis. Apart from the compulsory two hours clinic duty per week, students have a compulsory weekly tutorial with their clinicians where cases are discussed and students are instructed. Each student pair is responsible for a number of cases during the academic year. Students are also lectured in the conventional manner once a week, for a double lecture, either by way of a plenary or in their specialised units. Students are expected to work on their case files during the week, which will be discussed during the weekly tutorials.⁶⁹¹

At the UPLC CLE is taught in the following manner.⁶⁹² The CLE course is not compulsory and is divided in two separate semester courses. A secretary keeps a diary for the students who enrolled for the course. Clients visit the clinic by appointment only. The secretary does the initial screening relating to the suitability of the cases and whether potential clients will qualify for legal aid assistance. Initially the students are allocated for a 90 minute consultation for each firm of students (between four to six students per firm) at the beginning of each week. These

⁶⁸⁵ Du Plessis 2008 : 5.

⁶⁸⁶ Brayne, Duncan & Grimes 1998 : 12.

⁶⁸⁷ Du Plessis 2008(b) : 25.

⁶⁸⁸ Tarr 1993 : 33, 34.

⁶⁸⁹ Du Plessis 2008(b) : 25.

⁶⁹⁰ Also referred to as “teaching legal skills in a social justice context.” McQuoid-Mason 2008 : 2.

⁶⁹¹ For a detailed discussion see Du Plessis 2009 : 91 - 115.

⁶⁹² Note that the operation of this clinic differs, in that there are some clinics dedicated to litigation by attorneys who do not take on students. The discussion for purposes of this study will focus on the clinic where CLE is taught. See Haupt 2006 : 229 – 243.

set consultations may decrease later, depending on the case loads of the students. There are no formal tutorials, but clinicians have an 'open door' policy where students may consult in an informal manner and as their workloads demand. Clinicians and students correspond through notes placed in a 'post pigeonhole' situated in the clinician's office. The clinicians do regular 'spot checks' and there are continuous perusals of students' case files. This clinic does not have specialised units for student training and, although the client pool is varied, the bulk of the types of cases are in family law. New client intake ceases when capacity is reached.

At the UJLC CLE, which is a compulsory course, is taught in the following manner.⁶⁹³ Students work on their own, without partners. Students are required to work in the clinic for 80 hours per semester. Clinic duty is for one semester only and students may elect to do their duties in either the first or second semesters. Students are allocated a specific day for clinic duty, where they consult for a period of five hours per day. Clients visit the clinic by appointment only. The student assistant or secretary for each of the three clinics does the initial screening relating to the suitability of the cases and whether potential clients will qualify for legal aid assistance. Clients then consult by appointment. The UJLC does not operate in specialised units. Clinicians consult with students during and after their clinic duties and authorise the file work that needs to be done. There are no formal tutorials, but students may consult with the clinicians who also conduct continuous perusals of student files.

CLE is taught in the following manner at the UFSLC.⁶⁹⁴ The clinic operates in specialised units, namely civil litigation, family law, labour law and evictions, where students are trained.⁶⁹⁵ The seat of the South African Court of Appeals is in Bloemfontein and a selected number of students are trained in the appeals unit. CLE is a compulsory course, divided in two separate semesters. Students do their initial consultations in the presence of a clinician. From the third week students attend to their own consultations, but clinicians are available. Clients are consulted by appointment only, and a paralegal does the initial screening for suitability. The client pool is large enough for purposes of student training, but the types of cases are not varied enough.

⁶⁹³ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30.

⁶⁹⁴ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: RPK412 course outline. UFSLC RPK412 course outline 2012.

⁶⁹⁵ This clinic also operates a criminal unit, but no students are trained in this unit.

3. The Necessity of Assessment

Assessment provides for protocols for monitoring the quality of practice, provision of feedback to students and as incentive to provide quality client services. Clinicians need to carefully determine the assessment regime and ensure consistency, reliability, fairness and transparency in the marking process, as “[a]ssessment has always been an important part of academia – it is, after all, a fundamental part of our accreditation function. We do not only teach, we certify, and in so doing we act as gatekeepers to certain occupations, professions and statuses”.⁶⁹⁶ Performance assessment is an effective strategy for ability-based, student-centered education. The strength of the curriculum can only be tested when the principles of assessment are applied.

When CLE attracts credit towards the law degree, assessment and feedback are necessary. Prompt feedback allows students to take control over their own learning by obtaining necessary remediation for identified deficiencies in their understanding and to adjust their approaches to future learning tasks. Clinicians need to implement a system that assesses student learning and improves learning skills.⁶⁹⁷ Through a continuous assessment process, students’ performances are monitored throughout the year and are recorded. Continuous assessment provides for regular feedback on student performance which should be constructive and has to be delivered in a supportive manner. Vawda states that “the true art of critique is to be helpful by being specific. Generalisations are not particularly useful as they do not pinpoint specific weaknesses nor indicate what needs to be corrected”.⁶⁹⁸ Assessment is needed for learning, for effective teaching, for a quality learning environment and it drives the learning paradigm.⁶⁹⁹

The ABA Standards for Approval of Law Schools are in a revision process to emphasise outcome measures and to “apply a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students”.⁷⁰⁰ Assessment is about putting students at the center of education. “Assessment shifts the focus from what is delivered to students to what students take away from their educational experience, ... but it is not merely measuring the end results ... [it is also] about setting goals for student learning,” measuring achievement of the goals and improvement of student learning. Fisher states that an overall long-

⁶⁹⁶ Watson 2003 : 30.

⁶⁹⁷ Lasso 2011: 1.

⁶⁹⁸ Vawda 2004 : 123.

⁶⁹⁹ University of Connecticut: <http://assessment.uconn.edu/why/index.html>.

⁷⁰⁰ Fisher 2011 : 2.

term goal should be to create a culture of assessment, which should also be used to answer questions in which faculty are interested and to affirm what they value about the law school.⁷⁰¹

3.1 We need to assess, but do we need to grade?

At the Phoenix School of Law a General Practice Skills course is taught, consisting of seven modules in which skills and values are practiced.⁷⁰² The course is taught by practitioners and meets twice a week for three hours at a time. The course is graded on a pass/fail upon satisfactory completion. I submit that, although practical, this course is not comparable to a live-client clinical course.

Rice (at the time of presentation a clinician at Macquarie University, Sydney), although in favour of assessing clinical work, suggests that clinicians take for granted that clinic should be fully graded. He proposes a pass/fail assessment regime as an alternative. He argues that grading is a simple and simplistic mechanism which is attractive to teachers because it is unspecific and impersonal. Rice also argues that clinicians rely on grading as incentive for clinical students, but opines that the clinical experience transcends students' need for such incentive. He finds grading patronising to the students, viewing them as incapable of pursuing learning for their own sakes and grading fails to inspire students to do just that. He further claims that grading encourages surface learning as it places greater value on learned skills and retained knowledge than on new thinking and awareness.

Rice's views attracted criticism. Murray and Nelson criticised his views as idealistic. Clinic is probably the course where students receive the most feedback and they find his view, that grading is an easy way out, harsh. Students need grades to present when applying for training contracts (articles of clerkship). There is also a client involved, which prompts the students to work to the best of ability to get a grade, which is preferable to a student who does not engage, because it will not be recognised by a grade. Clinical pedagogy defies surface learning, as students are not able to memorise and regurgitate lecture notes.⁷⁰³ Evans & Hyams acknowledge that there is some merit to the arguments to the question whether students' clinical performances are best assessed on a pass/fail basis, but feel that students are usually principally motivated within a clinic by the nature of the work itself, not essentially by the possibility of receiving good

⁷⁰¹ Fisher 2011 : 3, 6.

⁷⁰² Gerst & Hess 2009 : 526, 543.

⁷⁰³ Murray & Nelson 2009 : 57 - 59.

marks. They doubt that a graded marking regime would have the effect of discouraging students from doing their best work for the clients, whose livelihoods may be at stake. The clinical experience is also a testing ground for their abilities as future lawyers. They pose a serious dilemma in using the pass/fail method: should a student for instance fail the professional competency module, but pass the other module – should such a student fail the course? The answer must be yes if the module failed is important enough to rank at the centre of clinical competence.⁷⁰⁴

I submit that, when CLE is a credit bearing course, it should be assessed and graded. In agreement with several authors, I am of the opinion that by not grading, students will be less motivated and devote less time to the course than is warranted.⁷⁰⁵ The course's credibility may be undermined and may not conform to university requirements.⁷⁰⁶

3.2 Grade descriptors?

Summative assessment can cause difficulty when students are assessed by their clinician, as there can be a large element of subjectivity due to the close (or sometimes challenging) working relationship. This is known as the halo and horns effect.⁷⁰⁷ Will there be consistency in grading when criterion referenced assessment is used – when clinicians mark according to a list of criteria, will one clinician's mark of 65% be comparable to another's 65%? This problem cannot be overcome by a moderation process, as only the clinical supervisor will know whether the final product is a first or the result of several attempts.⁷⁰⁸ These concerns led to the formulation of grade descriptors which detail the level students have to reach in order to achieve a specific classification. The descriptors concentrated on the student's ability to demonstrate autonomous learning and identify the performance indicators which a student has to achieve across all classification levels.⁷⁰⁹ Rather than allocating a specific mark, such as 65, students will be placed on a classification level. For example: a 2.2 classification level will place a student in the range of 50 – 59%, a 2.1 classification will be 60 – 69%, a first classification will be 70%+ and a strong first classification, 80%+. A fail student will be on classification level <50%. The descriptors

⁷⁰⁴ Evans & Hyams 2008 : 71.

⁷⁰⁵ Hyams 2006 : 87, 88; Haupt & Mahomed 2008 : 277.

⁷⁰⁶ See e.g.: Wits Senate Policy and Standing Orders on the Assessment of Students' Academic Performance.

⁷⁰⁷ Murray & Nelson 2009 : 49.

⁷⁰⁸ Ibid. 49 – 51.

⁷⁰⁹ Ibid 51.

should concentrate on the student's ability to demonstrate autonomous learning and identify the performance indicators which a student has to achieve across all classification levels.⁷¹⁰ I submit that this alternative grading solution, which is proposed by Northumbria University, UK, proves to be effective.⁷¹¹

4. Assessment challenges

The main challenge in CLE is not in the teaching of the course, but the assessment of the students' performances.⁷¹² Challenges in assessment in the South African environment include the following factors:

- Large student numbers

An ideal ratio between clinician and students in clinical courses has been suggested in various jurisdictions. South African university law clinics often exceed the maximum suggested ratio more than three times.⁷¹³

- Clinicians' time constraints – which also complicates assessments

Clinicians often indicate that they operate under undue time constraints, mainly because the large student numbers result in larger case loads and contact times.

- Assessing interviewing skills

It is impossible for the clinician to attend on every student consultation conducted with clients. This lack of direct supervision during consultations means that interviewing skills remain largely unassessed.

- Language barriers

The university's language of instruction is English.⁷¹⁴ Clients who frequent the clinic are sometimes not able to articulate their problems in English. The students who are

⁷¹⁰ The full grade descriptors can be viewed at

<http://www.northumbria.ac.uk/sd/academic/law/sloneu/assessment/>

⁷¹¹ Murray and Nelson are clinicians practicing at Northumbria University, UK.

⁷¹² Du Plessis 2011 : 1 – 10.

⁷¹³ Shrag 1996 : 175; Grimes & Brayne 2004 : 86. See discussion in paragraph 5, Chapter Four of this study.

⁷¹⁴ web.wits.ac.za/NR/rdonlyres/86CE4FF3.../0/languagepolicy.pdf; Du Plessis 2009 : 95; Barry 2007 : 50.

proficient in such other language, may be either overburdened or be limited in their access to the client pool.

- The nature of the client pool⁷¹⁵

The client pool mainly consists of the indigent in the community. The students' abilities to assist clients in distinguishing the various pockets of a general problem is deserving of assessment, even if a case is not taken on for litigation. These assessments pose to be difficult as the clinician may generally not be present during these consultations.

- Students working in pairs⁷¹⁶

Clinicians often see the end-product of "joint" effort without having an opportunity to fully observe the process of production. Assessing and allocating grades to an individual student becomes challenging.

- Students allocated to different specialisation units

Ortiz suggests that, when planning and setting a curriculum, the possibility of operating the clinic in specialised units, needs to be considered.⁷¹⁷ Stuckey correctly highlights that "[i]n a world of increased specialization, coupled with the innumerable fields of law that await law school graduates, makes it impossible for [the] years of law school to prepare students to practice competently in every field of law. The requisite knowledge and skills are simply too diverse."⁷¹⁸ The sentiment of specialised clinics is echoed by Australians Evans and Hyams, who believe that clinics should explore the mix between generalist and specialist clinical units.⁷¹⁹ From their perspective, specialist clinical units may provide students with 'a richer skill set and a deeper and more comprehensive milieu in which to practice those skills' which will benefit the law school and serves as a valuable resource for the community. Like Stuckey, who voiced the perspective in the USA, they suggest that specialist training is both appropriate and desirable in an ever-increasing climate of

⁷¹⁵ De Klerk 2007 : 97; Du Plessis 2009 : 96 for full discussion on the nature of the client pool.

⁷¹⁶ De Klerk & Mahomed 2007 : 312; Hyams 2006 : 77 – 95; Chavkin 1994 – 1995 : 199 – 244; Blumenfeld 2010 : 109 – 142.

⁷¹⁷ Ortiz 2011.

⁷¹⁸ Stuckey 2007 : 41.

⁷¹⁹ Evans & Hyams 2008 : 52 – 86.

professional specialisation. In a number of South African university law clinics, students are divided into groups that are allocated to specialised units, thereby exposing them to different clinical and legal procedures and different court systems. The assessment of students in an even-handed manner across the different specialised units poses certain challenges.⁷²⁰

- Education and experience variances amongst students

Students often struggle to de-compartmentalise the different subjects of the substantive law as taught to them in their first three years of study. More than only presenting the substantive law in clinical context, the students need to be exposed to areas of legal practice outside the scope of the law clinic and the practices of the social and/or business environment within which the client's legal problem manifests.⁷²¹ This problem is acknowledged across a number of jurisdictions and various solutions are proposed, such as the introduction of enrichment subjects,⁷²² skills classes in legal research, analysis and writing, the process of analysis and structured reasoning to assist students to "think like lawyers", as a future lawyer must be taught "how to provide an objective opinion. This teaches the future lawyer to explore the problem, to evaluate the strengths and weaknesses of both parties' arguments, and to arrive at a conclusion based on his or her own analysis."⁷²³ Iya holds that, in aiming through CLE to best equip future lawyers to operate effectively in a changing global environment, diversity management "can ensure an environment of better understanding and appreciating diverse viewpoints and experiences exchanged among individuals or groups, thereby expanding their horizon for managing even better external/global conflicts and challenges." These different viewpoints and experiences "encourage and prepare students to better understand the external world and global trends and to become better future lawyers".⁷²⁴

⁷²⁰ De Klerk & Mahomed 2006 : 306 – 318; Du Plessis 2007 : 44 - 63.

⁷²¹ Du Plessis 2007 : 59.

⁷²² Cody & Green 2007: 64.

⁷²³ Motala 1996 : 696 – 698.

⁷²⁴ Iya 2008: 34 – 52.

- Differing levels in students' knowledge of substantive and procedural law
Despite revision and examination during CLE programmes, some students remain less than capable in carrying over their knowledge and application of substantive and procedural law into clinical practice. These weaknesses impact on their case work. The assessment challenge lies in the fairness of subtracting a percentage of marks for these weaknesses when students' case file work is assessed.
- The differing levels of clinicians' experience in supervision and assessment
The more experienced clinician may be perceived (and often rightly so) to be able to maintain a certain standard in their assessment methods than a less experienced clinician. The flip-side of this statement is the possibility of new insights offered by the less experienced clinician to his/her senior. Other factors may also impact on the teaching and assessment methods of clinicians: one clinician may be more experienced in litigation whilst another in teaching; different clinicians may have different perspectives regarding the focus of the course; a new clinician may have been trained by a more experienced clinician who became stale regarding his/her focus and methodologies; and the clinical director may hold a different view and/or have a different approach from that of some of the clinicians.
- Student expectations
A 2005 survey was conducted among third- and fourth-year law students at the University of Kwa-Zulu-Natal and the Nelson Mandela Metropolitan University to establish students' expectations of their law degree.⁷²⁵ Curriculum design as well as assessment methods may have to be adapted to ensure that the students' expectations are addressed.
- The requirements of the South African Qualifications Authority.⁷²⁶
The South African Qualifications Authority prescribed a set of exit-level outcomes for the revised LLB degree. These exit-levels must be heeded.

⁷²⁵ McQuoid-Mason 2006(a) : 166 – 173.

⁷²⁶ McQuoid-Mason 2006(a) : 166 – 173; Du Plessis 2008 : 4.

Identifying and publication of assessment challenges are necessary for clinicians to understand limitations they may be facing, allowing them to use the information to overcome these challenges.⁷²⁷ In the remainder of this chapter, these challenges identified above will be reviewed and solutions will be proposed.

5. Large student numbers

The ideal ratio between clinician and students in clinical courses has been suggested to be between 1 : 7 and 1 : 12.⁷²⁸ The ratio of a maximum of 1 : 12 was proposed by the United Kingdom Clinical Legal Education Organisation (“CLEO”).⁷²⁹

5.1 Wits Law Clinic

At WLC the ratio over the past number of years has ranged between 1 : 38 and 1 : 46.⁷³⁰ As a result of the large student numbers in proportion to available clinicians, students are required to work in pairs,⁷³¹ thus reducing the contact time between clinician and student pairs to a ratio of, at least as far as clinical work is concerned, between 1 : 19 and 1 : 23. This clinician : student ratio may vary from one academic year to the next, depending on a number of factors, one of which is the number of students registered for a particular academic year.

Another factor is the availability of clinicians. Every year, since 2000 (except for 2008), a different clinician was granted a year-long study leave (“sabbatical”) by the university. The clinician component of the clinic comprise of senior clinicians, who hold the positions of Adjunct Professors or Principal Tutors, and junior clinicians, who may be Tutors, Senior Tutors or professional assistants. The senior clinicians all take on a full load of students, whereas some of the junior clinicians will only supervise a half load of students. During 2011, for example, the clinic employed ten clinicians, of which two took on a half load of students and one was on study

⁷²⁷ Schehr 2009 : 42, 43.

⁷²⁸ Shrag 1996 : 175.

⁷²⁹ Grimes & Brayne 2004 : 86. The authors noted that ‘US models advocate 8 : 1, presuming the staff is dedicated largely to the clinical programme’.

⁷³⁰ Du Plessis 2008 : 11. Student registration, excluding externs, for the course over the past number of years was: for 2005: 250 students, for 2006: 280 students, for 2007 and 2008: 308 students.⁷³⁰ 228 Students registered for the course in 2009. The student numbers for 2010: 258, for 2011: 297, for 2012: 306 and 408 students registered for the course in 2013.

⁷³¹ Du Plessis 2008 : 11.

leave,⁷³² with the effect that the students registered were shared by an effective clinician strength of eight. A further supervision restructuring occurred within the clinic during 2012. Nine clinicians were employed, one of whom on study leave for the year. Two of the senior clinicians were seconded to the Law School, allowing them to only take on a half load of students, together with a further three junior clinicians taking half student loads. For 2012 there was therefore an effective clinician strength of six and a half. For 2013 more clinicians were appointed, bringing the total clinicians serving the 408 students registered, to 11.

A further factor is the possible restructuring within the specialised units where junior clinicians sometimes rotate within units. For example: the general litigation unit, which accommodated two clinicians, was restructured during 2007 and replaced by the consumer unit and the evictions unit. During 2008 a housing unit was incorporated with the evictions unit. During 2009 additional clinicians were placed with the delict and labour units, due to large volumes of cases.⁷³³ With the reduced clinician numbers in 2012, the refugee- and delict units were left with single clinician supervision, whilst a second clinician was added to the general and consumer unit. Eleven clinicians are employed during 2013 with none on a sabbatical. The family unit employs three clinicians, two are allocated to the refugee unit, one to the consumer unit, two to the labour unit and one each to the housing and evictions unit and the delict unit. The student loads carried by the clinicians vary, depending on their seniority.

The seniority of the clinicians, the effects of the lecturing timetables of clinicians who also teach academic courses at the Law School and the requirements of specific funders are further factors impacting on the supervision of a large number of students.⁷³⁴ For example: in the refugee unit, the funders require the finalisation of a specific load of litigation each year, which is not necessarily aimed at or appropriate for student teaching. This resulted, during 2009, in one of the clinicians heading this unit, not supervising any students, whilst the second clinician allocated to this supervising only approximately half of the students who may normally be allocated to a specialised unit. During 2011 the funder's demands increased, causing the two clinicians in this unit to each take on half a load of students. This unit's profile changed again in 2012, where the unit is supervised by a single clinician taking on half a student load. Two clinicians are allocated to the refugee unit for 2013.

⁷³² Du Plessis 2009 : 93.

⁷³³ Ibid.

⁷³⁴ Ibid.

5.2 University of Pretoria Law Clinic

At UPLC the student numbers are controlled,⁷³⁵ mainly because CLE is an elective course. They also experienced a decline in student numbers over the past number of years. Student registrations for 2010: first semester - 61, second semester – 54; for 2011: first semester - 97, second semester – 89; for 2012: first semester - 53, second semester – 40; and for 2013: first semester – 54. From 2014 CLE will be a year course, which will ensure that there will not be a decline in student numbers for the second semester. Two clinicians supervise the CLE course. The clinicians at UPLC are appointed as support staff, as opposed to academic staff, and therefore do not qualify for sabbatical leave.

5.3 University of the Free State Law Clinic

The UFSLC's clinician : student ratio is on average 1 : 25, which also poses a challenge, particularly as CLE is a compulsory course.⁷³⁶ The seniority of the clinicians, the effects of the lecturing timetables of clinicians who also teach academic courses at the Faculty of Law, the compulsory training of candidate attorneys and the requirements of funders further impact on the supervision of a large number of students. The Director of the clinic is appointed as an academic staff member, but the other clinicians are appointed as support staff on a contractual basis. This appointment structure places an undue burden on the clinic, as continuation is not guaranteed. Clinicians are furthermore required to focus on a personal intake of clients as well, which may distract their focus from CLE. The clinic is situated off-campus, which creates interruptions in clinical work when students and clinicians have to commute for lectures. The Director also teaches at the Law Faculty, as do some of the clinicians. Students have problems with travelling costs to and from the clinic and students and staff do not have the protection of campus security. The moving of files between the clinic and the university campus pose to be difficult in view of the rules of the Law Society of South Africa regarding client and information protection.

⁷³⁵ Haupt & Mahomed 2008 : 237 – 292.

⁷³⁶ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: RPK412 course outline, and information supplied by the clinical director.

5.4 University of Johannesburg Law Clinic

The UJLC's clinician : student ratio is on average 1 : 48, spread over two semesters, which also poses a challenge, particularly as CLE is a compulsory course.⁷³⁷ UJLC operates three different clinics. The Kingsway and Soweto campuses each employ two full time clinicians, as well as an additional attorney on a contractual basis. At the Doornfontein campus there is only one clinician. All the clinicians are appointed as administrative staff, not as academics. Student numbers for 2013 is 254. UJLC does not employ candidate attorneys to assist them.

6. Proposed solution to: Large student numbers

A solution for large student numbers can be found in grouping students together for collaborative work.⁷³⁸ In an effort to make the large student numbers more manageable, the WLC pairs the students, thereby halving the student : clinician ratio. This ratio can be further reduced when students, in their pairs, form different student law firms or student teams. This alternative model of collaborative learning will be illustrated below.

Legal clinics in a variety of disciplines in the USA are poised to teach collaboration.⁷³⁹ Collaborative learning is a philosophy of education making the assumption that knowledge is not something given from one to another, but rather that knowledge is a consensus. In collaborative learning students learn to depend on one another rather than exclusively on the authority figure or teacher/clinician.⁷⁴⁰ The teacher/clinician's role becomes one of facilitator.⁷⁴¹ Knowledge as consensus acknowledges that there are different views and mandates. Dissent must be heard and incorporated into the final consensus that becomes the gained knowledge. Through collaborative learning students who face a world in which diversity is increasingly evident, tenacious and threatening are taught the craft of interdependence.⁷⁴²

An alternative model when clinicians have to work with large student numbers, and to incorporate collaboration, is to allocate students to different teams which will operate as student law firms. In South Africa, this model is already applied by UPLC.⁷⁴³

⁷³⁷ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30, and information supplied by the clinical director.

⁷³⁸ Du Plessis 2013.

⁷³⁹ Lerner & Talati 2006 : 111.

⁷⁴⁰ Blumenfeld 2010 : 119.

⁷⁴¹ Ibid 126.

⁷⁴² Ibid 121.

⁷⁴³ Haupt & Mahomed 2008 : 279.

6.1 Advantages⁷⁴⁴

Advantages of this collaboration model are plentiful. Researchers into collaborative learning consistently found an engagement of students in the learning process, and that they display high levels of motivation and involvement in the learning experience.⁷⁴⁵ Groups are known to conduct activities at a relatively high level of intellectual functioning, higher than that displayed by students in non-groups.⁷⁴⁶ Cooperative learning groups also promote more cross-race relationships than might otherwise be the case.⁷⁴⁷ A non-academic benefit is socialisation – cognitive theories of collaborative learning emphasise the effects of working together as an end in itself.⁷⁴⁸

By providing students with the opportunity to work in firms, student attorneys can filter client life experiences through multiple personal life experiences and thereby potentially develop richer and more accurate understandings of their clients. Although there are no guarantees that students will possess the relevant life experiences, the pairing does increase the potential for more accurate understandings and thereby more sensitive and appropriate representation of clients.⁷⁴⁹ Student challenges during interviews are discussed in paragraph 9.2 of this chapter. A varied student combination in firms will address these challenges, due to their different and multiple life experiences.

This collaboration may have a direct impact on student motivation. Some students feel that they may be more efficient when working at his/her own pace without the hassle of having to coordinate schedules with other students. However, some others reported increased motivation, as “I think I have been more motivated because my responsibility now is not just to a client but also to another [student] attorney”.⁷⁵⁰ Having student partners helps to keep student anxieties within creative limits, as they now must take responsibility for the impact of their acts on another person(s). Performance anxiety is lessened and unproductive levels are avoided.⁷⁵¹

⁷⁴⁴ The advantages of “student teaming” and the pairing of students are discussed by Hyams 2006 : 77 – 95, as well as by Chavkin 1994 – 1995 : 199 – 244.

⁷⁴⁵ Cohen *et al* 2004 : 3.

⁷⁴⁶ Shlomo & Shachar 1995 : 285.

⁷⁴⁷ Slavin & Cooper 1999 : 662.

⁷⁴⁸ Blumenfeld 2010 : 127.

⁷⁴⁹ Chavkin 1994 - 1995 : 213.

⁷⁵⁰ Ibid 214.

⁷⁵¹ Ibid 215.

Clinicians are not directly involved with the clients and therefore may not always have a sense of what is really going on in a case. Everything is filtered through the students which can result in preconceptions, biases and other factors that affect the accuracy. These uncertainties are lessened when information is filtered through more than one student in a firm. When working in firms, students can be exposed to a greater number of clients and issues in a smaller overall workload for individual students. Students may also feel responsible for a smaller portion of the cases, easing the clinician's supervision responsibilities.⁷⁵² In paragraph seven of this chapter the work loads and time constraints of clinicians are discussed. Students working in firms can alleviate these.

At the Phoenix School of Law, Arizona, working in student law firms is regarded as a hallmark of their General Practice Skills course. "Associating into law firms allows the students to learn through small group discussion, planning, sharing ideas, and division of labor. Additionally, the students learn, just as in actual law firm practice, that there are differences between them in strengths and weaknesses, work ethic and accountability. One of the most valuable lessons students learn is that their individual reputations can be affected by the work product of their law firm."⁷⁵³

Students should be encouraged to become involved in group work to foster support and to share responsibility.⁷⁵⁴ I submit that, with my 15 years' experience in clinical legal practice, I can identify the following additional advantages. Tutorials will be more structured, as members of the firm will prepare for the tutorial in advance. There will be less student : clinician contact time, freeing up the clinician for other activities, such as research. Students will learn to work in a group with a larger diversity of the student population, the shy student will be drawn to participate, the stronger students will learn to be firm with idle and inactive students and language and cultural diversity will be advanced. This model has the further advantages of promoting reflection, peer assessment and self assessment. When students work in pairs with a partner, decisions taken in their cases can be tested against other members of the firm. This can create healthy competition and teach practice management.

At the WLC, students are currently not trained in time-keeping and fee recovery. I submit that it will be prudent to do so when students operate in firms, creating healthy competition

⁷⁵² Ibid 216, 217.

⁷⁵³ Gerst & Hess 2009 : 532.

⁷⁵⁴ CLEO 2007 : 14.

amongst the firms. Although no actual fees may be recovered, the exercises of fee recovery will foster good file maintenance and practice management. Students will have to peruse their files regularly, as they will be entitled to ‘charge fees’, which in turn ensure that client files are not neglected.

I further submit that, following the competitions between firms to ‘generate fees’ students will be eager to assist more clients, even if only administratively. Whereas students currently turn clients away after a consultation where it transpires that no assistance can be rendered, they may now write an opinion or a report to the client, where reasons will be provided. The same principle can be applied when clients are referred to another agency for assistance – instead of merely sending clients there, students will draft an analysis and a report accompanying the reference. With this approach, the clinical experience will be enhanced, for both client assistance and student learning.

I submit that, when students are compelled to treat all consultations in the above manner, it will prevent good client files ‘slipping through the cracks’, as the clinician will be able to recall the client should it become clear during the tutorial following the consultation that the client can in fact be assisted by the students. Clinicians will also be in a better position to assess whether a specific case, although it has merits, is suitable for student training. These will be in instances where the case proves to be too complicated for student training and/or will place too high a demand on clinicians’ personal attention. These matters can be referred to other *pro bono* agencies. Should the matter be of interest for student learning, the facts can be used by the clinician to simulate the case, allowing the students the benefits of the procedure without causing the clinician to be too busy with the actual case to attend to the students. The students will have the benefit of learning the intricacies of the case whilst the client remains protected.

6.2 Firm size

The team or firm size is important, as researchers have found that it can have a significant impact on collaborative learning. It was found that student learning, satisfaction and work product may be maximised in teams larger than two.⁷⁵⁵ At the Phoenix School of Law, Arizona, students form themselves into law firms of four or five students at the beginning of the course and the law firms

⁷⁵⁵ Ibid 241.

are maintained throughout the course.⁷⁵⁶ CLEO recommends a minimum of two students to be responsible for each client/case. This offers protection to the student and provides continuity. CLEO found that firms of about six students can share a caseload.⁷⁵⁷ However, although firms can comprise of a number of students, students need to pair within the firm and attend to cases in student pairs. Chavkin correctly holds that clients cannot cope with active listening to more than two students. More than two students are also potentially destructive of the goal of forming an appropriate attorney-client relationship.⁷⁵⁸ Student partners working in pairs within a larger firm structure is recommended, despite a possible perception from other firm members that it will be unfair to deprive some of them from interaction with a client to avoid the intimidation effect.

I submit that the solution will be to have three pairs of students forming different firms of six students each. Cases are allocated to firms, but within the firms, a set of partners (student pair) work on specific cases which they will discuss with other members of the firm.

6.3 Firm set-up

At the Phoenix School of Law, students quickly move into professional skills instruction. For law office organisation and management, the student law firms produce a law firm business plan, which includes their decision regarding the firm's area of practice, location, office equipment needs, marketing, insurance coverage, staff, systems for checking conflicts, case management, billing, and the allocation of income and expenses. The firm draft documents essential to the attorney-client relationship, retention letters, fee agreements, client intake forms, a client conflicts checking procedure, a declination letter, a mail processing procedure, a closing letter on a client's case, a trust account three-way reconciliation, a billing statement, and time sheets. Additionally, students must discuss file retention policies, withdrawal from representation and the strict rules that apply to the handling of client funds and trust accounts. Students may also demonstrate an electronic case management system.⁷⁵⁹

I submit that the above represents an ideal scenario. However, setting up a firm with these details needs to be viewed in a US context where the JD degree is post-graduate and no articles of clerkship are required before writing the bar exam. In the South African context students will

⁷⁵⁶ Gerst & Hess 2009 : 532.

⁷⁵⁷ CLEO 2007 : 15.

⁷⁵⁸ Chavkin 1994 - 1995 : 241.

⁷⁵⁹ Gerst & Hess 2009 : 533.

have to organise their firms with at least some of the components, such as organisation and practice management,⁷⁶⁰ case management, fee structures and the drafting of certain documents such as client intake forms, a client conflicts checking procedure,⁷⁶¹ a declination letter, a closing letter and time sheets. I further submit that these should not take precedence to, or interfere with, the skills training components of CLE. Only components that can be assessed as part of practice management should be enforced.

6.4 Firm operation

Firms' meetings should be held weekly, in addition to the meetings of student pairs in the conduct of their cases. The knowledge, skills and expertise of the students are expected to be shared within the team or firm. Although students can and ought to rely on the clinician's judgment and control over cases, the initial responsibility should be the students'. This fosters a sense of professionalism and adds to the nature of the learning experience.⁷⁶² Firms can have management conferences, enter into negotiations with the assistance of a candidate attorney, do witness interviews and prepare settlements, all of which can be assessed.⁷⁶³

At WLC, student pairs currently attend weekly 45-minute tutorials with their clinician. With the alternative model of students working in firms, tutorials, for which the time can be increased, will be with the student firms and the clinician. Advantages are that the clinician : student contact time will be reduced. All the students in the firm will have the benefit of the discussions of all the cases.

The firm (or different firms falling under the supervision of a specific clinician) may also meet with their clinician for reflection on the work done, in a conference type setting. The firms can exchange ideas about their experiences. The clinician may pose either general or narrowly focused questions for discussion.⁷⁶⁴

⁷⁶⁰ Ethics and practice management can be assessed. Of interest when assessing, is "the five C's of Law Office Ethics" – communication/confidentiality, conflicts checking, calendaring, competence and cash. See Gerst & Hess 2009 : 536, 537.

⁷⁶¹ Ibid.

⁷⁶² CLEO 2007 : 14, 15.

⁷⁶³ Gerst & Hess 2009 : 533 - 536.

⁷⁶⁴ Bender *et al* 2006 : 65.

6.5 Disadvantages

Disadvantages with this model were identified. I submit that these disadvantages can be overcome, as will be indicated below.

Clients may prefer a specific student and ignore the other, or may prefer a male student, whereas the female student has more experience. Many of these types of scenarios may play itself out. These problems may complicate or detract from the experience for the student. I submit that in the clinical context this learning alerts the student to the context in which he/she may have to practice once qualified.

Students may not want to take responsibility for someone else in their team. It has been noted that “although lawyers are clearly responsible for their own acts, teamwork adds subtle shades of meaning to the obligation”.⁷⁶⁵

Ethical issues may not be solely within the control of a specific student, as all students in a team cannot directly receive each piece of relevant information, such as when one of the team makes a telephone call. The by-product is a high level of discomfort for the student who perceives an unresolved or inadequately resolved ethical problem. To lessen the discomfort, one student may assume a greater role in the case in order to be better able to control information flow and to mold the responses to ethical issues to that student’s vision of that responsibility.⁷⁶⁶ This can also be applied when discomfort arises due to language barriers.

There can be disagreement with large decision making issues. Even with the most effective tutorials, ensuring a full discussion of the issues and identification and weighing of the various factors supporting or undercutting each option, a conflict may exist between students over the weight that should be given to specific factors, or even the applicability of certain factors to a particular case. The clinician must weigh the various factors in light of his/her dependence on information provided by the students. Chavkin poses the following: Should the clinician simply break the tie and come in on one side or another? Who should decide? Must students just knock heads? For these, clinicians can be an independent outside voice in identifying and questioning problematic resolutions of difficult issues. The mere presence of the clinician may counteract some of the worst tendencies that can result from collaboration. This presence can maximise the

⁷⁶⁵ Chavkin 1994 - 1995 : 221.

⁷⁶⁶ Ibid 221, 222.

potential benefits.⁷⁶⁷ I submit that these disagreements and conflicts will also make suitable material for reflection.

There are logistical problems in the process of working with someone else. Schedules must be coordinated, information must be shared and duplication of effort may unintentionally result. These are however not uncommon in practice. Ultimately, the aim should be that the final product must be something that the students most probably would not have achieved singlehandedly, or at least within an efficient time frame.⁷⁶⁸

Another identified disadvantage is that the complexity of the tutorials may be increased.⁷⁶⁹ I submit that, as far as the complexity of cases presented are concerned, no real difference would be noticed, as these would have had to be worked through despite students working in a team. More time consuming will be the “intra-team issues that must be identified, considered and addressed.”⁷⁷⁰ Students may be reluctant to bring up certain issues in firm tutorials, as they might reflect badly on the others. I submit that students need to learn to speak up, as they will be confronted with these in practice. Students need to appreciate the benefits of cooperative learning, as it has been found to be of value for all students, including those identified as at risk, bilingual, gifted, as well as those identified as ‘normal’.⁷⁷¹ The clinician may also invite suggestions or comments to be placed with his/her mail, or meet with student(s) by appointment outside formally scheduled tutorials. The most efficient way of managing these, are by way of reflection, which can also be assessed.

6.6 Social loafing

Research showed that some individuals tend to reduce their effort when working with others. To overcome the impact of social loafing, students identified the need to create tasks where individual effort could be measured and individual marks awarded. The research further suggests that social loafing occurs when there is a perception that the benefit of loafing is greater than the net benefit of contributing fully to the group. A way to address this is to change the net benefits that attach to loafing behaviour. Suggestions are to allow students the right to refuse to share a grade with one of their team members. The group can submit a form when a task is to be assessed,

⁷⁶⁷ Ibid 224 - 226.

⁷⁶⁸ Ibid 226.

⁷⁶⁹ Ibid 228.

⁷⁷⁰ Ibid 228, 229.

⁷⁷¹ Blumenfeld 2010 : 127.

indicating their willingness to share a grade, as they all participated. The students who fail to sign the declaration will be entitled to an automatic review process, based on mandatory work programmes dividing up responsibility for tasks each week and to log individual student participation.⁷⁷²

Students refusing to share a group mark with a loafing member can be controlled by peer assessment schemes. Consistent poor peer assessment can have the effect of reducing rewards to the loafing team members. Advance awareness that peer assessment will be made part of the course assessment should be advantageous and encourage full group participation. Despite criticism against peer assessment, there are educational benefits, such as process orientation, students' initiative, self-regulation and self-reflection. Confidential peer assessment can be done at the end of the teaching period using either closed or open questions.⁷⁷³ Although criticised, when peers assess someone else's work, it encourages them to evaluate and benchmark their own performances.⁷⁷⁴ A peer assessment rubric may look as follows:⁷⁷⁵

PEER ASSESSMENT: EFFECTIVENESS OF TEAM MEMBERS

Firm _____

Date _____

Please rate the team effectiveness of your team member by placing an "x" in the appropriate block:

	Name of Team member to be rated	Seldom	Some of the time	Most of the time	All of the time
1	Attended all group activities and meetings				
2	Participated in all group activities and meetings				
3	Shared responsibilities for assigned tasks				
4	Provided effective and efficient assistance				
5	Provided constructive feedback during projects				
6	Exerted a significant effort to achieve project goals				
7	Acted in a trustworthy way				

⁷⁷² Hewitt 2008 : 109.

⁷⁷³ In conducting these peer assessments in the South African environment, clinicians need to take cognisance of diversity issues and multiculturalism. See discussion in paragraph 21 of this Chapter.

⁷⁷⁴ Hewitt 2008 : 110, 111.

⁷⁷⁵ This peer assessment rubric is used by UPLC.

8	Motivated other group members				
9	Controlled temper during group activities				
10	Criticised ideas, not people				

Another method when social loafing is present is to allow teams to ‘divorce’ a team member, thereby expelling a non-contributing, or ‘loafing’ member. A code of ethics can be drafted by the team which can be used to regulate contributions to group work and formalise the process of expulsion of members from the group, as well as clarify exactly when this should occur.⁷⁷⁶ I submit that this process may be somewhat advanced on student level, although it reflects what can be expected in a partnership contract in practice.

6.7 Recommendation

When students are working in firms, student feedback norms are a critical quality control issue. The clinic must decide how, what sort of and in what setting feedback will be provided. The benefits of this group supervision and feedback must be weighed against the lack of individual attention, as well as whether clinicians can continue to provide a specific level of individual attention to every student during the course. It is deemed to be appropriate for students to be progressively ‘cut loose’ from their reliance on their clinicians.⁷⁷⁷

Students working in firms may perform better in representing their clients and may learn more from the clinical experience than do students providing representation alone. Evidence suggests that benefits of pairing will not accrue automatically and steps must be taken to increase the likelihood that these benefits will be realised. To benefit from working in firms, students need to be informed that collaboration is one of the goals of the clinical programme. Only then can students begin to give it the weight it deserves in their clinical work. It is important to ensure that joint work in the clinic is truly collaborative, as opposed to parallel work.⁷⁷⁸ I submit that students should discuss all aspects of a case, even if the work is divided. When work is divided and partners work parallel, mistakes can occur when parallel work is merely put together towards the end of building a case. Therefore even parallel tasks must be discussed during joint meetings.

⁷⁷⁶ Ibid.

⁷⁷⁷ Evans & Hyams 2008 : 73.

⁷⁷⁸ Chavkin 1994 - 1995 : 232, 233.

Clinicians will need to inquire about students' collaboration during tutorials to try and identify problems that may be interfering with true collaboration. This may mean providing some time at the beginning or at the end of each tutorial during which the clinician meets with individual team members for a few minutes. This will provide some regular setting in which potentially awkward issues can be comfortably discussed. These meetings need not be weekly and need not be long. As indicated before, clinicians have additional time when the alternative model where students work in firms are used. Clinicians may alternatively provide for generally available consultation times during which students may consult by appointment. Clinicians should in any event allow for a 15 minute 'free time' between the different tutorials for quick discussions or to allow for tutorials running overtime.

When operating in student firms, explicit inclusion of collaboration in evaluation criteria is required for fairness, to ensure that students pay it the appropriate degree of attention.⁷⁷⁹

When this alternative model is considered, one needs to ensure that the aims of employing such a model are met, namely to address the workloads and time constraints of clinicians and to teach large numbers of students in an assessable curriculum and environment.

6.8 Firm and group work assessment

An advantage of group assessment is the significant reduced marking burden. As there are also strong educational benefits, including the development of a range of important skills such as team and leadership skills, communication skills and organisational skills, provision must be made for the assessment of these. A fair assessment strategy must be employed, as all group members receive the same mark.⁷⁸⁰

Hemingway opines that, developing and implementing clear grading criteria (rubrics) when students work in collaboration, will enable clinicians to grade numerous assignments consistently and fairly.⁷⁸¹ Clinicians can conduct a survey on collaboration prior to formal assessment. Sample questions for such a survey are illustrated below.

⁷⁷⁹ Ibid 236.

⁷⁸⁰ UKCLE : 2.

⁷⁸¹ Hemingway, Anthon, Smith, Desanctisc & Clark 2011 : 2, 3.

“COLLABORATION

GROUP WORK SURVEY

Sample Questions for group work survey⁷⁸²

1. Indicate the predominate method your group used when collaborating on this assignment:
 - a. In-clinic meeting for group work
 - b. Out-of-clinic synchronous physical meeting (i.e., being in the same place simultaneously)
 - c. Synchronous virtual meeting (e.g., telephone, skype/video conference, or other simultaneous or contemporaneous electronic meetings)
 - d. Asynchronous virtual meeting (e.g., email, blog, shared space on Google docs, or other electronic meetings not occurring at the same time)
 - e. Other (please specify)
2. Thinking only of the initial drafting/researching (but not the editing or revising), how did your group complete the work? Please read all choices before answering.
 - a. The entire case/assignment was drafted/researched by only one person
 - b. The entire case/assignment was drafted/researched by each group member working separately, so that initially the group had multiple versions/drafts of the entire case/assignment
 - c. Different sections of the case/assignment were drafted/researched by different group members working separately
 - d. The group met synchronously and all group members drafted/researched the entire case/assignment together
 - e. Other (please specify)
3. How would you rate the drafting/researching process that you selected in the previous question (from 1 to 5, with 1 representing “Poor” and 5 representing “Excellent”)?
4. Thinking only of the revising and editing (but not the initial drafting), how did your group complete the work? Please read all choices before answering.
 - a. The entire case/assignment was revised/edited by only one person
 - b. The entire case/assignment was revised/edited by each person working separately
 - c. Different sections of the case/assignment were revised/edited by different group members working separately
 - d. The group met synchronously, and all group members revised/edited the entire case/assignment together

⁷⁸² Adapted from: Hemingway *et al* 2011 : 3 - 5. *With special thank you to Widener Law Professors Jennifer Lear, David Raeker-Jordan, and Starla Williams for their work on the collaboration study and to Professor Jennifer Lear, Widener University School of Law – Harrisburg, for sharing the rubrics.

- e. Other (please specify)
5. If your group revised/edited the case/assignment, how would you rate the revising/editing process that you selected in the previous question (from 1 to 5, with 1 representing “Poor” and 5 representing “Excellent”)?
 6. Which of the following responses best describes your impressions after completing the case/assignment:
 - a. We shared the work equally
 - b. I did more than a fair share of the work
 - c. The other group members did more than a fair share of the work
 - d. I did all of the work
 - e. The other group members did all of the work
 - f. Other (please specify)
 7. How would you rate yourself in the following areas (from 1 to 5, with 1 representing “Poor” and 5 representing “Excellent”):
 - a. Communication skills
 - b. Leadership skills
 - c. Professionalism
 - d. Teamwork
 - e. Problem solving
 - f. Stress management
 - g. Quality
 8. How would you rate your other group members in the following areas (from 1 to 5, with 1 representing “Poor” and 5 representing “Excellent”):
 - a. Communication skills
 - b. Leadership skills
 - c. Professionalism
 - d. Teamwork
 - e. Problem solving
 - f. Stress management
 - g. Quality

There is no ideal way, but strategies to provide individual marks in addition to the group mark, can be achieved by way of peer assessment, which will develop their own judgment skills. Peer assessment is appropriate in assessing group work and it is particularly valuable if both product and process are assessed.⁷⁸³ A range of relevant skills are employed in the process of producing the group product. These include the ability to work with others, self management and organisational skills, research skills, communication and intellectual skills. Different marks can

⁷⁸³ See the discussion below in this paragraph.

be given to individual members of the group when the process is assessed, but this process is not visible to the clinician. Even if groups keep diary meetings to make the process of peer assessment more transparent to the assessor, the process will not be visible to other group members. Criteria for the assessment can be determined by the clinician or it can alternatively be negotiated with the students. It may be appropriate to allocate only a small part of the overall assessment to the peer assessed process, perhaps 10% or 20%. The percentage can be increased in due course as expertise and confidence improves.⁷⁸⁴

Chavkin suggests two models, of which one should be used to evaluate casework when students work on cases in teams.⁷⁸⁵

Model 1 : students are evaluated on the basis of the team's work on behalf of team clients. Students effectively incur joint and several liability for team work product. There are no incentives to discuss their partners' shortcomings, rather a strong incentive to either 'whip their partners into shape' or to compensate for the shortcoming of their partners. Loafing students will not feel the impact as they will be insulated by their partner's forced compensation. "At the same time, clients will often be protected since a student attorney cannot take solace in simply performing his or her own tasks well."⁷⁸⁶

Model 2: students are evaluated individually on the basis of their individual work. Students may have a somewhat reduced interest in collaborating with their partners, to the extent that their clinicians can identify who has done what on behalf of clients and students bear only individual liability. Clients may receive a lower level of performance since a student has at least one less reason – grades – for making up any deficiencies in partner work product. On the other hand, since he bears individual liability, he will not be able to shrink his responsibility, expecting the partner will make up.⁷⁸⁷

Although Chavkin notes the advantages and disadvantages of both models, he is of the opinion that grading in teams causes students additional stress and anxiety and he feels that teamwork should not be graded.⁷⁸⁸ I submit that team- or group work must be graded, as it involves a number of skills and the level of representation of live clients needs to be either

⁷⁸⁴ UKCLE : 3 – 5.

⁷⁸⁵ Chavkin 1994 - 1995 : 236, 237.

⁷⁸⁶ Ibid.

⁷⁸⁷ Ibid.

⁷⁸⁸ Ibid.

rewarded or penalised. The percentage which this grade counts towards a student's overall year mark may be set lower, but grading is essential.

Hewitt agrees that assessment can be complicated when students are expected to work in groups, especially where there is the inevitable tension between logistical convenience and sound educational practice.⁷⁸⁹ In her discussion of the assessment of groups, she notes that there is an increased competitiveness within the context of the law degree. When students perceive a loss of their individual advantage in terms of grading, it may lead to destructive behaviour in the group, as a group mark does not reflect their individual abilities or contributions. Students lose their abilities to judge their capabilities against those of their peers, causing them to resent group work and ignoring the benefits they can gain.⁷⁹⁰ It is therefore imperative to decide the purpose of the assessment, i.e.: what is being assessed. Hewitt states that group assessment can test substantive law or the development of particular general, legal cultural or theory context skills. She explains through example: if the main purpose of the group work is for students to develop skills in managing work among group members, to experience and resolve conflicts amongst members not contributing fully, it will be appropriate for the whole group to receive the same grade based on the group product, regardless of individual contribution. The logic for this grade is that, if only some members contributed, the quality of the product will be poorer and the overall grade will be less. The result is that all group members were appropriately marked for their failure to manage the workload within the group and their failure to ensure participation by all the members. This scenario would however imply that no group member contributed more than their fair share.⁷⁹¹ When some members contribute more than their fair share to cover for freeloading members, the grade will remain high and no members will be penalised for their lack in contribution. The freeloading students will end up with a grade they do not deserve. Hewitt posits that the key to this problem is whether the product or the process (i.e.: the ability to work successfully in a team) by which the product is achieved, is assessed.⁷⁹²

⁷⁸⁹ Hewitt 2008 : 92.

⁷⁹⁰ Hewitt 2008 : 101.

⁷⁹¹ Hewitt 2008 : 102.

⁷⁹² Hewitt 2008 : 103.

Various combinations for the assessment of a team/firm were suggested:

- the product is summatively assessed and process is not assessed;
- the product is summatively assessed and process is formatively assessed;
- the product is assessed as team mark and process assessed as individual or team mark;
- the product is assessed as a team mark by the clinician and peers mark the process;
- the product is marked as a team and the process self marked or assessed; and
- the product is marked as a team and the process marked by the clinician, peers and/or self.⁷⁹³

Hewitt indicates that the assessment of the process is not reliant on the quality of the group product. Skills associated with the group work can be assessed summatively or formatively. It is important to decide who should assess the team process, i.e.: the clinician, peers or self. The clinician can assess the process by observing the teamwork directly.⁷⁹⁴ This may be difficult, as clinicians may not be able to observe all the students all the time. This will also add to the workload and time consumption of the clinician, which is contra-productive for one of the main reasons of introducing team work/firms.

With peer assessment group members will assess the contributions of other group members. This can be done in a number of ways, such as: completing a survey about the teamwork process, or direct peer assessment where the team develops the marking criteria and applies them directly. The peer assessment can count as an individual mark over and above the group mark or it can be used to adjust marks awarded by the clinician. Weaknesses in reliability, such as inconsistent interpretations of marking criteria by the students, can be improved by frequent use of the process.⁷⁹⁵ Students can also be asked to assess their own competencies across a number of skills, including team skills. This self assessment method raises issues of reliability and it was reported that weaker students overrate their abilities while stronger students underrate their abilities.⁷⁹⁶ I submit that this will not be an appropriate assessment method when applied for summative grading. It may be used as a formative assessment.

⁷⁹³ Hewitt 2008 : 103, 104, as referenced to Burton 2003.

⁷⁹⁴ Hewitt 2008 : 104.

⁷⁹⁵ Hewitt 2008 : 105.

⁷⁹⁶ Hewitt 2008 : 105; Sergienko 2001 : 480; also see UPLC comments in paragraph 4.10.1 in chapter three of this study.

Explicit marking criteria for assessing the teamwork process must be distributed in advance of group work exercises.⁷⁹⁷ Teams can engage in either collaborative or cooperative activity. Cooperative activity is the effective division of labour, which develops delegation and/or management skills. (E.g.: students can divide one task into several component sections for which each takes individual responsibility.) Collaborative activity means that students work towards a common learning goal. Students must solve or perform a task together. Benefits, apart from the development of cooperative skills, include brainstorming and sharing of knowledge to understand substantive material. One task may involve both cooperative and collaborative activity elements. Differences in marking of these activities should be indicated.⁷⁹⁸

Finally, for effective assessment the clinician has to provide students with several opportunities to practice what they have learned and then applying clear evaluative criteria to their work.⁷⁹⁹ The use of both collaboration and rubrics can simplify the grading process.⁸⁰⁰ Collaborative work allows clinicians to conduct multiple assessments and feedback. In addition, developing and implementing clear grading criteria enable clinicians to grade numerous assignments consistently and fairly.⁸⁰¹ I submit that formative assessments on firms' work are done by clinicians mid-year. Summative assessments are to be done at the end of the course. These assessments must be graded and grade descriptors can be used.⁸⁰² Assessments should be guided by well crafted rubrics.

Hemingway suggests the following collaborative project rubric⁸⁰³

COLLABORATIVE PROJECT RUBRIC

Name of Evaluator:

Date of Evaluation:

Part 1: Evaluate the group as a unit with this section. Write to score in the score box.

Category	1	2	3	4	Score
Group cooperation	We talked very little among our group members	We shared information regularly	We worked together so that everyone contributed to	Can't imagine better cooperation	

⁷⁹⁷ Hewitt 2008 : 106, 107.

⁷⁹⁸ Ibid.

⁷⁹⁹ Sparrow 2004 : 1 – 9.

⁸⁰⁰ Suskie 2009.

⁸⁰¹ Hemingway, Anthon, Smith, Desanctisc & Clark 2011.

⁸⁰² Murray & Nelson 2009 : 49 – 51.

⁸⁰³ Hemingway, Anthon, Smith, Desanctisc & Clark 2011, with thanks to Professor Jennifer Lear, Widener University School of Law – Harrisburg, for sharing these rubrics.

			the final project		
Distribution of Group Tasks	Some group members did not complete any of the work	Everyone had a job to do but some jobs were incomplete	We divided up and completed the work equally	Can't imagine better/fairer distribution	
Group Leadership	We had no leader so we just did our own thing	No one person was a leader so we usually helped each other get the job done	One or more persons took a leadership role and gave good directions that kept us going	Can't imagine better leadership	
Communication among group members	We only talked when we thought we needed to, but received little feedback	We occasionally talked about what we were doing and shared some feedback	We usually asked each other for help and showed our work to each other	Can't imagine better communication - we talked all the time and shared our work for group feedback	
Individual Participation	A few people tried very hard, but most didn't do much	Each person did some work and tried to do a fair share	We all seemed to find our place and do what was needed	Everyone did a great job, I'll work with them again – can't imagine better	
Listening to other points of view	We usually listened to what others were saying but some either did not share ideas or argued	We usually listened to each other and tried to use what they said in the project	We listened while others talked, we learned about different view-points, and used some of that information in the project	Everyone listened to each other a lot, and used what we heard to improve our work and the whole project – can't imagine better	
Showing respect	No one was courteous and	Some were courteous and	Most were courteous and	All were courteous	

	opinions were not valued	some opinions were valued	most opinions were valued	and valued each other's opinions	
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Group Total Score

Rate your over-all group project experience	I would rather work alone	I learned that group work can sometimes be helpful	I liked learning this way and would probably try it again	It was a valuable and realistic way to learn. My group was great.	
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Part II. Use the following section to evaluate each member of your group. Your evaluation should be honest.

Name of Group Member You're Evaluating:

Category	1	2	3	4	Score
Source of Conflict	Participated in regular conflict that interfered with group progress. The conflict was discussed outside of the group	Was the source of conflict within the group. The group should have or did seek assistance from the instructor.	Was neutral; was not involved in either starting or solving conflicts.	Worked to minimize conflict and was effective at solving personal issues within the group.	
Assistance	Contributions were insignificant or nonexistent	Contributed some toward the project	Contributed significantly but other members clearly contributed more	Completed an equal share of work and strived to maintain equity through-out the project	
Effectiveness	Work performed was ineffective and mostly useless toward the final project	Work performed was incomplete and contributions were less than expected	Work performed was useful and contributed to the final project	Work performed was very useful and contributed significantly to the final project	

Attitude	Rarely had a positive attitude toward the group and project	Sometimes had a positive attitude toward the group and project	Almost always has a positive attitude toward the group & the project	Always had a positive attitude toward the group and the project	
Attendance & Readiness	Rarely attended group meetings, rarely brought needed materials, was rarely ready to work	Sometimes attended group meetings, some-times brought needed materials, and some- times ready to work	Almost always attended group meetings, almost always brought needed materials, was almost always ready to work	Always attended group meetings, always brought needed materials, and was always ready to work	
Focus on the task	Rarely focused on the task and what needed to be done. Let others do the work.	Focused on the task and what needed to be done some of the time. Other group members some-times had to nag, prod, and remind to keep this member on task.	Almost always focused on the task and what needed to be done most of the time. Other group members could count on this person most of the time	Consistently stayed focused on the task and what needed to be done. Other group members could count on this per-on all of the time.	
Group Member				Total Score	

The rubric below can be used to grade student partners' work on a specific case, as well as the performance of the firm.

FIRM/TEAM ASSESSMENT RUBRIC

	PERFORMANCE IN CASE: MR ABC v MRS XYZ		Pair/Partners	Firm
Skills and teamwork	* Presentation organised; sequence coherent; direction clear			

presentation 30 points (33%) 4 points per category	* Uses visual aids/demonstration effectively, professionally *Voices, gestures, use of humour, clothing appropriate for material *Both partners / all firm members participate in presentation, with each getting about the same amount of time * Firm members show each other respect *Partners / Firm used time effectively * Partners / Firm members respond to questions		
Content – research, identify and apply legal issues to facts 50 points (50%) 8 points per category	Applying relevant tests, rules and authorities: * Identifies all kinds of remedies available – clearly identifies which are definitively available, and which may be available * Accurately uses terms recognised by legal sources * Draws reasonable inferences from facts * Names assumed facts * Identifies methods of proving and measuring damages / alternative relief / type of relief * Provides justifiable specific amounts of damages / identified relief based on research		
Handout by the clinician pertaining to the case 20 points (20%) 4 points per category Responsiveness and organization	* Responds to questions posed in the problem * Organises response so that it is clear and easy to follow * Uses headings and subheadings to help the reader follow content * Cites to authorities – consistent and accurate * Includes the costs of preparing a settlement proposal (note: <i>depends on the question posed by the clinician and applicable to the case</i>)		
	Totals Note basis for reductions on criteria in the margins or on back		

7. Clinicians' workloads and time constraints

Clinicians often indicate that their time demands are acute, mainly due to the student numbers resulting in larger case loads. De Klerk, referring to WLC, indicated that clinicians have higher average student contact hours than law school academics, mainly because CLE is taught in smaller groups and in student pairs, as opposed to in a conventional classroom setting. Clinicians also supervise candidate attorneys and have to maintain client files throughout the year, as 'real-client clinics cannot simply close during student vacations'.⁸⁰⁴ The Director of the clinic is required to submit reports and statistical data to funders regularly, which is time consuming.⁸⁰⁵ Clinicians, who are appointed as academics, are also required to comply with the university's minimum requirements for peer-reviewed and accredited publication output. Clinicians and their students are subject to the same professional responsibilities and time management challenges that are experienced in any private practice, as well as the additional time constraints experienced when dealing with more complex matters.⁸⁰⁶

The WLC aims to ensure, where possible, an even distribution of student supervision amongst the clinicians. An uneven supervision allocation may result for a number of reasons. To illustrate: at the WLC there was a decline in student numbers during 2009, two additional professional assistants were appointed, and two senior clinicians who resigned, were replaced.⁸⁰⁷ The clinic, after these appointments, had 10 clinicians. Of these 10 clinicians, one was on a year's study leave, one of the senior clinicians who was replaced, was allocated to the refugee unit and was not able to supervise students, due to the requirements of the funder of the unit. Only 10 pairs of students were allocated to the clinical director, due to the administrative requirements of such appointment. Another senior clinician was replaced by a junior attorney and allocated only 10 pairs for the year. The two professional assistants (as clinicians), who are junior attorneys, were also only allocated 10 pairs of students each. The majority of students were allocated to the remaining five senior clinicians.⁸⁰⁸

At the WLC each clinician spends a minimum of four hours per week in the clinic and conducts a 45-minute tutorial with each student pair every week. All the clinicians lecture in the

⁸⁰⁴ De Klerk 2007 : 104.

⁸⁰⁵ Mahomed 2008 : 66.

⁸⁰⁶ Du Plessis 2008(a) : 128.

⁸⁰⁷ See De Klerk & Mahomed 2006 : 316, commenting on the ongoing challenge in replacing specialist clinical supervisors.

⁸⁰⁸ For the current number of clinicians and their allocations to specialised units at the WLC see discussion in paragraph 5.1 of this chapter, above.

specific specialised units for 90 minutes every week for a block of four weeks. All the clinicians also spend 90 minutes per week, for another four weeks, conducting trial advocacy exercises. The remainders of the weekly 90 minute lectures during the year are distributed amongst the clinicians.

At UPLC the larger clinic comprise of four divisions,⁸⁰⁹ namely civil litigation, criminal litigation, research and student training. The two litigation units and the research unit are manned by attorneys who do not attend to student training. The remaining unit is therefore allowed to focus on student training only, where CLE is currently taught by two senior clinicians who are regarded as support staff by their university and not eligible for sabbaticals. The clinicians are not required to research and published, although it is recommended. Clinicians' responses at this clinic were that they only experience time constraints occasionally, as their roles are defined.⁸¹⁰

At UJLC CLE is taught by five full-time clinicians and two attorneys appointed on a contractual basis. The staff is spread across three different campuses. As no candidate attorneys are employed, the clinicians have to attend to all the court appearances which leave the students unsupervised for those periods. As the clinicians are appointed as administrative staff, they are not required to research and publish and they are not eligible for sabbatical leave.⁸¹¹

At UFSLC CLE is taught by the Director and on average a further three clinicians who are regarded as support staff and only appointed on a contractual basis, creating much uncertainty regarding their positions. They are however not required to research and publish.⁸¹² They are required to consult with clients, manage cases personally, attend to matters at court, train candidate attorneys and supervise students. The Director holds an academic post, requiring her to research and publish. She is also responsible for the keeping of all statistical data and for reporting to funders.

⁸⁰⁹ Haupt 2006 : 229 – 243.

⁸¹⁰ Ibid.

⁸¹¹ UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30, and details provided by the clinical director.

⁸¹² UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: RPK412 course outline, and details provided by the clinical director.

8. Proposed solutions to clinicians' loads and time constraints

Greenbaum correctly indicates that “many law academics place limited value on their role as teacher, preferring to regard themselves primarily as lawyers ...”⁸¹³ This rings true for clinicians as well. Clinicians' loads and time constraints must be placed within university context. The abovementioned contact times of law school academics *vis-à-vis* those of clinicians relate to the academics' lecturing schedules only, and do not reflect their full academic loads.

In response to large student numbers and resultant increased case loads: clinicians should explore alternative clinical models, such as the collaboration or “firm” model described above, which will curtail student contact times and case loads. Academics also carry large student numbers, often burdened by teaching overly large classes. This results in larger assessment loads (comparable to clinicians' larger case loads). For each course, a number of examinations need to be prepared and set per course – interim, main, deferred and supplementary examinations. External reviews, as well as internal and external moderations need to be arranged and coordinated for all the examinations, for both setting and marking of papers. Academic courses are assessed in different formats during the semester or year, therefore these processes are repeated a number of times for each course. Student script reviews will furthermore follow after each assessment.

Clinicians' supervision of candidate attorneys and file maintenance during student vacations corresponds with time academics spend on post-graduate supervision and assessment and training and supervision of research and teaching assistants.

During student vacations new client intake is suspended and clinicians generally operate on a rotation basis,⁸¹⁴ or only attend the clinic on their duty days. This is in line with private practice where attorneys also take vacations. During this ‘student exam and vacation’ time when clinicians take time off and rotate duties, academics invigilate examinations, spend weeks marking large numbers of student scripts, with comments for student clarification, attend to external student assessments and enter marks. Much of academics' time is also devoted in preparation of lecturing and assessment material for the next semester during this period.

⁸¹³ Greenbaum 2012 : 17.

⁸¹⁴ This is recommended in CLEO 2007. This practice is followed at the WLC.

Clinical Director's administrative duties compare with academic course-coordinators' additional administrative work. Clinical Directors furthermore receive an additional stipend for these duties, whereas course-coordinators do not.

Clinicians' perceptions regarding time constraints relating to professional responsibilities and research are often misguided. All academics are expected to conduct research, publish and improve their education and experience levels. Academics' professional time include conference preparation and research and the presentation of scholarly papers. Many hours are spent researching academic development and case law in their respective fields, which need to be transferred into their lecture materials.

Iya, a seasoned clinician, remarked that "[c]linicians have to engage in scholarship, for without question law schools need to credit traditional writing about non-traditional subjects, that is, scholarly writing about clinical methodology, pedagogy, case studies and the practice of law". Clinicians are well positioned, it is argued, "by virtue of their access to courts and other bodies to engage in significant empirical research about how law actually functions and how lawyers and clients relate to one another. ... My limited experience shows that the demands of clinical work leave little time ... for the required research and publication. ... It has been suggested that if clinicians are to conduct research, write and publish as expected, law schools need to free them from some clinical responsibilities, either by reducing the workload through staff increase or by providing research leave (sabbaticals)."⁸¹⁵ At the WLC, clinicians are appointed as academics and therefore eligible for sabbaticals, leaving them ample time to conduct research which can be published in peer-reviewed and accredited law journals.

Clinicians should ensure that cases taken on are suitable for student training. More complex matters may be referred to other appropriate entities or to private practitioners as part of their compulsory *pro bono* work.⁸¹⁶ Complex matters should therefore not be time constraints which prevent clinicians from their student training focus. In an attempt to address the challenge of time management, a narrower definition of specialised units and the limiting of files taken on by students, to those which have good educational merit, was proposed by a former director of WLC.⁸¹⁷

⁸¹⁵ Iya 1995 : 273, 274.

⁸¹⁶ As recommended in CLEO 2007.

⁸¹⁷ Mahomed 2008 : 66 - 67.

The UPLC's clinical unit structure ensures that the roles of their clinicians who focus on CLE are defined. Time constraints are therefore only experienced occasionally. This structure underlines the principle of focus within the larger clinical structures.

I submit that the above challenge can be overcome by proper clinical focus, selecting the correct clinical model and alignment of the curriculum. I submit that clinicians who perceive themselves to be overloaded are often guilty of focusing mainly on access to justice, leaving them little time to focus on student training, an often unavoidable consequence being student neglect.⁸¹⁸ Students, who pay for a compulsory course, have a right to protest and demand clinicians' attention. These demands in turn will cascade the clinician into a feeling of overload. With proper focus, the correct teaching model, a well crafted curriculum and proper management, this can be avoided. When clinicians attend conferences,⁸¹⁹ become research active and build networks with clinicians locally and globally,⁸²⁰ they will discover the multitude of solutions that are available, which in turn will satisfy their required publication output.⁸²¹

9. Assessing interviewing skills

9.1 The challenge of assessing interviewing skills of students

At WLC student pairs are mostly left to their own devices when they consult with clients. To address this shortcoming, or at least to compensate for the lack of direct supervision during clinic consultations, students are lectured on interviewing and statement taking skills.

The WLC operates on a walk-in and first-come-first-served basis and no consultations are booked in advance. An average of 900 clients are consulted monthly.⁸²² Eight different clinical units operate in four-hour shifts weekly (i.e.: family law, refugee law, consumer law, labour law, housing and evictions law of delict (tort), criminal law (directly at a criminal court)⁸²³ and a general unit operating off-campus).⁸²⁴ Student counselors, working in pairs, are in attendance.

⁸¹⁸ Some clinicians also operate their own private practices, which may cause them feeling overwhelmed and tired, causing confusion as to where their time constraints and feelings of 'burn-out' originate.

⁸¹⁹ Krasnicka 2008 : 54.

⁸²⁰ Donnelly 2008 : 60.

⁸²¹ For a discussion on hiring of clinicians, see Lynch 2011 – 2012.

⁸²² See Mahomed 2008 : 62 – 63 for more statistical data.

⁸²³ This unit ceased operation in 2010. Clients are referred to the offices of the public defender for assistance with criminal cases.

⁸²⁴ This unit ceased operation in 2012.

The overflow of clients after the formal four hours of clinic duty, are attended to by interns/candidate attorneys.⁸²⁵ The approximate client interviews for 2007 were 8 777 and 1 800 files were opened. The approximate client interviews for 2008 were 9 824 and 1 847 files were opened. During 2010, 6 857 clients were interviewed, 338 files were opened and 3 695 clients were referred. During 2011, 9 370 clients were interviewed, 993 files were opened and 4 646 clients were referred. During 2012, 9 081 clients were interviewed, 928 files were opened and 6 060 clients were referred.⁸²⁶

The clinic comprises of a large floor area, divided into cubicles where the student pairs consult with the clients. Even when students are working in pairs, it is impossible for the clinician to attend on every consultation conducted with the clients. A substantial assessment challenge is experienced at this stage already, as the lack of direct supervision during consultations means that interviewing skills remain unassessed, both in relation to knowledge retained from the lectures and the practical application thereof.

At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on assessment of the course ‘practical legal studies’. For 2009, 27 students, for 2010, 17 students and for 2011, 16 students completed the questionnaire.⁸²⁷

Students were asked: “Please comment on whether interviewing skills during clinic duty should be specifically assessed on a continuous basis”. For 2009, 19 students responded “yes” and eight students responded “no” to the continuous assessment of interviewing skills. For 2010 nine students responded “yes” and eight students responded “no”. For 2011, 11 students responded “yes” and five students responded “no” to the continuous assessment of interviewing skills.

In practice, clinic consultations at WLC would work as follows: the students consult with the clients and briefly relay a summary of the clients’ problems to the clinician on duty. The clinician will then either direct the student pairs towards solutions, call for additional information from the clients or identify the problems as cases that can immediately be taken on by the clinic for litigation, direct the students to provisionally open a file for the matter, which will be

⁸²⁵ De Klerk & Mahomed 2006 : 309; Du Plessis 2008 : 11.

⁸²⁶ Statistics filed at and obtained from WLC.

⁸²⁷ WITS LAW CLINIC : 2009, 2010 & 2011.

discussed in more detail during the tutorial session, or to refer or to dismiss the matter.⁸²⁸ Given the significant number of students and the equally significant volume of clients to be assisted in a four-hour clinic session, the students inevitably waste valuable consultation time whilst queuing for their turn to discuss a client's problem with a clinician. The clinician's attention remains focused for the entire session on directing students, often waiting in queues for the clinician's attention, on how to service the clients during the consultation time available. As a result there is little or no time to observe and assess students' interviewing skills in the clinic environment. The problem of properly assessing interviews is compounded where students are to be assessed individually, when working in pairs. Often the pairing of students is "unequal" in the following respects:

- where one of them is bi- or multilingual;
- where one has a better understanding of the substantive or procedural law, or a better general knowledge; or
- where only one has an understanding of the culture and traditions of the client.

At UPLC clients consult by appointment only, after a pre-screening. Statistics at UPLC shows that during 2012 the students worked on 94 cases, allocated as follows: divorces – 43, maintenance – 4; labour law (including compensation commissioner claims) – 13, contractual disputes – 7, evictions and rental disputes - 8, deceased estates and disputes relating to wills – 4. The remaining 24 cases relate to diverse issues, such as rehabilitation, motor vehicle accidents, a dog bite and general advice on Small Claims Court claims.⁸²⁹

At UJLC clients consult by appointment only, after a pre-screening. Clinicians do not attend the student interviews with clients, but are available for student consultation during clinic duties. During 2012, 2 102 consultations were conducted.⁸³⁰

⁸²⁸ Du Plessis 2008(a) : 127.

⁸²⁹ Statistics provided by UPLC by email (on file with author). Also available at <http://Aulai.co.za>.

⁸³⁰ Statistics provided by UJLC. Also available at <http://Aulai.co.za>.

9.2 Student challenges during interviews⁸³¹

Apart from the challenge for students to correctly identify the legal problems clients present them with, they often encounter challenges not specifically pertaining to law. Students are 'typically confronted with real life problem situations which are not discrete, pre-packaged legal problems, but messy, raw life experiences in all their concreteness and complexity.' 'In addition, they have to deal with all the human emotions which accompany the client.'⁸³² Students will have had, through formal lectures, classroom discussion and interaction, an understanding of the basic outline, goals and techniques of interviewing clients.⁸³³

9.2.1 Student challenges during interviews: clinician interference (or not?)

Students have a further, maybe unexpected challenge during interviews. When the clinicians are present with the students and the clients, the exchange is bi-polar, the clinician converses with the student or the client. The student may be quick to surrender responsibility to the client and the client may be quick to see the authority of the clinician and abandon the conversation with the student.⁸³⁴ Chaskalson noted that in this scenario clinicians fail to teach and the student perceives that he/she has no responsibility. He indicates that "... the [clinicians] will take over and deal directly with the cases themselves (which is in the interest neither of the student nor the [clinicians]) ...".⁸³⁵

Clinicians are generally not part of interviews, but students may call the clinician to the interview when they experience specific difficulty with the client consultation.

9.2.2 Proposed solution to: Student challenges during interviews: clinician interference (or not?)

When a clinician is called by a student to become part of, or to intervene in, an interview, I suggest the following. The clinician must inform the client that the nature of the consultation is both for student education and client assistance. The student should therefore relay the problem to the clinician, not the client. The clinician should address his/her reply to the student. Should the

⁸³¹ Many of the challenges identified and discussed stem from my experiences as a clinician over the past 15 years.

⁸³² Vawda 2003 : 3, Vawda 2004 : 121.

⁸³³ Vawda 2004 : 126.

⁸³⁴ Bamberger 1990 : 2, 6.

⁸³⁵ Chaskalson 1989 : 2.

client proffer additional information, he/she should be guided to tender the information to the student. The clinician should for the duration of the interview perform a guiding role, never that of principal interviewer.

9.2.3 Student challenges during interviews: Challenges with identifying problems

When consulting, clinic clients tend to present to the students or clinic lawyer a rather large bouquet of problems, the majority of which has little to do with the law and the rest is so intertwined with general poverty that their actual legal problems are often very hard to distill. Simply being able to formulate the mandate is only half the battle won.⁸³⁶

A number of issues may arise where students are faced with problems not solely based in law, and which they often may have to deal with during interviews, without the assistance of supervision of the clinician:

- are students qualified to, and to what extent can a student be expected to comment on problems of a non-legal nature?
- are students able to select the correct forum to which to refer clients?
- when students refer clients, will they do so correctly and with the required empathy?
- are students equipped to withstand a client's possible anger and frustration when they perceive a referral as a dismissal of their problems?
- are students equipped to retain their and the clients' focus on the one problem, identified to be in law, amongst the many others presented?

9.2.4 Proposed solution to: Student challenges during interviews: Challenges with identifying problems

These challenges are not unique to one year of study. During the classroom and unit based lectures, the students should be made aware of these recurring challenges and solutions must be illustrated.

During the student/client interview, the student approaches the supervisor in the clinic to ascertain whether the relevant information was obtained and the broad contours of the client's

⁸³⁶ De Klerk 2007 : 97.

problem has been identified. These mid-stream consultations with the supervisor may serve as an early warning system for the identification of weaknesses on the part of the student they may also serve as formative assessments and allow for the re-direction of the student.⁸³⁷

Challenges that remain unaddressed during the interviewing stages can be discussed with the clinician during the weekly tutorials, debriefing conferences or through reflection.

9.2.5 Student challenges during interviews: Language barriers

This will be discussed in more detail in paragraph 11 below.

9.2.6 Proposed solution to: Student challenges during interviews: Language barriers

This will be discussed in more detail in paragraph 12 below.

9.2.7 Student challenges during interviews: Racial, cultural and religious differences

The South African landscape comprises an extraordinary diversity of races, tribes, creeds and cultures, hence referred to as “the rainbow nation”.⁸³⁸ Although the average South Africans are ostensibly known for their tolerance, this quality is often tested to the extreme in the clinical environment. At the WLC students are reminded of some basic cultural protocols, such as a more formal dress code during client greeting and consultations, to show respect.⁸³⁹

Although the clinic is situated in an urban area, some clients travel from rural areas where certain customs are strictly adhered to.⁸⁴⁰ Students are required to respect customs, traditional education values, religion and protocols. They must explain to clients why the consultation may be different to what they are used to, or expect. Clients are often unable to distinguish between cultural or indigenous customs, religious practices and the law regulating the society. Students who do not know these customs and practices often have difficulty advising clients. Some clients may withhold certain information from the students, for example:

⁸³⁷ Vawda 2004 : 127, 128.

⁸³⁸ The 'rainbow nation' is a term coined by Nobel Peace Prize winner Archbishop Desmond Tutu. Also see 'Diversity in South Africa'.

⁸³⁹ For a discussion of how these are addressed in Australia, see Cody & Nelson 2007.

⁸⁴⁰ Many of the challenges identified and discussed stem from my experiences as a clinician over the past 15 years.

- issues relating to money. This information may be vital in the execution of their cases, but their cultural custom prevents them from discussing details about money, particularly with females, strangers or people younger than them;
- issues relating to family. In some cultures family ties are formed that do not correlate with the concept of a family in a legal sense. Clients may possibly refer to someone who is a distant family member, or to someone who lived with them for a period of time, as a brother or a sister. They may also refer to an aunt or other elderly lady, who was involved in their upbringing as a mother. Students who fail to clarify the correct legal relationship between the client and such third party may advise incorrectly. Many students therefore feel that they must first fight their way through a maze before they are able to assist the clients.
- Confusing use of language. Clients regularly confuse the words “he” and “she” in the English language. Some clients find the application of genders confusing and students find it equally confusing to follow the conversation.

Students at the WLC commented – a student pair made up of an Indian and a Coloured male: “I feel the client, being a coloured male felt comfortable with us, but he also led us down the garden path.” A male and female student pair: “I have noticed that the more elderly male clients tend to focus more on [my male partner] when recounting their stories. I understand why they do this, though – they simply feel more comfortable speaking to another male.” A male and female Indian Muslim student pair: “We noticed that our client, being an elderly black gentleman, had been very uncomfortable talking about his matter to [my female] partner and he only focused on me.” Female student, white, English, 22 years of age, consulting with Black, 50-year old Zulu-speaking male client: “There were a number of obstacles which I encountered during my consultation with the client. The first was how to greet him – I was brought up to address any person older than myself by their surname upon first introduction. I also know that in the Zulu culture, proper respect of one’s elders is extremely important. However my client’s surname on the register was illegible. I was also unsure as how to introduce myself, so I took the formal route and used my name and surname. He appeared to be uncomfortable divulging some of his personal information. I am not sure whether this had to do with the fact that I was so much younger than him, the fact that I was female, or whether he did not understand clearly enough why I was asking him specific questions. It proved rather difficult consulting with a client who was my opposite in

age, race, gender and language. I was conscious of these issues at the time and felt that the best way to approach the consultation was to appear as professional and polite as possible.” White, female, English and French speaking student pair, early 20’s: Their elderly male Zulu client complained that his wife’s disability pension was abandoned fraudulently by the government. The client’s wife also receives an old-age pension from the government. The students consulted for over an hour, attempting to explain that his wife is only entitled to one government pension, which the client refused to accept. The client eventually produced a document, which he claimed not to understand. “[We] found, on a closer examination of the court documents, that it was specifically in respect of the disability pension that the client’s wife had defrauded the State. When the client was asked about this ... he finally explained that a Western doctor had said that his wife would not qualify for a disability grant and so the client’s wife had gone to see a traditional healer who had said that she was sufficiently ill to qualify. The SA government does not recognise the diagnoses of traditional healers.” The client refused to accept the students’ explanation and was angry that they were not able and/or willing to assist him. A white, female student, aged 22, wrote me a personal letter on her consultation difficulties across age and gender differences, which brought yet another perspective to the fore: “I find it difficult, as a young consultant, to give advice or instruction to older clients in general, partly because of the way I was raised to treat all my elders with respect. I feel uncomfortable with my suggestions possibly being taken as patronising or impertinent. This is more difficult when the client is male, as we then also lack the common ground of gender. I find female clients are often willing to speak more freely if they identify possible common ‘female’ experiences and understanding. At first thought, I considered the difficulties posed by race, culture and language barriers when consulting with an elderly, male, black client for example, as particularly challenging. However, I actually think that I find it equally, if no more, difficult when the client is white. Without sounding disrespectful, my experience with elderly black male clients has been limited to those who are uneducated. I think it may be because of this that they are more willing to assume that I, although young, white and female, have more knowledge than themselves on the issue with which they are seeking help, and are equally as willing to accept advice and instructions. It seems easier to develop a mutual understanding with such clients, as I try to show them respect as my elders and in return feel respected as the ‘professional’ in the situation. However, when the client is elderly, male and white, it is seldom (obviously due to the period in which they grew up in South Africa) that they

are uneducated. This makes it harder for me to assume a position of ‘superior knowledge’, as I don’t want to be felt to be ‘talking down’ to my client. It also sometimes makes the client reluctant to accept advice from someone who is perhaps less educated and definitely less experienced than they are, in life at least if not in legal matters. I also often get the impression of embarrassment on their part for needing legal aid in the first place, which obviously does not help the relationship. This is generally not felt with black clients. Thinking about this again has made me consider that in certain situations, with regards to culture and race, commonality is perhaps more of a barrier than difference.”⁸⁴¹

At the UPLC, the UJLC and the UFSLC a number of these challenges are avoided, because clients and cases are pre-screened and clients consult by appointment only.

9.2.8 Proposed solution to: Student challenges during interviews: Racial and cultural differences

Studies on legal education identify cultural literacy as a core skill. Learning theory shows that students learn well by viewing a problem through multiple perspectives and experience shows that cross-cultural examples can serve as particularly fascinating, revealing comparative models for learning core material.⁸⁴² Those examples can also reduce feelings of marginalisation among diverse students.⁸⁴³

Many clinical teachers have recognised the importance of teaching diversity issues in the clinic. Bryant and Peters developed ‘the five habits of cross-culture lawyering’.⁸⁴⁴ I will briefly refer to these habits.

Habit One: Degrees Of Separation And Connection. The authors describe how an Irish-Catholic student in a domestic violence clinic, submits two client-intake memos. In one she describes an intake interview that she had with a recent immigrant from Pakistan. The memo provides a detailed description of the client’s family and circumstances. In another memo the student describes an interview with another client, who is a recent immigrant from Ireland. The student reports little information about this client’s family and circumstances. Why does the

⁸⁴¹ WLC Student feedback.

⁸⁴² Kowalski 2011 : 1 – 4.

⁸⁴³ Ibid.

⁸⁴⁴ Bryant 2001 : 12, 13.

student have extensive information about one client's family and little about another's? Habit One gives students a framework within which to analyse how similarities and differences between the lawyer and client may influence lawyer-client interactions. Students are asked to list and diagram similarities and differences between themselves and their clients. Differences create the possibility of cultural misunderstanding, bias and stereotyping. Similarities illustrate the connections between students and clients. Students must take note of how similarities and differences might affect their abilities to understand clients and to form relationships with them as lawyers.⁸⁴⁵ Students are made aware that culture is dynamic and the importance of different identities changes as the situation changes.

Habit Two: The Three Rings. Students are asked to identify and analyse the possible effects of similarities and differences on the interaction between the client, the legal decision-maker and the lawyer - the three rings. This analysis is linked to the Habit One analysis to explore all the ways in which culture may influence a case.⁸⁴⁶

Habit Three: Parallel Universes. The client is 40-year-old Polish-American who has not worked outside the home for 15 years. She is seeking custody of her 8-year-old child after separation from her husband. The student lawyer is a 40-year-old immigrant from the Dominican Republic who came to the United States at age 10. The student, who has a 12-year old son in counseling, advises the client that she should seek counseling for her 8-year-old daughter as recommended by the court. The client agrees, but fails to do so. The student believes that the client either does not care enough about her case or that she does not credit the student's assessment that counseling will improve the case. Habit Three teaches students a method for exploring alternative explanations for clients' behaviors. The habit of "parallel universes" thinking invites students to look for multiple interpretations, especially at times when the student is judging the client negatively.⁸⁴⁷

Habit Four: Pitfalls, Red Flags And Remedies. A fourth generation Austrian-American Jewish lawyer interviews his client, an 8-year-old African-American, the subject of a child-neglect proceeding, who has been described by social workers as "a bright, verbal boy." During interactions, the client is subdued and reticent to talk other than saying, "I did not do anything wrong." The lawyer explains that neglect proceedings are brought by the state against his parents

⁸⁴⁵ Bryant 2001 : 13. See pp 14, 15 for a discussion of the Venn diagram.

⁸⁴⁶ Ibid. See discussion of this habit pp 15, 16.

⁸⁴⁷ Ibid. See discussion of this habit pp 16, 17.

and not against him. After a court proceeding the client asks the lawyer why there were no police in the court-room, explaining that everyone whom he knows who had a lawyer was put in jail. Habit Four focuses on cross-cultural communication, identifying some tasks in normal attorney-client interaction that may be particularly problematic in cross-cultural encounters as well as alerting students to signs of communication problems. This example demonstrates the problems of relying on a lawyer's developed scripts for explanation and stereotypes.⁸⁴⁸

Habit Five: The Camel's Back. Lawyers may have disturbing conditionings: against people who are of a different race, people who are overweight, people who "talk too much." What is the lawyer to do with these re-actions? Habit Five involves exploring one-self as a cultural being. Students must face the sometimes ugly side of cultural blinders - bias and stereotype. Habit Five encourages the student to create settings in which bias and stereotype are less likely to govern. The Habit promotes reflection and change of perspectives with a goal of eliminating bias. It recognises innumerable factors that interact with bias and stereotype to negatively influence an attorney-client interaction.⁸⁴⁹

As a solution to challenges with racial and cultural differences Vawda proposes the embracing of the diversity and multi-culturalism in South African society. Our co-existence requires more than mere lip service to issues of diversity in our immediate and broader community and issues of difference and commonality need to be actively explored to develop a broader understanding and to build a community premised on that understanding. The clinic is a good place in which to attempt this, as the material is provided by the clients, students and clinicians. Issues such as race, ethnicity, class, gender or culture-specific notions may be examined and debated in this controlled environment. Vawda illustrates: "a legal problem relating to the Zulu custom of lobolo (loosely, dowry or 'bride-price') may raise a variety of questions about the gendered nature of this practice;⁸⁵⁰ about comparable practices within Indian and western tradition;⁸⁵¹ or about the historical role occupied by such practices within 'traditional' societies.⁸⁵² The supervisor can choose to either evade the issue, or confront it with sensitivity and understanding.⁸⁵³ Above all, the student needs to hear that it is acceptable to

⁸⁴⁸ Ibid. See discussion of this habit pp 17 – 19.

⁸⁴⁹ Ibid. See discussion of this habit at 19.

⁸⁵⁰ Vawda 2004 : 131, 132.

⁸⁵¹ Ibid.

⁸⁵² Ibid.

⁸⁵³ Ibid.

question such practices and subject them to clinical discourse;⁸⁵⁴ that tradition and culture must be viewed not as sacred cows, but as contextually appropriate or inappropriate practices;⁸⁵⁵ and that their impact on oppression and power relations must be acknowledged and understood.”⁸⁵⁶

At both the UFSLC and the UPLC they ensure diversity when their respective student firms or student groups are formed. The firms or groups must ensure cohesion, as marks are awarded to such firm or group, not to individual students. Students consult individually at UJLC. The diversity of students allow for appropriate student : client placements to avoid differences.

I submit that managing racial and cultural differences also form part of students’ fundamental lawyering skills development,⁸⁵⁷ as they will be confronted with diversity issues throughout their careers in future. Students should adopt a correct attitude and embrace these as self-development opportunities.

9.2.9 Student challenges during interviews: Fear

Students may on occasion experience fear.⁸⁵⁸ This may happen, for example, when the client is a traditional healer (sometimes referred to as a “witch doctor”), or a client wishes to sue a traditional healer. Whereas students from a culture where they understand the role of traditional healers may treat the client in the normal fashion, other students may dread such a consultation and may even refuse to deal with such a matter, as a result of the fear and their perception of possible supernatural consequences when dealing with such a matter. Experience taught that students also experience fear when they consult with clients who require them to take action against a gang or a gang member. Students often fear retribution against them by the gangsters, should they proceed with such a matter.

Fear may however potentially be limited to certain societies. During a discussion with the Dean and the clinical director of Robson Hall School of Law, University of Manitoba, Winnipeg, Canada, during April 2013, it transpired that their (Canadian) students, to their recollection over a vast number of years, never suggested fear as an element or challenge in the clinical course.

⁸⁵⁴ Ibid.

⁸⁵⁵ Ibid.

⁸⁵⁶ Vawda 2004 : 131, 132. Also see Vawda 2006 : 295 – 305.

⁸⁵⁷ Lynch 2011 – 2012 : 48 – 50. This is also applicable in cases of discrimination or bias towards gender or sexual orientation.

⁸⁵⁸ Many of the challenges identified and discussed stem from my experiences as a clinician over the past 15 years.

The assessment of a student who portrays fear poses a unique challenge for the clinician where such fear is real – other than a general fear to deal with a matter which a student perceives to be too difficult.

9.2.10 Proposed solution to: Student challenges during interviews: Fear

When it becomes apparent to the clinician that the student's fear, is deep-rooted and/or real, the student may be removed from the consultation or the case. In practice an attorney may refuse to accept certain persons as clients and may refuse to take on specific cases. I further suggest that, should a client threaten a student in any way whatsoever, he/she be removed from the clinic by campus security and barred from re-entering the campus.

10. Proposed solutions the challenge of assessing interviewing skills

Leading English scholar, Brayne, concerned not to usurp students' relationships with clients, ceased to attend interviews after four years.⁸⁵⁹ Several leading Australian clinicians also indicated that they never observe interviews. Clients are however not advised without input by the clinician. When there is a teacher evaluation of interviewing skills through observation, the skills or knowledge to be assessed must be clear and consistent if it is to be fair.⁸⁶⁰

Grosberg suggests supplementary or complementary ways to assess interviewing skills, the rationale being that observing a single live-client interaction could have a distorting effect due to many reasons influencing the course of that interview. Another reason is that different students learn differently and using a variety of methods enables them to demonstrate their talents in at least some of the tests. This also improves the validity of the grade. The element of repetition affords students the opportunity to improve their abilities.⁸⁶¹

I may take the uncomplicated course of simply dismissing the importance of assessing these skills, but I submit, although in agreement with the comments of Brayne and Grosberg above, that the interviewing and statement taking form the basis upon which the decision is made whether to accept a case for litigation or not. The assessment of these skills is therefore essential. Alternative solutions will be explored.

⁸⁵⁹ Brayne 1996 : 173.

⁸⁶⁰ Grosberg 2006 : 60.

⁸⁶¹ Ibid.

Malkus *et al* drafted notes, duplicated below, on interviewing clients that should be shared with students.⁸⁶²

“NOTES ON INTERVIEWING CLIENTS

Interviewing as the Beginning of the Attorney-Client Relationship

Conducting the First Meeting

Purposes of the Interview – Problem Solving: Beginning the Diagnosis

- Establish an attorney-client relationship.
- Understand the client’s goals.
- Learn the facts from the client’s perspective.
- Allay anxiety about the problem (establishing rapport, trust, reassuring the client about your role, making sure that the client is listened to).

Stages of the Interview

- Opening – introductions, small talk.
- Information gathering – curiosity, interest, excitement.
- Goal identification.
- Preliminary strategy.
- Conveying info to the client – next steps.
- Closing.

Establishing the Attorney-Client Relationship

- Practical tips: dressing professionally; being on time; being respectful of your client’s time and business operation.
- Introducing yourself: business cards, explain your role and status. Answer questions. Establishing rapport.
- What if the client brings someone with him to the interview?
- Case acceptance: be aware, and explain the process to client.

⁸⁶²

Malkus 2011 : 1 – 10.

- Be careful what you agree to, and don't answer questions too soon. It's fine to say, "I'll do research on that or check into it, and get back to you".

Understanding the Client's Goals

- Develop your listening skills. Active listening. Body language. Reflecting back what the client is saying.

Learn the Facts from the Client's Perspective

- Let the client tell the story. Non-verbal active listening is best at the beginning. Later asking questions that are supportive and show understanding.
- Be careful about interjecting "OK". That can mean to the client "That's good".
- Taking notes.

Allay Anxiety about the Problem

- Establishing rapport, trust: reassuring the client about your role; making sure that the client is listened to."

The following solutions are proposed.

10.1 Observing and formative peer assessment

A proposed solution is to allow students to initially observe interviews conducted by clinicians and to attend seminars on interviewing.⁸⁶³ Stuckey concedes that it is difficult to determine the degree of rapport with a client during an initial interview, but suggests techniques students may employ.⁸⁶⁴ To enforce these techniques, students may conduct formative peer reviews on their partners after consultations. I reworked these techniques in reference format, for use by student partners to assess peers, as indicated below.

⁸⁶³ Giddings 2008 : 19 – 21.

⁸⁶⁴ Stuckey 2006 : 23, 24.

INTERVIEW TECHNIQUES: ESTABLISHING RAPPORT WITH CLIENT

YES NO

Be friendly

Stand up to greet the client warmly and personally

Engage in appropriate ice-breaking talk before the interview

Make the interview space comfortable and inviting

Give your client your full attention, avoid interruptions during the meeting

Give the client an immediate opportunity to explain why he/she is there and how the student counsellors can help

Attend to any immediate questions or other needs of the client

Explain the purpose and structure of the meeting

Listen to the client without being judgmental

Use verbal and nonverbal communication facilitators, good listening techniques and employ good body language

Avoid or adjust for communication inhibitors such as ego threat, case threat, etiquette barriers, trauma, perceived irrelevancy and greater need

Employ a structure for organising the discussion

Appear confident and competent

Appear empathetic and concerned about the client's problem

Ensure before the meeting ends that the client knows when to expect the next contact with the student counsellors and what the client and the student counsellors need to do before then

To keep in mind during these formative peer assessments, is Grosberg's indication that a central aspect of assessment is the learning goal.⁸⁶⁵ These techniques, when reinforced, can assist in reaching goals during interviews.

10.2 Tutorial intervention

Many of the challenges students face during interviews only become evident during the weekly tutorial sessions, when they can be addressed. Clinicians may note students' feedback on the interviews they conducted, which may serve as a formative assessment and also contribute towards the final file assessment mark. During tutorials students have to present their clients' statements to the clinician from which potential disparities, inconsistencies and discrepancies may become apparent. The statements taken by students serve as records of the interviews and serve as a pivotal points from which certain questions for elaboration may be probed, such as whether appropriate supporting evidence were collected. Clinicians should keep record of queries and instructions during tutorials, to be noted in the case file. This will also enforce the notion of file maintenance, a practice which students should learn.

10.3 One-way mirrors

At UPLC the consultation room has a one-way mirror through which clinicians view interviews from time to time. Although this is an excellent solution, it will prove to be impossible in clinics with large student and client numbers. It may also prove impossible to view all the interviews.

10.4 Debriefing conferencing

At the University of KwaZulu-Natal a regular two hour conference session is held with student groups and their clinicians where clinical activities are reviewed.⁸⁶⁶ Interactions with clients are reviewed, problems are identified, concise outlines of cases and facts clarification through questions are made,⁸⁶⁷ followed by suggestions and critique by student colleagues and

⁸⁶⁵ Grosberg 2006 : 58.

⁸⁶⁶ Vawda 2004 : 127 – 129.

⁸⁶⁷ Ibid.

clinicians.⁸⁶⁸ These sessions, where students are engaged and supported in their pursuits for solutions, reinforce the principle of problem-solving.⁸⁶⁹ Given the diversity of the client and student populations,⁸⁷⁰ these conference sessions can serve as authentic cross-cultural exchanges between students and clinicians.⁸⁷¹ Feedback conferencing is also used successfully at La Trobe University in Australia.⁸⁷²

10.5 Reflective journals

Reflection can be used, but when graded, it is necessary to identify clear guidelines for awarding grades. Descriptive writing will not suffice - rather use descriptive reflection where reasons or justifications are provided in a descriptive way. With dialogic reflection the student will step back from the events and engage analytically. Critical reflection will place actions in reference to multiple perspectives and be influenced by multiple historical and socio-political contexts.⁸⁷³ The guidelines and types of reflection will not only ensure consistency in the assessment of reflection across the different specialised units, but also prevent students from manipulating details through distortion or invention to ensure better grades.

In addition to the guidelines, students must be encouraged to be truthful and not succumb to:

- Feelings of incompetency, inability to deal with cases or fear, as they find all or most of their interviews as problematic;
- Perceptions of themselves as indomitable, as all their interviews are perfect;
- Writing down what they think the clinician may want to hear – this strategy may fail if the capabilities they claim to possess are not reflected in their case file work.

I submit that students should be encouraged to detail the problems they experience during interviews. These problems can be discussed with the clinician where solutions may be found. The skills students develop as a result of a previous problematic interview may be applied

⁸⁶⁸ Ibid.
⁸⁶⁹ Ibid.
⁸⁷⁰ Ibid.
⁸⁷¹ Vawda 2004 : 127 – 129.
⁸⁷² Curran 2007 : 14.
⁸⁷³ Ledvinka 2006 : 42, 43; Grosberg 2006 : 68.

successfully during subsequent interviews, which in turn may be reflected upon in the journal. Solutions found in this way may lead to a successful re-interview of a client.

10.6 “Standardized Client”

Another method is the “standardized client” where a lay person is trained to role-play a client and to complete an assessment checklist.⁸⁷⁴

10.7 Video material

A less-traditional suggestion is to watch video clips of lawyers in action during interviews. Students will evaluate their actions and inactions against a framework of model rules. This method is also used as a teaching tool for interviewing skills at the WLC. Video material developed by Professor Jeff Giddings of Griffith University in Brisbane is used.

Journal entries may be emailed to the clinician for marking.⁸⁷⁵ Grosberg supports videotaped performance tests, but caution that it should be used as a supplementary assessment. A transcript of a videotaped interview can also form the basis for assessment by way of multiple choice questions.⁸⁷⁶

11. Language barriers

South Africa has 11 official languages.⁸⁷⁷ The University of the Witwatersrand, and therefore WLC’s language of instruction is English.⁸⁷⁸ Clients who frequent the clinic are often not able to articulate their problems in English. The range of problems presents specific problems.⁸⁷⁹

- one student out of a pair may be fluent in the client’s language of choice, thereby isolating the other student from his/her student partner during all client communication;

⁸⁷⁴ Grosberg 2006 : 60 - 70.

⁸⁷⁵ Chavkin 2007 : 7.

⁸⁷⁶ Grosberg 2006 : 64 - 67.

⁸⁷⁷ English, Afrikaans, Sesotho, Setswana, Venda, Tsonga, Xhosa, Zulu, SiSwati, IsiNdebele and Sepedi.

⁸⁷⁸ University of the Witwatersrand Language Policy.

⁸⁷⁹ Also see Chavkin 1994 : 222.

- the student communicating with the client in his/her preferred language may assess the client's problem while he listens and then merely gives a shortened, and possibly not fully accurate, version thereof to his/her student partner;
- a student who is fluent in a particular language may be identified by fellow students to consult with all clients wishing to communicate in that language, effectively limiting his/her access to the pool of clients;
- this specific student may also be called away from his/her consultation to act as interpreter for another student pair. This scenario limits the assessment of the consultation and statement taking to one out of a pair of students. All further communication with the client, should a matter be taken on for litigation, is necessarily through that particular student;
- in the absence of a student able to communicate in a particular language, an administrative staff member who happens to be fluent in that particular language may be asked to act as a translator. Students may be unsure whether the translation is accurate, particularly where a student knows the language to some extent, but not enough to feel confident to conduct an interview in it. This may cause friction with the translator in front of the client. A further problem arises when this particular administrative staff member used as translator in this informal manner may not be available during follow-up consultations. The client may also indicate that he/she already told the translator something, but the students do not understand or comprehend what the client is saying;
- a notice in the waiting area, inviting clients to indicate their language of choice may be abused by clients who are sufficiently proficient in English, but insist on their indigenous language, thereby ensuring that they consult with a student with a similar cultural background as their own. This may lead to the overloading of some students, often to the detriment of others *vis-à-vis* work exposure;
- there may be no student or other staff members available to interpret the language the client wishes to communicate in. All communication will then necessarily be in either English or another language, which may be a second or third language for both the client and the student. Should this unsolicited scenario influence the assessment of the student, be it positively or negatively?

- how will a clinician be able to assess communication sent out in a language other than English, where only the client and the student communicating with him/her is proficient in that language? How will it influence the students taking over the file, should the case not be finalised during the current academic year?⁸⁸⁰

Vawda correctly indicates that participants to law clinic structures “are forced to interact across various divides, for example language, in order to achieve certain common goals, namely legal representation or advice and counseling, on a variety of legal problems”.⁸⁸¹ He further indicates that,⁸⁸² in the process of making decisions on clients’ matters,⁸⁸³ “an ability to communicate effectively, establishing rapport and understanding between client and legal advisor”⁸⁸⁴ is required.⁸⁸⁵

At one of the law clinics at the University of KwaZulu-Natal student-client interactions “takes place in a medium which is not the first language of at least one of the participants”.⁸⁸⁶ A research study done in 2004, by way of two sets of questionnaires administered to students and supervisors,⁸⁸⁷ was conducted.⁸⁸⁸ Part of the study canvassed “the first language(s) of the students,⁸⁸⁹ supervisors and clients; their preferred medium of communication; the effect of using the particular medium; ... and suggestions on mediating any problems arising from language ...”.⁸⁹⁰ On first language backgrounds the results showed an almost equal division between the African and Indian racial groups.⁸⁹¹ “Some 45% are Zulu first-language speakers; about 43% are English first-language speakers; and the remainder speak a variety of Southern African languages (Xhosa, Sotho, Venda, Tswana and Afrikaans).”⁸⁹² The majority (80%) of the clients were Zulu first-language speakers.⁸⁹³

⁸⁸⁰ See Van der Walt & Nienaber 1996 : 71, 86 for an empirical study on the language needs of law students.

⁸⁸¹ Vawda 2006 : 296.

⁸⁸² Ibid.

⁸⁸³ Ibid. Vawda holds that “[m]aking a decision about the most appropriate option for the resolution of a client’s problem is ... one which must involve the client as the primary agent and not merely a passive observer of the process”.

⁸⁸⁴ Ibid.

⁸⁸⁵ Ibid.

⁸⁸⁶ Ibid 297.

⁸⁸⁷ Ibid. The responses were analysed and commented on in discussions with the clinical supervisors.

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid. “The first language backgrounds of fourth year LLB students in the law clinic course (approximately 60 students) were ascertained”.

⁸⁹⁰ Ibid.

⁸⁹¹ Ibid.

⁸⁹² Ibid.

⁸⁹³ Ibid.

Students' uses of languages were probed. Eighty percent of the Zulu first-language students "preferred to use Zulu when communicating with other Zulu first-language speakers."⁸⁹⁴ Language therefore may not be a problem for Zulu first-language students, as the majority of clients are Zulu speakers.⁸⁹⁵ This may however impact when students are paired with a client from a different language group.⁸⁹⁶ During consultation 38% of Zulu-speaking students used English, which "appears to correlate with the 20% of clients are English first-language users..."⁸⁹⁷

In probing the English first-language students, "[a]pproximately 95% of these students interviewed a client with a language different from their own, the overwhelming majority of whom (95%) were Zulu first-language speakers".⁸⁹⁸ This group "exhibited the most 'difficulties' in relation to the language issue"⁸⁹⁹ and had the greatest potential for "misinterpretation, misunderstanding and miscommunication".⁹⁰⁰ Twenty three percent of the students "felt that the client displayed discomfort over language"⁹⁰¹ and 71% "felt there was no discomfort".⁹⁰² Eighty five percent of these students used an interpreter where the client's first language was Zulu,⁹⁰³ and the majority felt that it "improved communication (62%) and helped obtain accurate information (80%)".⁹⁰⁴

Students at the WLC commented on language barriers.⁹⁰⁵ "The client's command of English was limited (and I speak no Zulu at all). I had to ask him to repeat himself a number of times, which was frustrating for both of us. I was also concerned that he might have the impression that I thought him unintelligent in some way. I had to specifically phrase questions in a language that he could understand, without making him feel patronised or disrespected." Other students commented: "[We] found that determining what the issue actually was, was incredibly difficult.

⁸⁹⁴ Ibid 298. "The majority of them stated that they did so for better communication (52%); client comfort (18%); and because it was the client's first language (18%)." Eighteen percent spoke Zulu "for their own comfort" and only 29% of students "had a client with a different first language".

⁸⁹⁵ Ibid.

⁸⁹⁶ Ibid.

⁸⁹⁷ Ibid.

⁸⁹⁸ Ibid 299.

⁸⁹⁹ Ibid.

⁹⁰⁰ Ibid.

⁹⁰¹ Ibid.

⁹⁰² Ibid.

⁹⁰³ Ibid. Vawda places a caveat on this statistic, as "the interpretation was not consistent, in that a variety of personnel was utilised, including supervisors, paralegals, fellow students and persons accompanying the client".

⁹⁰⁴ Ibid.

⁹⁰⁵ WLC student feedback.

The client could speak proficient English which was heavily accented. For the first 15 minutes of the consultation we listened intently to the client's story but could not understand anything." Student partners, one English speaking and the other Tswana speaking commented: "Naturally my [Tswana-speaking partner] takes the lead in questioning clients and explaining things to them and even introducing us and them. Automatically I feel like her subordinate. This is because the clients obviously communicate directly with her, which almost makes my presence redundant. They do not give me any eye contact or communicate with me as I do not understand anything. [My partner] does make the effort to translate what the client is saying, to me, and I put questions that need to be answered ... through to her which she then asks them and again relays their answers. Needless to say, this causes many interruptions in the client's statement and affects the natural 'ebb and flow' of the conversation. It also makes me doubt that we can tease out the issues properly with all these interruptions and language barriers. It also makes me feel uncomfortable at times when I put questions through [my partner] because I almost feel like I am insulting their intelligence – because the questions are quite simple at times but because I don't know their level of English, I feel it's safer for her to ask them. I can only imagine that the clients feel more comfortable with [my partner] (as I would) and I feel like they would place their confidence in her (as their counselor) instead of me. I think that for any healthy attorney-client relationship communication is key. There is a definite disadvantage where there is a language barrier." An English speaking student pair, who only had Afrikaans as an additional language in high school and are not proficient in that language, commented: "We had to consult completely in Afrikaans. It was an interesting experience, to say the least. However, between us, [my partner] and I managed to get the facts from our client. We were quite impressed with our efforts by the end of it though – turned out to be hectic, but fun!" A student who did not have fun, commented: "I know my partner feels left out when we get clients who can't speak English as it is easier for me to speak to the client and try to understand the full story before translating to [my partner]. I have tried translating to [my partner] after every sentence the client says but this has proven to be ineffective because it disrupts the client's thought process and sometimes doesn't make sense as there is no direct translation from vernacular to English." On being the translator, a student commented: "[A] problem I face is that I speak isiTswana and so generally only understand Tswana and Sotho but most of the clients at the clinic speak Zulu and while I understand Zulu (some of it) I am by no means a fluent speaker so it is difficult to translate what the client is

saying in Zulu to Tswana (which is what I respond to them in) to English so that [my partner] understands as well. ... [I]t is sometimes difficult to get to the point when I have to think in two completely different languages and it becomes even more challenging because there often is no direct translation for certain words. It also becomes a challenge when the client changes [his/her] story or isn't sure of certain aspects of the case because it comes across to my partner as though I'm not translating properly." And: "If [the client] doesn't understand [a language] we always ask a Zulu student to take the case or translate to us just to make sure we have all our facts straight, but ... it takes up a lot of time checking and double checking facts and translating to different languages so that we are all on the same page."

The assessment of students by clinicians, when faced with the issue of language barriers, may have either a positive or a negative impact: should the student, who can not communicate with the client, be credited for all that is done right to the detriment of his/her partner? Alternatively, should the same student be penalised for errors made due to (mis)communication?

There are no formal translators available at the WLC and the UJLC. At both the UPLC and the UFSLC there are translators available.

12. Proposed solutions to the challenge of language barriers

12.1 Journal feedback

Clinicians may invite students to comment on their experiences where one of the student partners does the translation and leave the work to be done by the other partner. Whether one of the partners feels excluded, both with regard to the communication, the quality of the work done as a result thereof and the feedback to the client by only one of the partners, may also be reflected upon. Students may be invited to air their views on the assessment of that particular matter.

A rubric for this type of feedback may also be designed.

12.2 Interpreters

Language barriers in effectively serving the poor, also pose as a significant challenge in India. University and student instruction languages are English and Hindi, but many of the clients speak only the local state language and students often come from several Indian states.

Interpreters are necessary to assist with the complex communication needed for competent representation.⁹⁰⁶

I submit that the development of the skill of working with interpreters in a hybrid clinic setting is useful for students, given the strong possibility that their careers will involve the use of interpreters. This skill may then also be assessed.

In the clinical environment which by its nature requires greater resources than conventional classroom teaching,⁹⁰⁷ it may be difficult to pay for the services of interpreters. With the net of languages so wide in South Africa, it will be impossible to provide for interpreters for all the official languages. In clinics where the lack of resources prohibit the appointment of a translator proficient in the languages most spoken in its area, administrative members of staff may be designated to serve as interpreters when required. In a 2004 study at one of the law clinics at the University of KwaZulu-Natal, the majority of student responses indicated that “the use of an interpreter improved communication (62%) and helped to obtain accurate information (80%).”⁹⁰⁸ The interpreters used by the students consisted of a variety of personnel ... including supervisors, paralegals, fellow students and persons accompanying the client.”⁹⁰⁹

The exercise of translation may be used in different forms, e.g.: for the translation of information from the client to the student, as well as misinformation provided during the translation. The student’s ability to identify mistranslations, which may alter the facts of the matter, can then also be assessed.

At both the UPLC and the UFSLC in-house paralegals, able to act as translators or translators are employed. They furthermore ensure diversity in language skills when their respective student firms or student groups are formed. The firms or groups must ensure proper translation, as marks are awarded to such firm or group, not individual students. The UJLC does not employ paralegals. There are usually enough students available who can interpret.

⁹⁰⁶ Barry 2007 : 47.

⁹⁰⁷ Vawda 2004 : 118.

⁹⁰⁸ Vawda 2006 : 299.

⁹⁰⁹ Ibid.

13. The nature of the client pool (Undocumented and unassessed assistance to clients)

At the WLC the client pool mainly consists of the indigent in the community, often living in abject poverty. (To put this in perspective, it may be helpful to point out that South Africa's Per Capita income is approximately one fifth of that of the United States'). Clients' financial statuses are determined by way of a means test, which will determine whether they qualify for legal aid. In certain instances cases may be taken on despite a client not qualifying for legal aid in terms of the means test, provided that the merits present with good teaching opportunities. The clinician and the clinical director will in these exceptional cases exercise their discretion within the guidelines issued in terms of Rule 115A.4 of the Law Society of the Northern Provinces, which reads: "... the services may be rendered only to persons who, in the opinion of the Council, would not otherwise be able to afford them; and the Council may from time to time issue guidelines for the assistance of clinics in determining to whom services may be rendered; ..."⁹¹⁰ The client is however required to pay all the disbursements in the case. Only the legal assistance will be free.

As WLC operates a daily "walk-in" clinic, as opposed to "consultation by appointment", a fair number of cases may not be taken on for litigation, although a full consultation will be held. Students may be presented with what often amounts to an incoherent mish-mash of problems and they are required to distinguish between what would be relevant in law and what could be referred for some other form of (often social) intervention.⁹¹¹ Files are often not opened for these clients, but they are assisted by the students during the consultation. The student's ability to assist the client in distinguishing the various pockets of their general problem is deserving of assessment. These matters are generally resolved during the clinical session by way of referral, a telephone call, a letter or general legal advice. Although students act on instructions from the clinician, due to the volume of these types of instructions (which are not recorded, as files are not opened), this intervention and assistance by the students may go unnoticed by the clinician.

At UPLC, UJLC and UFSLC clients are pre-screened, therefore all clients that are assisted in any form will become official clients of the clinic.

⁹¹⁰ <http://www.northernlaw.co.za/content/view/105/128/>

⁹¹¹ The typical profile of a client was aptly described as follows: "... (W)hen consulting, clinic clients 'tend to present to the clinic lawyer a rather large package of problems, half of which have nothing to do with the law and the other half so intertwined with poverty that their actual legal problems are often very hard to extract' and '(f)ormulating the mandate is only half the battle won' " De Klerk 2007 : 97.

14. Proposed solutions to the challenge of Client pool (Undocumented and unassessed assistance to clients)

Possible solutions may be found in bringing the matters for which files were not opened to the clinician's attention during the weekly tutorials with students. These may be assessed formatively.

These consultations also provide good material for reflection or for the compilation of a portfolio where students take down comprehensive statements from such clients and add a summary of the assistance provided. These can be taken into account when the file assessments are conducted. Students may alternatively raise the portfolio content during oral assessments.⁹¹²

15. Working in student pairs: Student pairs with uneven strengths

At the WLC students are requested during the first lecture to choose a partner with whom they will work for the duration of the course. Clinicians only allocate a partner to a student in rare instances where students are unable to. With partnering, Chavkin cautions that race, gender, sexual orientation, ethnicity, extreme diverse backgrounds and socio-economic status are some factors that may impede meaningful interaction between students and law schools are not designed to facilitate dealing with diversity and difference and he cautions that care and sensitivity should be applied, should clinicians decide to pair students when any of these factors are present.⁹¹³ Working in pairs afford definite benefits for students, such as having a partner to discuss the case with and 'filter client life experiences through multiple personal life experiences and thereby potentially develop richer and more accurate understandings of their clients',⁹¹⁴ to plan strategy and the execution thereof, and to draft the necessary documents and correspondence together.⁹¹⁵ Feedback from students in the USA on pairing is diverse. Chavkin holds that students are more likely to pick partners with whom they are already friends or at least with whom they are acquainted. One student explained an advantage as:

⁹¹² Also see the discussion in paragraph 6 of chapter four (proposed solutions to large student numbers: working in student firms), as a solution.

⁹¹³ Chavkin 1994 : 211, 212.

⁹¹⁴ Chavkin 1994 : 204, 213.

⁹¹⁵ Haupt & Mahomed 2008 : 278; Hyams 2006 : 89 on 'Student teaming'; Chavkin 1994 : 203 – 208 on the advantages of pairing students.

“I think I’ve gained more as a result of working together. We started out friendly but we have become friends. Because of that it keeps you more involved because it’s someone you’re friends with. Having worked in groups before, if you are neutral or don’t get along at all with the others it would have made it a worse learning experience because you would have put everything off. With a friend, you don’t mind getting together to do something. You talk about the case more. I suspect if you weren’t friends you would not have talked as much about the case. If we didn’t get along so well, we would also have had to divide things up more formally. I would have been involved in my piece of the case more and less in the whole case. I wouldn’t have chatted about the case with my partner. As it is now, we often just sit around and talk about the case.”

However, another student noted:

“There is a potential goofing off factor when you work with friends. When you are assigned to do something with a friend, you tend to spend half the day working on the project and half the day goofing off. Whereas when you are working with someone who you are not friends with you tend to feel more responsible just to be doing your work.”

and

“I don’t know if we would have gotten as much work done if we had been friends first. My partner and I became friends through our work on the case. If we had been friends first, we might have gotten around to working on the case. At the same time, when you assign people you can’t tell if they will get along. So, I don’t know.”

and

“If you are allowed to pick you can get aggravated because they’re our friend but you don’t know what kind of work they’ll do. I couldn’t have done this on my own. I think partners should be assigned. That seems to work out fine.”

Chavkin is of the opinion that, when students are paired, “[t]he appropriate balance is probably best struck by clinician pairing of students.”⁹¹⁶

⁹¹⁶ Chavkin 1994 : 237, 28.

At the end of the 2010, 2011 and 2012 academic years, students at WLC were requested to optionally and anonymously complete a questionnaire on the pairing/partnering of students for the course 'practical legal studies'. For 2010, 10 students, for 2011, 20 students and for 2012, 13 students completed the questionnaire. The students responded to the questions as set out below.

1. Did you know your student partner before you became partners for the course "practical legal studies?"

For 2010, eight students replied "yes" and two students replied "no".

For 2011, 16 students replied "yes" and four students replied "no".

For 2012, eight students replied "yes" and five students replied "no".

2. How did you become partners for the course?

For 2010, two students replied that the law clinic paired them and eight students replied that they chose their own partners.

For 2011, three students replied that the law clinic paired them and 17 students replied that they chose their own partners.

For 2012, four students replied that the law clinic paired them and nine students replied that they chose their own partners.

3. Was the workload divided equally between you?

For 2010, eight students replied "yes, all the time", one student "no, I carried the load all the time" and one students replied "yes, in the beginning, but later I carried the full load".

For 2011, all the students replied "yes, all the time".

For 2012, 12 students replied "yes, all the time", one student replied "no" and another student's partner deregistered from the course.

4. Did you work on the files together?

For 2010, eight students replied “yes, all the time”, one student “no, I worked on the files alone” and one students replied “yes, in the beginning, but later I worked on the files alone”.

For 2011, all the students replied “yes, all the time”.

For 2012, 12 students replied “yes, all the time”, one student replied “no” and another student’s partner deregistered from the course, leaving him/her to work on the files alone.

5. Did you make appointments to meet to discuss or work on matters?

For 2010, eight students replied “yes” and two students replied “no, my partner never showed”.

For 2011, all the students replied “yes”.

For 2012, 11 students replied “yes”, one student replied “not often enough” and another student’s partner deregistered from the course.

6. Were these appointments kept by your partner?

For 2010, eight students replied “yes” and two students replied “no”.

For 2011, all the students replied “yes”.

For 2012, 10 students replied “yes”, two students replied “sometimes” and another student’s partner deregistered from the course.

7. If you were friends before – was it a good idea to become partners for this course?

For 2010, seven students replied “yes”, one student replied “no” and two students replied “not applicable”.

For 2011, 16 students replied “yes”, one student replied “no” and three students replied “not applicable”.

For 2012, seven students replied “yes”, two students replied “no” and four students replied “not applicable”.

8. If your partner was slack – how did it make you feel?

For 2010, seven students replied either “not applicable”, “my partner was never slack” or “we covered for each other”. Comments were: “I had so much work to juggle, but I felt ‘fine, then I’ll do it’”; “not in a negative way” and “very irritated”.

For 2011, 19 students replied either “not applicable”, “my partner was never slack” or “we covered for each other”. The student whose partner was slack, commented: “irritated”.

For 2012, nine students replied either “not applicable”, “my partner was never slack” or “we covered for each other”. Further comments were: “let down”; “a little frustrated”; “hurtful and mostly irritated” and “frustrated and impatient”.

9. What was the division of the work between you and your partner – in percentage?

For 2010, seven students indicated 50%. One student replied that during the first teaching block, each partner did 50%, but that he/she later on did 80% -90% of the work. One student felt that he/she did at least 80% of the work and one student indicated a ratio of 60%/40% – his/her partner did most of the work, as he/she “is a workaholic”.

For 2011, 19 students indicated 50%. One student indicated a ratio of 60%/40%, where he/she did most of the work.

For 2012, eight students indicated 50%. Four students indicated a ratio of 60%/40%, where the students replying to the questionnaire did most of the work. One student did not comment.

10. Should the supervisor divide the work and the files, although you interview the clients together and attend tutorials together?

For 2010, five students replied “yes” and five students replied “no”.

For 2011, three students replied “yes” and 17 students replied “no”.

For 2012, four students replied “yes” and nine students replied “no”.

11. Do you think “forced partnering” would be better – meaning that the supervisor chooses your partner for you?

For 2010, four students replied “yes” and six students replied “no”.

For 2011, four students replied “yes” and 15 students replied “no”. One student declined to comment.

For 2012, five students replied “yes” and seven students replied “no”. One student replied “maybe”.

12. Do you think the fact that you worked with a partner will influence your file assessment mark? (In a positive way)

For 2010, three students replied “yes” and six students replied “no”. One student was uncertain.

For 2011, 16 students replied “yes” and four students replied “no”.

For 2012, 10 students replied “yes” and three students replied “no”.

13. Were there any benefits for you in working with a partner?

For 2010, seven students replied “yes” and two students replied “no”. One student was uncertain.

For 2011, 19 students replied “yes” and one student replied “no”.

For 2012, 11 students replied “yes” and two students replied “no”.

14. Any suggestions regarding working with a partner?

For 2010, seven students had no comments. One student indicated: “it worked for me”, another student suggested: “to change partners after six months or to carry on your own” and one student commented: “if I was a 3rd year, I would’ve liked a 4th year partner to lead. I can then lead a 3rd year when I’m a 4th year”.

For 2011, 15 students had no comments. One student indicated: “it worked for me”, another student suggested: “peer assessments”, and another suggested that “there should be room to decide to work alone, as where your partner is unreasonable, not participating and not doing the work.” One student suggested that “the supervisor can have individual meetings to make sure that the other partner is carrying their weight and address any issues that arise”, and another student commented that “more communication is always needed”. For 2010, 10 students had no comments. Two students wanted “to change partners after six months and another student suggested “peer assessments”.

During assessments attributing work to individual students become problematic. It is often difficult for the clinician to distinguish, by the end of the year when the assessment on case file work is done, whether both individuals contributed equally. Clinicians ‘often see the end-product of “joint” effort without having an opportunity to fully observe the process of production’.⁹¹⁷

The clinician may furthermore find himself/herself in an unenviable situation should students query the mark allocation.

At UPLC students work together in firms comprising of between four to six students. Files are marked according to a rubric and a mark is allocated to every file a firm worked on.⁹¹⁸ An average is determined for all file work and allocated to the firm. At UJLC students do their work individually. At UFSLC every student must submit a portfolio of learning, which will include his/her group work efforts. The portfolio is assessed.⁹¹⁹

16. Proposed solutions to the challenge of working in student pairs: Student pairs with uneven strengths

In order to assist students who do not utilise their true potential, the method of Havruta can be applied to the student pairs, as each student has no option but to be engaged with his or her partner, to argue and inquire with an equal.

Havruta is a traditional Jewish method of using student pairs to closely study a text of the Talmud which requires interpretation and which often involves questions with no one right

⁹¹⁷ Chavkin 1994 : 227 – 229.

⁹¹⁸ The rubric used by UPLC is illustrated in paragraph 4.12 of chapter three of this study.

⁹¹⁹ UFSLC RPK412 course outline 2012.

answer.⁹²⁰ The Talmud itself is written as a spiral with the earliest text or argument in the middle of the page, with dialogue and responses spiraling outward around it in chronological order. A primary objective is to tease out the meaning and purpose of each twist of the argument and to learn how to apply the law in new situations. This method relies on discussion rather than lecture. The benefit of this paired learning is that if one makes a mistake, the other will correct him/her. When studying the Talmud, student pairs do not simply debate a text they read as a record, but use it as a framework to think in a manner that examines issues in complex ways, engaging in a vigorous dialectic as they struggle to understand each passage and apply it to larger issues addressed. Partners must listen to one another and must be willing to revise their misconceptions and preconceptions, which binds the students directly to the learning experience. The teacher is a guide for questions and clarification.⁹²¹ This cooperative learning has been found to be of value for students, specifically those identified as at risk, bilingual and gifted.⁹²² Havruta enforces the process of study and stresses the importance of listening to other voices, confront the ideas of others and explain their own thinking, thereby honing critical thinking skills.⁹²³ This style of learning can be fundamental in helping students to acquire the necessary independence to function as a lawyer.

The Taxonomy of Legal Learning Objectives posits that there is a natural hierarchy to the way novices approach learning law.⁹²⁴ Burgess designed a programme to help clinicians engage in the differential diagnosis required to pinpoint the area where students are struggling and to help them overcome their struggles. The programme provides exercises to students that walk through the hierarchy of learning, isolating each level of learning and each skill students must master, so that students can focus on just one learning objective at a time. These exercises can be used for low performing students to diagnose exactly where their misunderstanding lies.⁹²⁵

Kelly proposes an intervention programme that addresses critical thinking deficiencies which will help students address those gaps to enable them to develop into independent

⁹²⁰ Blumenfeld 2010 : 110 – 117.

⁹²¹ Ibid.

⁹²² Ibid 127.

⁹²³ Ibid 128 – 132.

⁹²⁴ Burgess 2010.

⁹²⁵ For a discussion on these exercises, see Burgess 2011.

learners.⁹²⁶ She uses self-evaluation rubrics to assist students to identify the sources of their performance issues:

Self- Evaluation

Use the following questions to help you identify the source(s) of your academic performance issues.

GENERAL STUDY HABITS	YES	NO
Devoted 45+ hours/week outside of class reading, reviewing, outlining and answering hypothetical questions.		
Studied during most alert times.		
Studied in an effective physical location with few distractions.		
Refrained from emailing, texting, checking FB, surfing the internet, watching TV, or other distractions when studying.		
Familiar with my learning style and study in a way that best suits this style.		
Used my time efficiently and effectively.		

CLASS/CLINIC/TUTORIAL PREPARATION AND REVIEW	YES	NO
Regularly completed the assigned tasks and reading for class/clinic/tutorial.		
Usually understood what I read.		
When taking notes, I usually put things in my own words.		
Actively engaged in class/clinic/tutorial, treating each question as though it were asked of me.		
Took effective class/clinic/tutorial notes.		
Refrained from texting, checking email, surfing the internet in class/clinic/tutorial.		
Spent 10 minutes each day reviewing what was covered, correcting notes, etc.		
Went to clinician when I had questions about the material.		
Created my own outlines or flashcards (individually or with a study group).		
Wrote and answered my own hypothetical questions.		
Throughout the semester, I regularly reviewed the course material and my case files – on my own or with someone else.		
Took advantage of opportunities for self-assessment (practice and feedback from clinician, peers).		
Limited use of commercial study aid or other students' notes and summaries for substantive material.		
Avoided last-minute cram sessions.		

⁹²⁶ Kelly 2011 : 1 - 10.

NON-ACADEMIC ISSUES THAT AFFECT LAW SCHOOL/CLINIC PERFORMANCE	YES	NO
I took care of myself – balanced academics with activities and personal interests.		
Kept in touch with family and friends outside of law school.		
I value myself as a person, whatever my grades might be.		
I have a group of law school friends who can help me when things go wrong.		
Exercised or was active on a regular basis.		
Regularly got 6 - 7 hours of sleep per night.		
For the most part, had a somewhat healthy diet.		
Consumed hyper-caffeinated beverages (i.e., Red Bull) on a regular basis.		
Dealt with stress effectively.		
Struggled with staying motivated through the semester.		
If I experienced any problems, academic or non-academic, I talked it over with a clinician, other professor, student aid services, or other school personnel.		
Kept sight of and reminded self of professional goals.		
Took stock of my skills that will be of value to the legal profession.		
Stable living arrangements (roommate, security, etc).		
Have my finances under control (didn't run out of money)		
I have a significant medical condition or disability, I received treatment or appropriate accommodations.		

Another proposal is to hand additional research tasks to the weaker partner of the student pairs. Legal research is legal and lawyering skills which are fundamental to learning and practicing law.⁹²⁷ Legal research skills outcomes might include that all students must be able to find and retrieve legal authority in both electronic and print formats; effectively use Westlaw and Lexis/Nexis to perform legal research; demonstrate an understanding of basic internet legal research techniques; and construct a research plan and memorialise research findings in a concise written summary.⁹²⁸

⁹²⁷ Valentine 2010 : 207 – 212.

⁹²⁸ Fischer 2011 : 7.

17. Group work and group work assessment

When assessing group work, there is a perception that individual students will lose their competitive edge in any group assessment, which may lead to destructive behavior within groups,⁹²⁹ as assessed group work often does not provide an accurate reflection of the skills, academic ability or contribution of individual group members, causing students to fail to recognise the benefits of group work.

18. Proposed solutions to the challenge of group work and group work assessment

The solutions were discussed in paragraph 4.13 of chapter 3 (trial advocacy), in paragraph 5.4 of chapter 3 (group work rubrics) and in paragraph 6 of chapter 4 (solutions to large student numbers). A further possible solution to counter the destructive behavior may possibly be found in a combination of assessment methods, such as peer assessment, self assessment and reflective journals.

19. Students allocated to different specialisation units

At the WLC students registered for the course are divided into groups and are allocated to a specialised unit,⁹³⁰ thereby exposing them to different clinical experiences and legal procedures. The various groups will be exposed to different court systems, such as the high court, magistrate's court, consumer court, labour court, criminal court, children's court, maintenance court and the divorce court. Sometimes matters are disposed of administratively or settled before students are exposed to any of the litigation formalities. Ensuring that students are assessed in an even-handed manner across the different specialised units is challenging.

⁹²⁹ A further possible solution to counter the destructive behavior may possibly be found in a combination of assessment methods, such as peer assessment, self assessment and reflective journals.

⁹³⁰ Students may choose a specific unit, provided the clinic times for such a unit can be accommodated in their timetable, as well as the availability of placements in such a unit. De Klerk & Mahomed 2006 : 312.

The UFSLC indicated that their assessments are unit specific. Consistency in assessment across the specialised units remains a constant battle.⁹³¹ At UPLC and UJLC CLE are not taught in specialised units. The UJLC does however have a unit specialising in the Children's Court at their Soweto campus, but this unit is driven by the clinician. Students may elect to work in this unit and their work will be assessed accordingly by the clinician.⁹³²

20. Proposed solutions to the challenge of students allocated to different specialisation units

In ensuring that students are assessed in an even-handed manner across the different specialised units, strict guidelines for assessment methods are essential. This may result in the clinician having to simulate litigation procedural drafting in matters where students did not have practical experience to the full extent of the curriculum. The standard and quality of work in the different units and assessment of file work should ideally be monitored by the director of the clinic.

I submit that this should be a standard function to be expected from the director as part of his/her workload. At the WLC the director currently monitors the case file intake and the success rate, by signing off on matters finalised and files that are to be closed, in the different units. The monitoring of quality, standard and assessments in the different units needs to be done by the director in any event, for purposes of reporting to funders. This corresponds with the functions expected from a head of department or a course coordinator at a university. The director can also introduce a form of peer review by allowing the clinicians of the different units to have insight into the activities of other units. All examination question papers and assignment instructions across the different units, although drafted by the clinicians responsible for the different specialised units should be monitored by one designated senior clinician, or a clinician from another university law clinic, to ensure that the standard is maintained across the different units, in the same way that internal and external examiners moderate assessments of peers in other academic courses.⁹³³

⁹³¹ UNIVERSITY OF THE FREE STATE LAW CLINIC 2012: RPK412 course outline, and advised by the clinical director.

⁹³² UNIVERSITY OF JOHANNESBURG 2012. APPLIED LEGAL STUDIES (TPR 0000) LEARNING GUIDE : 2 – 30, and advised by the clinical director.

⁹³³ See discussion chapter 3, paragraph 6: moderation systems.

21. Education and experience variances amongst students

Legal problems do not manifest in a vacuum and in order to best achieve the required outcome of students properly assisting clients with their legal problems, they must firstly be able to correctly identify the client's legal problem. Students often struggle to de-compartmentalise the different subjects of the substantive law as taught to them in their first three years of study.⁹³⁴ Some students are also unable to position the problem within the social and/or business environment within which the client's legal problem manifests. Some students will therefore have the advantage of being better equipped to understand the circumstances surrounding clients' problems than others.

To illustrate: Students' (all of whom are in their final year of LLB studies) education levels and experience of the environment outside the constraints of law vary. Some students will have the advantage of being better equipped to understand the circumstances surrounding clients' problems than others. Experience in the law clinic shows that some students just know certain practical processes and others not, whilst there are some who still get confused by traditional practices and customs that are not applicable in law. For example: to best assist a client who presents with a problem relating to his/her immovable property being attached and sold in execution, merely informing the client that "you were in arrears in the payment of your mortgage bond, therefore you are in this dilemma," is not enough. The students need to be able to explain for instance, mortgage bond application procedures which involve property valuations, assessing clients' income and repayment abilities and the conveyancing procedures. Clients often make telephonic arrangements directly with staff at the bank, not realising that such arrangements are of no effect in terms of the standard non-variation clauses in the mortgage bond, which they agreed to. Clients also do not realise that once the matters are handed to attorneys for legal intervention, they may not make arrangements directly with the bank. Students are now compelled to read the relevant documents and court pleadings and explain the consequences to their clients, who clearly did not read or understand either the mortgage bond documents and/nor the court pleadings and processes.

Some students will have had personal experiences of, for example, entering into credit agreements, purchasing immovable property and obtaining finance through banks, opening and

⁹³⁴ Du Plessis 2007 : 59.

maintaining bank accounts, assisting family members in divorces or the obtaining of family violence interdicts, reporting and administering estates of deceased family members, whereas other students may not have had such personal exposures.

These are remedied by not only presenting the substantive law in clinical context, but also through exposing students to areas of legal practice outside the scope of the law clinic and the practices of the social and/or business environment within which the client's legal problem manifests.

Legal insight is required in the consultation and/or interview phases already, where clients' statements are taken by the students.

Vawda indicates that students encounter diversity and differences attributed to a "myriad of factors of race, gender, class, culture, religion and language (which) all impact on the way students experience their world, and hence on the context in which their learning takes place".⁹³⁵ I agree with Vawda who states that the "diversity afforded by a multicultural environment is ... beneficial to both learners (students) and teachers (clinical supervisors)".⁹³⁶ Law clinics create safe environments for multicultural interaction. Vawda explains that law clinic participants "are forced to interact across various divides ... in order to achieve certain common goals".⁹³⁷ Students indicated that during their initial client interviews "their interactions and responses were often mediated by various other factors, including language, race, culture religion and gender".⁹³⁸ A 2004 study by one of the law clinics at the University of KwaZulu-Natal, where questionnaires administered to approximately 60 fourth year LLB students were analysed, revealed the following: Zulu first-language students responded "[a]s to whether the consultation was affected by any other (other than language differences) perceived differences, 28% said it was not, and the same number did not respond ... Others indicated the following factors had affected communication: race (16%); age (12%); gender (8%); and other (8%)".⁹³⁹ English first-language students responded "[a]s to whether the consultation was affected by any other (other than language differences) perceived differences, 26% said that it was not, while 28% did not respond

⁹³⁵ Vawda 2006 : 296.

⁹³⁶ Ibid.

⁹³⁷ Ibid. The common goals were described as "legal representation or advice and counselling on a variety of legal problems".

⁹³⁸ Ibid 297.

⁹³⁹ Ibid 298.

to this question. The diversity issues which were deemed to have affected the consultation were identified as: gender (14%); race (10%); age (16%); and other (6%)”.⁹⁴⁰

The same study also engaged with clinical supervisors, who responded that, in dealing with clients, “diversity issues arose in about 75% of instances, and manifested as issues of culture (30%); religion (14%); language (14%); race (14%); gender (14%); and age (14%)”.⁹⁴¹ Supervisors also “indicated that diversity issues impacted on student/student and supervisor/student relationships in 50% of instances, and on student/client relationships in 100% of the instances”.⁹⁴² The impacts of diversity manifested as: “lack of interaction among students of different races (16%); clients considering students too young and inexperienced (16%); students lacking respect for younger supervisors (16%); cultural differences regarding respect for elders (16%); and perceptions about race (16%)”.⁹⁴³

The diversity in the South African multicultural society impacts on students’ receptivity to particular forms of CLE. The three recommended modes of instruction in CLE are clinic duty, classroom instruction and tutorial sessions. In the clinical context diversity will be most apparent during clinic duties and tutorial sessions, specifically where students are paired, or during group work, such as trial advocacy exercises. In paragraph 9.2 of this chapter, students’ challenges during interviews in the clinic are discussed. The challenges are identified as:

- a) Students having to identify problems not solely based in law, but often of a social nature. Many of these problems are rooted in poverty, which in turn may have strong customary or cultural elements. Questions posed included (i) when students refer clients to another forum will they do so correctly and with the required empathy? and; (ii) are students equipped to withstand a client’s possible anger and frustration when they perceive a referral as a dismissal of their problems? This is particularly so when the problem has a cultural component and the student and client have different cultural backgrounds.⁹⁴⁴
- b) Language barriers.⁹⁴⁵

⁹⁴⁰ Ibid 299.

⁹⁴¹ Ibid.

⁹⁴² Ibid 301.

⁹⁴³ Ibid 302.

⁹⁴⁴ See discussion in para 9.2.3 above.

⁹⁴⁵ See discussion in para 11 above.

- c) Racial, cultural and religious differences amongst students and their clients. Clients are often unable to distinguish between cultural or indigenous customs, religious practices and the law regulating the society. Students who do not know these customs and practices often have difficulty advising clients, as some may withhold certain information from the students as a result of their cultural differences, such as issues relating to money or family. Sometimes confusion may be caused merely by the different use of language in different cultures.⁹⁴⁶
- d) Fear. For example: where students and clients are from different cultures and the client is a traditional healer. Students from a culture where traditional healers are common may treat the client in the normal fashion, whilst students unaccustomed thereto may experience fear.⁹⁴⁷

Vawda provides additional insight into cultural and linguistic inequivalences.⁹⁴⁸ Communicating across diversity lines “often entails significant losses in meaning”.⁹⁴⁹ When students and supervisors are “required to translate and interpret words, actions, gestures, silences and varying forms of body language, [t]hey in turn, similarly give off signals which the client is required to interpret”.⁹⁵⁰ These nuances of “different cultural groups, can result in misunderstanding or ... a serious breakdown in communication”.⁹⁵¹

The above examples serve as illustrations of the impacts of students’ perceptivity to clinic duties and client consultations. Students’ perceptions and experiences during clinic duties influence CLE in the following manner:

- a) The classroom component of CLE needs to be adapted to make provision for instruction by the clinician on diversity issues and multiculturalism. Students need to be informed that although the clinic is situated in an urban area, some clients travel from rural areas where certain customs are strictly adhered to. Students must be instructed to respect customs, traditional education values, religion and protocols. Students must also be instructed on how to explain to clients why the consultation may be different to what they are used to, or expect. Vawda holds that the role of the

⁹⁴⁶ See discussion in para 9.2.7 above.

⁹⁴⁷ See discussion in para 9.2.9 above.

⁹⁴⁸ Vawda 2006 : 302.

⁹⁴⁹ Ibid.

⁹⁵⁰ Ibid.

⁹⁵¹ Ibid. Also see Vawda’s discussion on multiculturalism on 302, 303.

teacher is critical and that teaching skills need to be bolstered. Law teachers must raise diversity issues in the classroom through the experiences of students⁹⁵².

- b) More awareness of diversity and multiculturalism need to be enforced in the clinic duty component of CLE. Students must be trained to “deal head-on with personal identification issues, by which is meant characteristics of class, race, ethnicity, gender, sexual orientation, physical disability and age”⁹⁵³.
- c) The tutorial component of CLE must be enhanced to include discussions relating to diversity and multiculturalism. This may include the training of students according to Bryant and Peters’ ‘the five habits of cross-culture lawyering’.⁹⁵⁴ The challenges discussed in paragraph 9.2 of this chapter, make for good discussion material during tutorial sessions.

Vawda concludes his discussion on the 2004 survey by recommending that “[i]t is the responsibility of institutions to create a learning environment conducive to the development of important life skills, and this entails crafting an appropriate curriculum which consciously accommodates multi-culturalism and diversity”.⁹⁵⁵

I recommend that students also communicate issues of diversity and multiculturalism in their reflective journals.⁹⁵⁶ I further recommend debriefing conferences as described in paragraph 10.4 above.

Other factors that contribute to education and experience variances amongst students have been identified as the lack of some essential skills,⁹⁵⁷ which are inculcated as a by-product of legal education rather than a core component; introduction of the four-year LLB as an undergraduate course;⁹⁵⁸ and admission decisions based on matric results.⁹⁵⁹ Details of these factors are:

- The lack of essential skills

In November 2010 the Law Society of South Africa (“LSSA”) expressed its concern that a substantial number of law graduates are lacking in a number of essential skills such as research,

⁹⁵² Ibid 303.

⁹⁵³ Ibid 304.

⁹⁵⁴ See the discussion in paragraph 9.2.8 above.

⁹⁵⁵ Ibid 304. For a full discussion of this study see Vawda 2006.

⁹⁵⁶ See paragraph 10.5 above.

⁹⁵⁷ LSSA 2010; O’Regan 2002 : 247, 248.

⁹⁵⁸ Magistrates’ Conference 2007 : 2; Gauntlett 2011.

⁹⁵⁹ O’Regan 2002 : 245.

computer work, literacy and numeracy. The SA Law Deans' Association ("SALDA") responded that such a conclusion is 'unfounded, at best anecdotal, and a gross generalisation.'⁹⁶⁰ On 31 January 2011, SALDA announced a meeting with representatives of the legal profession to discuss the four-year LLB, stating that "[i]ndications are that the majority of students enrolling for the LLB degree do not have the requisite academic literacy or numeracy skills to complete the undergraduate LLB degree in four years."⁹⁶¹

O'Regan identified skills a competent lawyer should have and concluded that they are inculcated as a by-product of legal education rather than a core component. "These skills are also generally acquired by the bright students who have also had an advantaged educational background at primary and secondary levels. The effect of this differential in skills on leaving universities determines to a significant extent the success of the law graduates thereafter".⁹⁶² The skills identified by O'Regan include the abilities to: listen and absorb information; think clearly and in turn to express those thoughts orally and in good prose; to conceive an argument and to be able to use verbal techniques of persuasion; read and understand a text, and particularly the ability to condense it without losing accuracy; use a law library – to be able to read and understand a case, to identify the facts and the ratio, to note-up cases, to compare and contrast judgments and to critique them; to use basic computer programmes for preparing documents and for legal research; find and interpret statutes and regulations, and amendments to them and case law elaborating upon them; understand the legal significance of a set of facts; and see the big picture, to be able to locate a case or a statutory provision and see where it fits into the legal system as a whole, as well as the continuities or discontinuities it has with other aspects of the law.⁹⁶³

- The four-year LLB

O'Regan is of the view that problems are compounded in law schools with the introduction of the four-year LLB as an undergraduate course.⁹⁶⁴ This four-year LLB degree is often criticised.⁹⁶⁵

⁹⁶⁰ Legalbrief, 26 November 2010.

⁹⁶¹ Legalbrief, 31 January 2011.

⁹⁶² O'Regan 2002 : 247, 248.

⁹⁶³ Also see Greenbaum 2012 : 34, 35. See discussions by Woolman *et al* 1997 : 30, 31 and Iya 2001 : 355,

^{362.}

⁹⁶⁴ O'Regan 2002 : 245.

The Judge-President of Transvaal, Justice Bernard Ngoepe, at a magistrates' conference, referred to this LLB degree as a 'souped-up' BProc degree. He found it unacceptable that degree courses are adapted to accommodate previously disadvantaged South Africans.⁹⁶⁶

KwaZulu-Natal Acting Judge President Achmat Jappie said that many graduates of the condensed four-year LLB are out of their depth. He noted that the main problem is communication skills, a lack of understanding of basic court procedure and that with trial work, these graduates battle with understanding questions of onus and putting forward a coherent argument. The judge said that he "did not believe one could be critical of the motive for reducing the length of the LLB from five to four years (in 1998) but felt that decision was now hampering graduates." "There is a need to get disadvantaged people through university, but you're not assisting in the long run. They might at the end of four years have an LLB but the question really is: Are they equipped to get into the profession?"⁹⁶⁷

Advocate Jeremy Gauntlett, SC, implored law schools "not to fall victim to mere pressure and political correctness in [your] curriculum setting. I believe you unfortunately did so once before, when you agreed to the introduction of the four-year LLB. I know of no law firm, other legal employer or Bar in the country which considers that to have been a wise step."⁹⁶⁸

On 4 July 2012 the Professional Provident Society ("PPS") released the result of a survey into the attorneys' profession, indicating that attorneys in South Africa are concerned that the current LLB degree does not sufficiently prepare young graduates who are entering the legal profession. There is a confidence level of just 50% that the standard of general education will improve over the next five years. Only 44% of the survey respondents believe that high ethical standards are maintained and only 44% of attorneys would encourage their children to enter the profession.⁹⁶⁹

⁹⁶⁵ For a discussion on the transformation of the LLB degree and skills shortages, see Godfrey 2009 : 91 – 123.

Also see Greenbaum 2012 : 32.

⁹⁶⁶ Magistrates' Conference 2007, Gallagher Estate, Midrand. See Rapport 2007 : 2.

⁹⁶⁷ Legalbrief, 30 July 2012.

⁹⁶⁸ Gauntlett : 2011.

⁹⁶⁹ <https://www.pps.co.za/portal/news/SA%20ATTORNEYS%20CONCERNED%20ABOUT%20QUALITY%20OF%20LLB%20DEGREE.pdf>

- Admissions to the LLB degree on matric results

Constitutional Judge Kate O'Regan highlights the problems at law schools with the introduction of the four-year LLB as an undergraduate course, as universities have to make admission decisions based on matric results,⁹⁷⁰ whereas previously, with the post-graduate LLB, "law schools could use undergraduate performance as a measure to determine whether a student was ready and able to undertake legal studies". Success in matric exams appears to a significant extent still to be racially determined. Other determinants of success include urban or rural residence, provincial residence and probably parental income levels and social class. Mediocre matric results may not be an accurate reflection of a student's ability, as the school he/she attended may have been under-resourced. She questions whether this can be remedied at tertiary level.⁹⁷¹

In discussing the admissions policy, O'Regan indicates that "to a university, law students are 'a great deal'", as much less resources are required than with other degrees, such as the sciences. Universities therefore encourage admissions, regardless of the social responsibility to ensure that students are ready for this degree.⁹⁷²

Ogunronbi views the disadvantages of some students as the legacy of poor higher education which was given legalistic teeth by the Black Education Act,⁹⁷³ and which divided education in South Africa along racial and ethnic lines. According to him a 'mass' system was created which "produced a nation of illiterates".⁹⁷⁴ O'Regan echoes this challenge as "particularly acute because of the legacy of Verwoerdian education policy which means that many students enter university poorly prepared for tertiary education".⁹⁷⁵ Vawda also comments on the increasing access of poorer students to tertiary education post-1994,⁹⁷⁶ bringing with them many of the disabilities of the Bantu education system and making them 'passive' learners.⁹⁷⁷

At UPLC and UFSLC these challenges are less pronounced, as students work in mixed groups or firms. Because of the close contact between individual students and clinicians at the WLC, some students may require additional tutorial intervention to address these skills shortages. The challenge, when assessing students, lies in the extent to which any social or other

⁹⁷⁰ O'Regan 2002 : 245.

⁹⁷¹ Also see Greenbaum 2012 : 38, 39.

⁹⁷² O'Regan 2002 : 245.

⁹⁷³ Act No 47 of 1953.

⁹⁷⁴ Ogunronbi 1998 : 493, 498.

⁹⁷⁵ O'Regan 2002 : 249.

⁹⁷⁶ Vawda 2003 : 1.

⁹⁷⁷ Vawda 2003 : 1. Also see Vawda 2006 : 295 – 305.

disadvantage of the students, and where additional intervention was required, should be factored into such assessment. At UJLC students work individually.

22. Proposed solutions to the challenge of education and experience variances amongst students

The challenge of the education and experience variances amongst students and specifically whether additional intervention afforded to students should be factored into their assessment, needs to be probed.

Ogunronbi perceives the strategy to overcome the previous educational policies, which have ‘produced a nation of illiterates’, and which must promote enhanced access, as the ‘affirmative-action policy’.⁹⁷⁸ This will include strategies to promote student success as a fallout of the enhanced access in the under-preparedness of the majority of students from the previously disadvantaged group. He suggests a redirection of programmes to address the potential effect of such a gap in preparedness and supports suggestions for the provision of intermediate level programmes between school and higher education, as well as the adjustment of higher education starting levels to meet the needs of the majority of entrants.

As law schools now increasingly admit more students from previously disadvantaged backgrounds to the extent that they constitute the majority, O’Regan cautions law schools in their endeavours to seek ways in which the damage done by inadequate primary and secondary education can be remedied at tertiary level. This may include the introduction of new teaching methods to ensure the transmission of key skills and appropriate core knowledge. O’Regan further indicates that it is the primary social responsibility of law schools to produce competent graduates once you admit students to the degree. This includes assisting graduates being placed in the legal profession.⁹⁷⁹ She points to “[t]he bitter truth ... that the law is a discursive and analytical discipline” and suggests the introduction of bridging courses to enable students to overcome their previous disadvantages in language education, particularly in the context of

⁹⁷⁸ Ogunronbi 1998 : 498.

⁹⁷⁹ O’Regan 2002 : 249, 500. She comments “I am often dismayed at the poor quality of curricula vitae submitted to the Constitutional Court by would-be law clerks. Many do not include their academic transcripts, or the names and addresses of referees. In a field where applicants outstrip positions by five or ten to one, they are effectively excluding themselves from consideration.”

reading and writing skills, whilst acknowledging that the best way to remove that obstacle remains elusive.⁹⁸⁰

Greenbaum refers to research undertaken among English law graduates, suggesting that “learning which would improve students’ critical understandings of the legal profession, through critical reflection on the profession, would assist outsider students entering a profession still dominated by divisions of class, to understand the structures and culture of the professions.”⁹⁸¹ This will assist students to be “better able to identify the skills and attributes that are often implicitly expected, but unstated, by law firms ...”⁹⁸² I submit that thorough discussion of the legal profession should form part of plenary teaching content on the legal profession. This should be constantly re-enforced during student tutorials.

The law faculty of the University of New South Wales,⁹⁸³ Australia, regards the inclusion of two enrichment subjects, specifically aimed at Indigenous students, as key developments. Indigenous students are not required to do both these alternative subjects. Students appear to appreciate the availability of extra support rather than resist it. These are taught during weekly small group tutorials. The primary purpose of these tutorials is to develop students’ academic skills, including oral communication, problem solving, comprehension and legal writing skills and to develop their critical and analytical skills. An issue identified by Indigenous students interviewed, is the lack of relevance of the material that students are confronted with. At the time of publication the outcomes were not yet evaluated. Cody however indicated during 2009 that these courses are now internally evaluated and that a 2009 survey of Indigenous students’ experience of the law school courses was favourable.⁹⁸⁴

I submit that bridging courses or intermediate level programmes which are completed satisfactory before students are accepted into the law school for studies, may prove helpful, but a drop in entry level standards, as suggested by Ogunronbi above, is, and should remain, unacceptable.

⁹⁸⁰ O’Regan 2002 : 245 – 247.

⁹⁸¹ Greenbaum 2012 : 27.

⁹⁸² Ibid.

⁹⁸³ Cody & Green 2007 : 52, 53.

⁹⁸⁴ This was confirmed in an email by Cody to the author on 13 October 2009. (Copy of email on file with author). The author discussed these courses with Cody during a meeting in Brisbane, July 2013, where the successes were confirmed.

Ogunronbi further calls for the restructuring of current law school syllabuses (*sic*) to recognise and protect the cultural values of all South Africans.⁹⁸⁵ I submit that recognition of and respect for cultural values are an ethical given, but students need to be able to distinguish between the applicable law and custom. Respect for the custom, however gallant, does not warrant the restructuring of syllabi. Law schools are not the forum for the protection of cultural values – they are for educating students in and proper application of, the law.

In response to deficiencies identified in law schools and specifically the LSSA’s concerns to some law graduates lacking a number of essential skills, Advocate Jeremy Gauntlett, SC, expressed his strong belief “that the predicament of those who train young legal practitioners as regards their educational deficiencies is not to be addressed by expecting universities to remedy basic educational deficiencies.” “The function of universities is the induction of the intellectually qualified in the rigors of rational discourse ... not to remedy the deficiencies of primary and then secondary education”.⁹⁸⁶

I submit that clinicians should, during lecture times with students, share some of their experiences and wisdom gained over time with students. A philosophy, which may be shared with students, is:

- to empower themselves through continuous legal research;

Judge Motala discusses skills classes in legal research, analysis and writing, the process of analysis and structured reasoning to assist students in “thinking like lawyers”. He further indicates that law schools’ inadequate teaching of research skills and legal opinion writing results in attorneys’ reluctance to write opinions “where legal research of primary and secondary sources is needed”. These legal problems are then left for advocates to handle. These skills courses may “prepare students to go beyond looking at their teacher’s favourite textbook or treatise for answers to legal problems”.⁹⁸⁷

⁹⁸⁵ Ogunronbi 1998 : 498.

⁹⁸⁶ Gauntlett 2011.

⁹⁸⁷ Motala 1996 : 696 – 697.

- to read over a broad spectrum outside the law and increase general knowledge;

Iya states that, in aiming through CLE to best equip future lawyers to operate effectively in a changing global environment, diversity management “can ensure an environment of better understanding and appreciating diverse viewpoints and experiences exchanged among individuals or groups, thereby expanding their horizon for managing even better external/global conflicts and challenges.” These different viewpoints and experiences “encourage and prepare students to better understand the external world and global trends and to become better future lawyers.”⁹⁸⁸

- to know the environment in which they practice; and
- to understand the core of attorneys’ practice.

This includes “accepting that the legal profession is increasingly becoming global in the context of lawyers being faced with arrays of problems that involve multicultural considerations.”⁹⁸⁹

I submit that clients’ problems should be seen in a broader context by students, whereafter they can start to de-compartmentalise the various sections of the applicable substantive law and apply it to the problem on hand. Sound knowledge, good command of written and spoken language and impeccable ethical conduct will instill a sense of confidence and ensure that they present themselves to both their clients and the court with authority.

Motala holds that a future lawyer must be taught “how to provide an objective opinion. This teaches the future lawyer to explore the problem, to evaluate the strengths and weaknesses of both parties’ arguments, and to arrive at a conclusion based on his or her own analysis.”⁹⁹⁰

I further submit that shortcomings must be addressed during student tutorials when education and experience variances in clinical practice are identified. Additional tutorials may be scheduled, should such a need arise. Students should not be penalised for these interventions upon assessment. However, in the event of repeat mistakes after interventions, penalisation may be appropriate.

Journal feedback may be invited where students feel that there was a disparity in the general knowledge, between him/her and his/her partner, when executing on clients’ matters. The contents of at least this part of each individual student’s journal should remain confidential to

⁹⁸⁸ Iya 2008 : 37, 41 and 42,

⁹⁸⁹ Iya 2008 : 49.

⁹⁹⁰ Motala 1996 : 698.

ensure that students feel that they may freely discuss problems they encounter with their student partners and without embarrassing the partner who had a shortcoming not directly attributable to him/her.

23. Differing levels in students' knowledge of substantive and procedural law

Since students accepted in the CLE course are in their final year of LLB studies, clinicians may realistically expect the students to have acquired a certain level of knowledge of substantive and procedural law. Despite revision and examination during CLE programmes, some students remain less than capable in carrying over their knowledge and application of substantive and procedural law into clinical practice. These weaknesses impact on their case work. The assessment challenge lies in the fairness of subtracting a percentage of marks for these weaknesses when students' case file work is assessed.

At WLC penalties for these weaknesses will be reflected in their case file assessments and oral examinations. At UPLC students are penalised for these weaknesses when individual assessments are done, but all students are awarded the same mark for group work done in their firms. This creates a check-and-balances system within the student firm. At UFSLC clinicians assist students and do not penalise them. At UJLC students are afforded a reprieve for one week to research or correct the weakness. Should students thereafter remain incapable to assist their clients properly, they will be penalised. Weekly file assessments are done and it was found that the lack of knowledge of substantive and procedural law makes the assessments more intensive and slow.⁹⁹¹

24. Proposed solutions to the challenge of student weaknesses in their knowledge of substantive and procedural law

This assessment challenge concerns the fairness, or not, of subtracting marks for student weaknesses in their knowledge of substantive and procedural law.

⁹⁹¹ Advised by the various clinical directors.

The mission statement of the law clinic should include the purpose of preparing students for the practice of law.⁹⁹² To be eligible for the CLE course, a minimum competency and knowledge of substantive and procedural law should be expected.

I submit that students should be penalised for their lack of knowledge, particularly as they have been taught and assessed on these materials on different occasions during the previous years of their LLB studies. Students are also operating in a live-client environment, where mistakes may potentially have a huge impact. Penalisation upon assessment in these instances will further instill a sense of good practice and ethical conduct, as well as the value in constant research, upon the students.

25. The challenge of variances in clinicians' experience in supervision and assessment

The more experienced clinician may be perceived (and often rightly so) to be able to maintain a certain standard in their assessment methods and it is advisable for a less experienced clinician to, at least initially, conduct assessments under the supervision of a more experienced clinician. The flip-side of this method is the possibility of new insights offered by the less experienced clinician to his/her senior.

Factors that may impact on the teaching and assessment methods of clinicians are that one clinician may be more experienced in litigation whilst another in teaching; different clinicians may have different perspectives regarding the focus of the course; a new clinician may have been trained by a more experienced clinician who became stale regarding his/her focus and methodologies; and the clinical director may hold a different view and/or have a different approach from that of some of the clinicians.

The only real insight a clinician will get into the assessment skills of another at WLC, is when clinicians act as one another's external examiners during oral examinations of students towards the end of the academic year. Some insights are also gained when candidate attorneys rotate from one clinician to another for supervision. At UPLC the same clinician will do a specific form of assessment and another clinician the other. Clinicians do regular cross checking.

⁹⁹² Fisher 2011 : 4.

At UFSLC, the director does spot checks on clinicians' assessments. At UJLC all the clinicians have senior status and are in practice for more than 10 years.⁹⁹³

26. Proposed solutions to the challenge of variances in clinicians' experience in supervision and assessment

In 2013 the WLC appointed a senior clinician, who resigned after accumulating 17 years of clinical experience, on a part time basis to train and supervise junior clinicians. Although this proved to be of huge assistance, it may not be a viable option in the long run, or possible for all law clinics. The procedures followed at both the UPLC and the UFSLC are recommended. A further recommendation is the use of rubrics for student assessments.

Hyams emphasises clinicians' pedagogic responsibilities which includes the enhancement of their teaching and assessment skills. With assessments, grading criteria provides structure and clinicians can relate feedback comments directly to the grading criteria, which in turn reduces the time demands of the feedback process.⁹⁹⁴ This process will simplify the moderation of assessments between clinicians. Guidelines to internal and external moderation, as well as clinicians' self-evaluation of the assessment process was discussed in paragraph 6 of chapter 3 of this study.

Mlyniec provides an extensive history on the development of clinical teacher training fellowships in the US since the 1960's. He indicates that in recent years "clinical teachers probably spend more time perfecting their craft and training new members of the academy than any other group of law teachers in America."⁹⁹⁵ Other than training fellowships, he proposes that clinicians regularly attend and present at conferences, as the lessons learned continue to be implemented at law schools when the conferees return home. Conferences "have provided the vehicle for the development of a pedagogy that is far more sophisticated and refined than any of the founders of the [CLE] movement could have envisioned."⁹⁹⁶

I submit that clinicians must deliver papers on their experiences at these conferences. By attending the submissions of other clinical participants to these conferences, clinicians will re-

⁹⁹³ Advised by the clinical director.

⁹⁹⁴ Hyams 2008 : 24, 30, 31.

⁹⁹⁵ Mlyniec 1996 -1997 : 981.

⁹⁹⁶ Mlyniec 1996 -1997 : 982.

focus their clinical endeavours and in the process come to a better realisation regarding their clinical time management. They will find that by publishing their papers will support their aspirations to be accepted as fully-fledged academics.

27. Student expectations

Assessment methods form part of the planning of the curriculum. During this planning phase, it is advisable to take cognisance of students' expectations.

In 2005 a South African survey was conducted to establish students' expectations of their law degree.⁹⁹⁷ The survey was conducted amongst third and fourth year law students at the University of KwaZulu-Natal ("UKZN") and the Nelson Mandela Metropolitan University, Port Elizabeth ("NMMU"). The author indicates that the findings need to be treated with caution, because 'whether or not law students were in fact being taught the desired skills and values at their institutions was not clear.' The views of about 25% of the students were reflected.⁹⁹⁸ The findings indicated that the seven most important courses and the five most important skills identified by law students are the same as those recommended by the law deans in 1997.⁹⁹⁹ UKZN students listed, in order of priority, the seven most important courses as: contract, delict, commercial law, family law, constitutional law, criminal procedure and civil procedure. NMMU students listed, in order of priority: contract, commercial law, property, criminal law, family law, delict and civil procedure. UKZN students listed trial advocacy, research and problem solving, legal writing, dealing with ethical issues and litigation skills as the five most important skills they would like to learn during LLB. NMMU students listed trial advocacy, research and problem solving, legal writing, interviewing and counseling, and litigation as the most important skills they wanted to acquire.¹⁰⁰⁰

A survey conducted amongst final year LLB students who enrolled in the CLE course at the WLC identified their needs and expectations of the course as follows:¹⁰⁰¹ Seventy nine percent of the students indicated their most valuable experience was the ability to help clients and learn attorneys' practice in the process. The same percentage of students further indicated a need

⁹⁹⁷ McQuoid-Mason 2006 : 169.

⁹⁹⁸ Ibid. Also see Du Plessis 2008 : 4.

⁹⁹⁹ See McQuoid-Mason 2004 : 102 for a discussion of the law deans' suggestions.

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ Du Plessis 2008 : 4.

to include training in trial advocacy, drafting of court pleadings, interviewing and assisting clients, refining research skills and visiting courts to observe cases being heard. Eighty seven percent of the students indicated a need to be instructed in smaller, rather than large groups. Ninety two percent of the students found the clinical course to be successful in providing a bridge between legal theory and practice.¹⁰⁰² The statistical data quoted represents 80 students registered in the clinical legal education course at the WLC. The data was gathered from 2004 to 2007.¹⁰⁰³

Assessment methods applied to an assessable curriculum may be adapted to ensure that the students' expectations are addressed.

28. The South African Qualifications Authority

The South African Qualifications Authority (SAQA),¹⁰⁰⁴ prescribed a set of exit-level outcomes for the revised LLB degree which include the supporting of specific outcomes and associated assessment criteria for each outcome. Of the 10 SAQA outcome levels, CLE has direct application in at least five of them.¹⁰⁰⁵

The SAQA exit outcomes for the LLB degree is:

1. The learner will have acquired a coherent understanding of, and ability to analyse fundamental legal concepts, principles, theories and their relationship to values critically.
2. The learner will have acquired an understanding of relevant methods, techniques and strategies involved in legal research and problem solving in theoretical and applied situations.
3. The learner is able to collect, organise, analyse and critically evaluate information and evidence from a legal perspective.
4. The learner will have acquired the ability to communicate effectively in a legal environment by means of written, oral, persuasive methods and sustained discourse.
5. The learner can solve complex and diverse legal problems creatively, critically, ethically and innovatively.

¹⁰⁰² Du Plessis 2008 : 4.

¹⁰⁰³ Ibid.

¹⁰⁰⁴ For a discussion of these exit-levels, see McQuoid-Mason 2006(a) : 166 -172 and Du Plessis 2008 : 4.

¹⁰⁰⁵ De Klerk 2006(c) : 939.

6. The learner is able to work effectively with colleagues and other role players in the legal process as a team or group and contribute significantly to the group output.
7. The learner will have acquired computer literacy to effectively communicate, retrieve and process relevant data in a legal environment.
8. The learner is able to manage and organise her or his life and professional activities in the legal field responsibly and effectively.
9. The learner can participate as a responsible citizen in the promotion of a just society and a democratic and constitutional state under the rule of law.
10. The learner is able to understand the different employment and income generating opportunities in the legal field, including outside the legal profession.

In Chapter Two an ideal curriculum for South African university law clinics was proposed. In Chapter Three assessment methods that may find application in CLE courses were surveyed. In Chapter Four assessment challenges in CLE were identified and solutions were proposed.

In Chapter Five the proposed CLE curriculum will be measured against the assessment criteria identified as suitable for CLE courses.

CHAPTER FIVE

MEASURING THE CURRICULUM AGAINST THE IDENTIFIED ASSESSMENT CRITERIA

The purpose of Chapter Five is to measure the curriculum proposed at the end of Chapter Two against forms of assessment identified in Chapter Three as appropriate for CLE courses. The outcome will be an indication of whether the proposed curriculum can be properly assessed.

In this chapter I collate the different assessment methodologies discussed in this study. The table below provides an application of the variety of assessment tools to the components identified for a CLE curriculum. Optimal forms of assessment, best suited in the South African context, are indicated for particular tasks or curriculum pieces.¹⁰⁰⁶

Identified components	Outcomes ¹⁰⁰⁷	Skills ¹⁰⁰⁸	Assessment Methods Available
substantive law	substantive law (goal 3)		written examination, spot tests, minute papers, short essay quizzes, in-class short-answer tests, oral examination ¹⁰⁰⁹
legal analysis and reasoning	applied practice skills, legal research, factual investigation, and client counseling (goal 4)	consultation and analysis of facts and law and legal research	reflective journals, self evaluation, peer evaluation, oral examination, case file work assessment, minute papers, spot

¹⁰⁰⁶ Also referred to as identified components of the CLE curriculum.

¹⁰⁰⁷ The references to 'goals' in this column, refer to the goals/outcomes identified in Steenhuisen 2006 : 266 – 279.

¹⁰⁰⁸ The references to 'skills' in this column, refer to the skills identified in either the AULAI MANUAL : 2005 and/or in De Klerk *et al* : 2006.

¹⁰⁰⁹ In the South African context, I submit that the optimal forms of assessment for substantive law will be written and oral examinations. Spots tests can be applied during focused unit based lectures. Minute papers should be restricted to tutorial sessions and only serve as formative assessments. Short essay quizzes and in-class short-answer tests may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

	judgment and analytical abilities, recognition of relevant facts and applicable law, and understanding strategy, tactics and decision making (goal 2)	consultation and analysis of facts and law and legal research	tests, short essay quizzes, in-class short-answer tests reflective journals, self evaluation, peer evaluation, oral examination, case file work assessment, minute papers, spot tests, short essay quizzes, in-class short-answer tests ¹⁰¹⁰
legal research	legal research (goal 4)	legal research	reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests, short essay quizzes ¹⁰¹¹
interviewing techniques	consultation skills, and applied practice skills (goal 4)	consultation skills	reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests,

¹⁰¹⁰ In the South African context, I submit that the optimal forms of assessment for legal analysis and reasoning will be written and oral examinations, case file work assessments and reflective journals, once introduced properly. Self evaluation can be used as a formative assessment. Peer evaluations can be used to assess consultations where students work in pairs or groups, but with the required caution. Peer evaluations should also only serve as formative assessments. Spots tests, minute papers, short essay quizzes and in-class short-answer tests may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

¹⁰¹¹ In the South African context, I submit that the optimal forms of assessment for legal research will be case file work assessments, oral examinations and reflective journals, once introduced properly. Self evaluation can be used as a formative assessment. Peer evaluations can be used as assessment where students conduct research in pairs or groups, but with the required caution. Peer evaluations should also only serve as formative assessments. Spot tests, minute papers and short essay quizzes may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

			short essay quizzes, in-class short- answer tests ¹⁰¹²
problem solving	recognition of relevant facts and applicable law, decision making, and judgment and analytical abilities (goal 2) factual investigation, client counseling, negotiation, legal research, and applied practice skills (goal 4)	consultation skills and analysis of facts and law, legal research analysis of facts and law, and alternative dispute resolution	reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests, written tests, short essay quizzes, in-class short- answer tests reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests, written tests, short essay quizzes, in-class short- answer tests¹⁰¹³
oral communication	recognition of relevant facts and applicable law, decision making, and judgment and analytical abilities (goal 2)	consultation skills and analysis of facts and law, legal research	reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests

¹⁰¹² In the South African context, I submit that the optimal forms of assessment for interviewing techniques will be oral examinations and reflective journals, once introduced properly. Self evaluation can be used as a formative assessment. The interviewing techniques applied will also become apparent from the statements taken from the clients during case file assessments. Peer evaluations can be used as assessment where students interview clients in pairs, but with the required caution. Peer evaluations should also only serve as formative assessments. Spot tests, minute papers, in-class short-answer tests and short essay quizzes may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

¹⁰¹³ In the South African context, I submit that the optimal forms of assessment for problem solving will be oral examinations, written tests (particularly drafting tests on legal process) and reflective journals, once introduced properly. Self evaluation can be used as a formative assessment. The problem solving techniques applied will also become apparent during case file assessments. Peer evaluations will not be an optimal assessment form for problem solving, as challenges amongst students in this regard will generally be resolved in consultation with clinicians during tutorial sessions. Spot tests, minute papers, in-class short-answer tests and short essay quizzes may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

	factual investigation, client counseling, negotiation, legal research, and applied practice skills (goal 4)	analysis of facts and law, and alternative dispute resolution	reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests ¹⁰¹⁴
writing in a legal context	draft legal documents (goal 4)	drafting letters, pleadings, notices, applications, wills and contracts	reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests, written examination, in-class short-answer tests ¹⁰¹⁵
drafting of pleadings and other formal documents	draft legal documents (goal 4) applied practice skills (goal 4)	drafting letters, pleadings, notices and applications drafting letters, pleadings, notices and applications	written examination, spot tests, minute papers, case file assessment written examination, spot tests, minute papers, case file assessment ¹⁰¹⁶
drafting of letters	applied practice skills (goal 4)	drafting letters	written examination, spot tests, minute

¹⁰¹⁴ In the South African context, I submit that the optimal forms of assessment for oral communication will be oral examinations, written drafting tests and to some extent reflective journals. Self evaluation can be used as a formative assessment. The oral communication skills will also become apparent during case file assessments. Peer evaluations will not be an optimal assessment form for oral communication. Minute papers and spot tests may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

¹⁰¹⁵ In the South African context, I submit that the optimal forms of assessment for writing in a legal context will be oral examinations, written drafting tests and reflective journals. Self evaluation can be used as a formative assessment. Writing in a legal context will become apparent during case file assessments, which, for these purposes will serve as an optimal assessment tool. Peer evaluations, even when students are working in pairs when writing, will not be an optimal assessment. Minute papers, in-class short-answer tests and spot tests may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

¹⁰¹⁶ In the South African context, I submit that the optimal forms of assessment for drafting of pleadings and other formal documents will be written drafting tests and examinations, as well as oral examination, where the reasoning for the drafting can be examined. The drafting of pleadings and other formal documents will become apparent during case file assessments, which, for these purposes will serve as an optimal assessment tool. Minute papers and spot tests may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

			papers, case file assessment, reflective journals ¹⁰¹⁷
professional responsibility	professional responsibility (goal 1)	practice management, financial management, office administration, and file and case management	Written examination, spot tests, minute papers, case file examination, oral examination, reflective journal, short essay quizzes, in-class short-answer tests, self evaluation, peer evaluation ¹⁰¹⁸
practice management	office management (goal 4)	practice management, financial management and office administration	Written examination, spot tests, minute papers, case file assessment, oral examination, reflective journals, self evaluation, peer evaluation, multiple choice quizzes ¹⁰¹⁹
observance of and reporting on trials, either civil or criminal	understanding strategy, tactics and decision making	analysis of fact and law	written assignment, oral examination, reflective journals

¹⁰¹⁷ In the South African context, I submit that the optimal forms of assessment for drafting of letters will be written tests and examinations and case file assessments. Reflective journals can be used, but to a lesser extent and mostly for students' self development. Minute papers and spot tests may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

¹⁰¹⁸ In the South African context, I submit that the optimal forms of assessment for professional responsibility will be oral examinations. Professional responsibility will also be apparent during case file assessments. Reflective journals, once introduced properly will be a useful assessment tool. Self evaluation can be used as a formative assessment. Professional responsibility can also be tested as part of a written test or examination. Peer evaluations can be used as an assessment tool where students work on client cases clients in pairs, but with the required caution. Peer evaluations should also only serve as formative assessments. Spot tests, minute papers, in-class short-answer tests and short essay quizzes may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

¹⁰¹⁹ In the South African context, I submit that the optimal forms of assessment for practice management will be case file assessments, oral examinations and to some extent written examinations. Reflective journals, once introduced properly will be a useful assessment tool. Self evaluation can be used as a formative assessment. Peer evaluations can be used as assessment tools where students work on client cases in pairs, but with the required caution. Peer evaluations should also only serve as formative assessments. Spot tests, minute papers and multiple choice quizzes may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

	(goal 2) trial advocacy (goal 4)		oral examination, reflective journals, written assignment ¹⁰²⁰
professional ethics	legal ethics (goal 1)	professional and ethical conduct and professional responsibility	Written examination, spot tests, minute papers, case file assessment, oral examination, reflective journal, short essay quizzes, in-class short-answer tests, multiple choice quizzes ¹⁰²¹
negotiation techniques	negotiation (goal 4)	alternative dispute resolution	oral examination, reflective journal, self evaluation, peer evaluation, written examination, spot tests, short essay quizzes ¹⁰²²
trial advocacy	trial advocacy (goal 4) appellate advocacy (goal 4)	trial advocacy and preparation for trial preparation for trial	oral examination, reflective journal, self evaluation, peer evaluation reflective journal, self evaluation, peer

¹⁰²⁰ In the South African context, I submit that written assignment, oral examination, as well as reflective journals are optimal forms of assessment for the observance of and reporting on trials, either civil or criminal.

¹⁰²¹ I submit that the optimal forms of assessment of professional ethics in the South African context are oral examinations and reflective journals. Professional ethics can also be tested as part of a written test or examination. Whether professional ethics were maintained will also be apparent during the case file assessments. Spots tests, minute papers, in-class short-answer tests, short essay quizzes and multiple choice quizzes may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

¹⁰²² I submit that the optimal forms of assessment of negotiation techniques in the South African context are oral examinations and reflective journals. Negotiation techniques can also be tested as part of a written test or examination and self evaluation may prove to be useful. Spots tests, short essay quizzes and peer evaluation may prove to be problematic due to student sensitivity and the challenges of large student numbers, limited lecture time and clinicians' time constraints.

	learning and working in groups (goal 6)	trial advocacy and preparation for trial	evaluation oral examination, reflective journal, self evaluation, peer evaluation ¹⁰²³
social responsibility	social awareness (goal 1)	social justice	self evaluation, peer evaluation, oral examination, case file assessment
	legal services to the community (goal 5)	social justice	self evaluation, peer evaluation, oral examination, case file assessment ¹⁰²⁴
the capacity to reflect on learning and performance	reflection (goal 2)	Reflection	Reflection
to work effectively in a group	learning and working in groups (goal 6)	pairing of students, working in firms, trial advocacy	Written examinations, spot tests, minute papers, oral examination, reflective journal, self evaluation, peer evaluation ¹⁰²⁵
case management	applied practice skills (goal 4)	file and case management, professional responsibility	case file assessment, spot tests, minute papers, oral examination, reflective journal, self evaluation, peer evaluation ¹⁰²⁶

¹⁰²³ In the South African context all the forms of assessment indicated can be used as optimal assessment tools.

¹⁰²⁴ All the forms of assessment indicated can be used as optimal assessment tools in the South African context.

¹⁰²⁵ I submit that the optimal forms of assessment of “to work effectively in a group” in the South African context are reflective journals, self evaluation and peer evaluation. To some extent oral and written examinations can be used, but the scope is limited. Spots tests and minute papers may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians’ time constraints.

¹⁰²⁶ In the South African context, I submit that the optimal forms of assessment for case management will be case file assessments and oral examinations. Reflective journals, once introduced properly will be a useful assessment tool. Self evaluation can be used as a formative assessment. Peer evaluations can be used as an assessment tool

numeracy skills	applied practice skills (goal 4)	numeracy skills	case file assessment, written examination, spot tests, multiple choice quizzes, minute papers ¹⁰²⁷
writing programmes	draft legal documents (goal 4)	drafting letters, pleadings, notices, applications, wills and contracts, legal research	reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests, written examination, in-class short-answer tests
	applied practice skills (goal 4)	drafting letters, pleadings, notices, applications, wills and contracts, legal research	reflective journals, self evaluation, peer evaluation, oral examination, case file assessment, minute papers, spot tests, written examination, in-class short-answer tests
	reflection (goal 2)	reflection	reflective journal ¹⁰²⁸

The above table clearly indicates that the curriculum proposed in chapter two can be properly assessed by the forms of assessment identified in chapter three as appropriate for CLE.

where students work on client cases clients in pairs, but with the required caution. Peer evaluations should also only serve as formative assessments. Spot tests and minute papers may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

¹⁰²⁷ In the South African context, I submit that all the suggested forms of assessment can be used as optimal forms of assessment for numeracy skills.

¹⁰²⁸ In the South African context, I submit that the optimal forms of assessment for writing programmes will be the assessment of students' writing skills during case file assessments, written examinations and reflective journals. Self evaluation can be used as a formative assessment. Peer evaluations, spots tests, in-class short-answer tests and minute papers may prove to be problematic due to the challenges of large student numbers, limited lecture time and clinicians' time constraints.

South African university law clinics in particular should heed the suggestion by Professor Philip Plowden during a clinical conference at WLC in 2007,¹⁰²⁹ namely that due to the “unique and challenging circumstances of [South African] law clinics compared to those in the United Kingdom, ... one should rather focus on less of the possible components of the assessment methodologies, as [South African university law clinics] are not operating in an ideal clinical teaching environment.”¹⁰³⁰

From all the above identified components for the CLE course the Directors and course co-ordinators should mindfully make a selection, specifically when new CLE programmes are set. Integration of all the identified components is however recommended as an ultimate goal of the CLE course.

Multiple assessment methods were indicated for the different components. Not all of the assessment methods should be used for each component, as this may lead to over-assessment of the various components, and which may unnecessarily overload the clinician and deflect his/her attention from the main focus of CLE, namely the teaching and training of students. The directors, course co-ordinators and clinicians should select the most appropriate assessment method that can be applied to the specific component as taught in their respective courses.

Challenges with assessments should be dealt with as proposed in Chapter Four. I recommend that clinicians assess all the components of students’ work in terms of a well crafted rubric.

¹⁰²⁹ Professor Plowden, at the time the Dean of the Law School of Northumbria University, United Kingdom, during the 5th International Journal of Clinical Legal Education Conference, held at the University of the Witwatersrand, Johannesburg on 9 and 10 Jul 2007.

¹⁰³⁰ Du Plessis 2009 : 114.

CHAPTER SIX

CONCLUSION

In this concluding chapter, I set out specific proposals about how university law clinics, with specific reference to South Africa, can enhance their assessments of students in CLE courses. I start with the importance of designing a CLE curriculum with assessable content. I then refer to the various assessment methods that were shown as to be applicable in CLE courses. I will show that the assessment challenges, specifically in the South African clinical environment, were addressed. A proposed ‘ideal’ CLE curriculum for South African university law clinics were tested against the appropriate CLE assessment methods identified in this study. I will finally consider what can be done by South African universities, university law clinics and those working in clinical programmes.

Firstly, on CLE and its place in the LLB curriculum, I agree with Browne who states that “[t]he argument that skills-based courses are vocational and not educational and demean the proper intellectual function of higher education, has been countered by others who believe that the academic study of law is enhanced by live client work as ‘it opens eyes through experiential methods to the meaning and application of the law’”.¹⁰³¹

Although the aim of this study was to find appropriate assessment methods for CLE, I submitted that the effectiveness of an assessment programme can only be determined when measured against a curriculum. By drawing on the relevant literature, reviewing the current CLE manual for South African university law clinics and reviewing the curricula of four South African university law clinics, I addressed the question: “How to design a curriculum with assessable content, specifically for South African university law clinics?”

In Chapter Two of this study the importance of the mission of a university law clinic was indicated. “If [a law school] lacks a mission, explicit outcomes, and appropriate curriculum and teaching methods, any assessment ‘program’ will be fragmented and lack cohesiveness.”¹⁰³²

In reviewing multiple jurisdictions, it became apparent that CLE should be a mandatory or core course in the LLB curriculum.

¹⁰³¹ Browne 2001 : 39.

¹⁰³² Munro 2002 : 230.

I stated that clinical teaching methods can make distinctive contributions to student learning and the most productive use of those methods requires an understanding of the objectives for which they can be deployed. South African university law clinics seek to meet dual objectives in relation to student learning and community service causing ‘dynamic tensions’¹⁰³³ between these objectives.

I further stated that these objectives can be advanced in parallel when the forms of learning are prioritised to ensure pedagogical sustainability of the clinics. To this end the missions of university law clinics are foundational,¹⁰³⁴ as are the focus, skills and values and the clinic’s goals and objectives.

In probing the focus of a university law clinic and the role of the clinician, scholars across multiple jurisdictions were in agreement that the focus of such a clinic must be CLE, i.e.: the teaching of students by the clinicians and not the provision of free legal services. Communities’ needs for legal services are acknowledged, but such services should not be rendered at the expense of student training. Clinicians, although they generally are admitted attorneys, are academics for purposes of CLE and their main focus should be the training of the students.¹⁰³⁵ Franklin stated that “[t]he danger of processing large numbers of cases is not only that there is no time for effective teaching but also that student[s] take away the message that it is alright to skimp on preparation.” A purpose of CLE is to set a standard for the practice of law and even if not met, students should know what the standard is.¹⁰³⁶

Expected outcomes, skills and values were identified as preconditions in designing a curriculum that can be assessed effectively. Surveys across a wide selection of jurisdictions, pertaining to the skills, values and expected outcomes of the course were reviewed, where common requirements for curricula were identified, all of which can be used in the design of an effective and assessable curriculum in CLE. It was also shown that the outcomes of a clinical programme are relevant to the needs of the society, students and the profession. Outcomes, skills

¹⁰³³ Gavigan 1997 : 443, 459.

¹⁰³⁴ Munro 2002 : 231 - 232.

¹⁰³⁵ Australian clinical programmes became more effective in managing the tension between the objectives of service to clients and student needs. A successful approach was the development of a broader range of clinical models and the fostering of multi-disciplinary approaches. There is a greater acceptance of clinics that do not provide ongoing casework services, but referring cases to other agencies, or by receiving their cases from other agencies. See Giddings 2008 : 9, 10. This was also experienced at the University of Manitoba, Canada, where the Legal Aid Help Desk where students are placed, fulfilled the role of referring cases to appropriate agencies, not necessarily legal work, but also to social services or other alternative dispute resolution bodies. See Smyth & Liddle 2012 : 15 – 34.

¹⁰³⁶ Franklin 1986 : 66, 67.

and values identified for South African university law clinics proved to compare well to those suggested by a number of foreign jurisdictions. Crucially important, but mostly neglect skills, namely language and writing, were identified. I suggested the incorporation of these skills not only into the CLE programme, but throughout the LLB curriculum.

Discussion of clinical pedagogy, in three categories,¹⁰³⁷ as well as specialised clinical units, addressed the sub-question of: “Which components of CLE teaching will best contribute to advance the identified purposes of the objectives of the clinic?”

The study found that the CLE pedagogy should consist of the clinical experience, as well as classroom and tutorial components. In an in-house live-client clinic students will learn certain skills through the clinical exposure, but it is not enough to learn lawyering skills. It is therefore advisable to run a seminar and tutorial programme alongside the live-client work. This will support and expand the legal skills learnt in the clinical environment. Specialised units within the larger clinical setting may make more manageable caseloads possible, but students must be trained within set parameters to ensure that they are assessed in an even-handed manner across the different specialised units.

In reviewing the outcomes, skills, values and CLE curricula of the WLC, the UPLC, the UJLC and the UFSLC, it can be concluded that the skills and values that are required by the profession and the expected outcomes, as defined for the South African landscape and as adapted by the individual university law clinics, are achieved according to the mission statements of each individual clinic.

The comparison of curriculum requirements that were identified across a number of jurisdictions to those of four South African universities under review provided the answer to the question posed above: “How to design a curriculum with assessable content, specifically for South African university law clinics?”

The classroom curricula and tutorial components of the WLC, the UPLC, the UFSLC and the UJLC, with reference to the curricula of other jurisdictions, as well as a manual compiled by AULAI during 2005, were reviewed, as were the operations of clinics in specialised units. In exploring suggestions from other jurisdictions in an attempt to find a comprehensive and appropriate curriculum for South Africa, common course content was sought. The curriculum requirements identified in this manner was compared to the curricula of the four South African

¹⁰³⁷ The clinic experience, classroom instruction and tutorial sessions.

universities under review. Once I identified the common, and ideal, components for the curriculum, these were measured against outcomes and skills determined for the South African landscape. I identified the required components for a curriculum in CLE and suggested that all should form part of the teaching of CLE, although clinicians may structure them according to their clinics' needs. I also indicated the importance of valid assessment and continual feedback as an integral part of the curriculum. An 'ideal' curriculum for South African university law clinics was proposed.

In the history of CLE in South Africa, there is only one record of any concerted effort to consider the assessment of CLE courses.¹⁰³⁸ The questions are: "Do South African university law clinics assess differently from other jurisdictions", and; "Is this a problem?" Sub-questions are: "Should formative and summative assessment be applied"; and "Whether assessment parameters should be set".

In Chapter Three I collated different assessment methodologies and indicated the advantages and disadvantages of each. The following forms of assessment, that can be applied successfully in CLE, were discussed, with suggestions as to their applications when assessing the different components of the CLE programme: written tests; spot tests, minute papers and short essay quizzes; multiple-choice quizzes; in-class short-answer tests; written assignments; essay examination; oral examination; rotation of students within clinics and interim assessments; reflective journals; self evaluation, peer evaluation, feedback and peer editing/peer review; client evaluation; case file work assessment / case file work portfolio; trial advocacy skills; and computerised assessment tools.

The conclusion to the above questions were drawn that South African university law clinics assess differently, as they limit their application of the wide array of appropriate assessment methods available. Problems are exacerbated by a failure to make use of moderation systems and assessment rubrics as scoring tools, which may result in students not being assessed even-handedly, particularly so across different specialised units and where students work in pairs or groups. It was found that the assessment regimes need to be remedied. Optimal assessment tools to be applied in the South African context were indicated in Chapter Five. The reasons why clinicians should use rubrics and the process of developing rubrics were indicated in Chapter

¹⁰³⁸

Aulai Manual 2005.

Three. Moderation systems which include internal assessors, internal moderators and external examiners were discussed and guideline rubrics were offered.

The conclusions to the sub-questions of whether formative and summative assessments should be applied and whether assessment parameters should be set were that both formative and summative assessments must be applied, within set parameters for assessment and mark allocation.

In Chapter Three the differences between formative and summative assessments were indicated, as well as suggestions of when to use them. Formative assessment measures provide students with feedback to help them improve their performances. These assessments need not be scored and they are not used to assign course grades. Summative assessment measures, by contrast, provide students with evaluative feedback such as a grade.¹⁰³⁹ Several summative assessments should be administered during the semester. This will increase the accuracy of the final grade. Summative assessments must be both valid (when what was taught is evaluated) and reliable (if it accurately measures who has learned and who has not learned). Students should be evaluated on how well they achieved the outcomes (criteria-referenced assessments) rather than on their own performance relative to other students (norm-referenced assessments). As summative assessment measures provide students with evaluative feedback such as a grade,¹⁰⁴⁰ results should be returned to students with comments to enable students to understand how to improve their performances. In this way a summative assessment also serves a formative purpose. The use of rubrics can assist in informing students. Graded assessment may be by way of grade descriptors. Graded assessments provide a structure for feedback – essential ingredients in the learning process. “For feedback to be a useful pedagogical tool it must be timely and frequent, transparent, honest and structured. It must follow a set of paradigms which is common to all supervisors undertaking the assessment task, and it must relate to the assessment criteria provided to the students. Feedback is a much more straightforward process when supervisors have a structure in which it can be housed. Grading criteria provide that basic structure. Thus, feedback need not be a “free-form” process in which the supervisor comments in a capricious and unstructured way on the students’ journey to understanding notions of professionalism. The use of grading means that the supervisor can relate feedback comments directly to the grading criteria.

¹⁰³⁹ Stuckey 2007 : 255; Fisher 2011 : 9.

¹⁰⁴⁰ Stuckey 2007 : 255; Fisher 2011 : 9.

This provides a format for the supervisor and thus reduces the time consuming demands of the feedback process. More importantly, however, it provides the students with a way of measuring their progress in the learning exercise. They should be able to relate their supervisors' responses directly to a set of unambiguous criteria that was provided to them at the commencement of the unit."¹⁰⁴¹

The setting of the parameters for assessment and mark allocation, specifically as they pertain to WLC, was discussed, with reference to their applications at the other university law clinics under review. The prescriptions of the University of the Witwatersrand's Senate Policy on the Assessment of Student Learning were examined.

In Chapter Four the question of the necessity or not to assess students in CLE courses was asked. I indicated the necessity of the assessment of CLE courses. The sub-questions of the need to grade the assessments and whether specific grades should be awarded were posed. Both were answered in the affirmative. I indicated that although the grading of the assessments is required, grade descriptors will suffice.

In Chapter Four the further question of whether specific factors that influence and challenge assessments in CLE can be identified in the South African environment was posed. The conclusion was drawn that a number of assessment challenges can be identified. Solutions to these challenges were suggested.

The following factors were discussed:

1 Large student numbers

It was found that South African university law clinics generally exceed the maximum ratio suggested by multiple jurisdictions. Of all the various factors that impact on assessment methodologies, the single recurring challenge remains large student numbers. The ratio between clinician and students in the context of large client numbers (with differing cultural backgrounds and languages, presenting an almost limitless range of legal complaints) challenges the parameters within which assessments are conducted. In view of CLE being a practical course, specifically aimed at allowing students to experience the preceding years of substantive law studies in practice, severe curbing of the current assessment procedures may be unwarranted. A solution may be found in limiting the number of client cases taken on, by applying the test of 'whether

¹⁰⁴¹ Hyams 2008 : 30, 31.

assistance to a specific client or the acceptance of his/her case will add educational value to the student curriculum.’¹⁰⁴² The best solution was found in grouping students together in student firms for collaborative work. Suggestions were made as to the sizes of the firms, their set-ups and operations. Social loafing when working in groups, as well as suggestions of how to counter it, was discussed.

2 Clinicians’ workloads and time constraints

Clinicians often indicate that they operate under undue time constraints, mainly because the large student numbers result in larger case loads and contact times. It was shown that clinicians, when adequately focused on student training and by selecting appropriate cases, as well as placing students in firms for collaborative work, can hugely reduce their workloads and time constraints. With the correct focus and teaching models, a well-crafted curriculum and proper management, these pitfalls can be avoided. I also suggested that, when clinicians attend conferences, become research active and build networks with clinicians locally and globally, they will discover the multitude of solutions that are available.

3 Assessing interviewing skills

The impossibility clinicians to attend on every student consultation conducted with clients were found to be not a unique problem. Students’ challenges during interviews were identified as:

- challenges with identifying problems. Clinicians are available during clinic duties. Challenges that remain unaddressed can be discussed during weekly tutorials, debriefing sessions or through reflection.
- racial, cultural and religious differences. The five habits of cross-culture lawyering were discussed.¹⁰⁴³ The clinic was identified as a good place where students can actively explore and develop a broader understanding of these issues, as the clinic provides a controlled environment.¹⁰⁴⁴ This forms part of students’ fundamental lawyering skills development, as they will be confronted with diversity issues throughout their careers.

¹⁰⁴² Du Plessis 2008 : 14.

¹⁰⁴³ Bryant 2001 : 12, 13.

¹⁰⁴⁴ Vawda 2004 : 131, 132.

- fear. It was indicated that students sometimes experience fear when confronted with cultural and societal scenarios they either don't understand or were brought up or conditioned to fear. When a student's fears appear to be deep-rooted and/or real, he/she may be removed from the consultation or the case, as attorneys may refuse to accept cases.
- clinician interference, or not? When clinicians are called to intervene in an interview, they must inform the client that the nature of the interview is both for student education and client assistance and the clinician must address all issues through the students. The clinician must, for purposes of the interview, adopt the role of a guide, not an attorney.

Solutions proposed to the challenge of assessing interviewing skills include: students must avail themselves of interviewing notes drafted and handed out by the clinician; allowing students to initially observe interviews conducted by clinicians; attend seminars on interviewing skills; conducting formative peer assessments according to a rubric; tutorial intervention by the clinician; one-way mirrors; debriefing conferencing; reflective journals; using the "standardized client" method; and the use of video material.

4 Language barriers

At the WLC the university's language of instruction is English. Clients who frequent the clinic are sometimes not able to articulate their problems in English. The students who are proficient in such other language, may be either overburdened or be limited in their access to the client pool. Language barriers are part of the South African landscape and will in all probability not change in the short to medium term. In aiming for a more even playing field in the varied exposure amongst students in education and general experience levels, simulations of these experiences may be generally incorporated in the introductory lectures to the students. A further proposed solution is to invite students to reflect upon their experiences as part of their journal feedbacks, for which a rubric may be designed. Another solution is the use of interpreters which will develop students' skills in this regard. The development of these skills may also be assessed.

5 The nature of the client pool (undocumented and unassessed assistance to clients)

The students' abilities to assist clients in distinguishing the various pockets of a general problem is deserving of assessment, even if a case is not taken on for litigation. These should be brought

to the clinician's attention during weekly tutorials, where the students' assistances to clients may be assessed either formatively or summatively. Students may also reflect upon these or compile portfolios which can be taken into account when case file work are assessed, or during oral examinations.

6 Students working in pairs: student pairs with uneven strengths

It was shown that the pairing of students is preferable and more advantageous. However, clinicians often see the end-product of "joint" effort without having an opportunity to fully observe the process of production. Assessing and allocating grades to an individual student becomes challenging. Solutions may be found in the use of the method of Havruta,¹⁰⁴⁵ student exercise programmes,¹⁰⁴⁶ intervention programmes, using self-evaluation rubrics that address critical thinking deficiencies,¹⁰⁴⁷ and in allowing the weaker student partner to do additional research tasks to enhance his/her legal and lawyering skills.

7 Students allocated to different specialisation units

All jurisdictions surveyed in this study recommend that university law clinics should explore the mix between generalist and specialist clinical units. The assessments of students in an even-handed manner across the different specialised units pose certain challenges. Solutions to these challenges were found in strict guidelines for assessment methods, assessment rubrics, monitoring of the standard and quality of work in each specialised unit by the director and that all examinations are moderated to ensure that the standard is maintained across the different units.

8 Education and experience variances amongst students

Students are not only expected to present the substantive law in clinical context, the students need to be exposed to areas of legal practice outside the scope of the law clinic and the practices of the social and/or business environment within which the client's legal problem manifests.¹⁰⁴⁸ This problem is acknowledged across a number of jurisdictions and various solutions are proposed, such as the introduction of enrichment subjects, bridging courses, skills classes in legal research,

¹⁰⁴⁵ As explained by Blumenfeld 2010.

¹⁰⁴⁶ As explained by Burgess 2011.

¹⁰⁴⁷ As explained by Kelly 2011.

¹⁰⁴⁸ Du Plessis 2007 : 59.

analysis and writing, the process of analysis and structured reasoning to assist students to ‘think like lawyers’ and, as future lawyers ‘how to provide an objective opinion’. Students’ shortcomings can also be addressed during tutorials, or additional tutorials may be offered. Students should not be penalised for these interventions.

9 Differing levels in students’ knowledge of substantive and procedural law

Some students do not know their substantial and procedural laws learnt in earlier years of their LLB studies, or are not capable of carrying over their knowledge and application of substantive and procedural law into clinical practice, weaknesses that impact on their case work. I submitted that students should be penalised for their lack of knowledge, particularly as they work in a live-client environment. Penalisation will further instill a sense of good practice, the value of consistent research and ethical conduct.

10 The challenge of variances in clinicians’ experience in supervision and assessment

In most clinics there will be these variances. It was shown that clinicians have pedagogic responsibilities, in addition to being good attorneys. A solution to the training of clinicians and the enhancement of their skills, other than training fellowships, was found in clinicians regularly attending, and delivering papers, at conferences that will serve as vehicles for their own learning from, and sharing with, fellow clinicians, often globally.

11 Student expectations and the requirements of the South African Qualifications Authority

A 2005 survey on student expectations and the prescribed set of exit-level outcomes for the revised LLB degree were discussed. Curriculum design as well as assessment methods may have to be adapted to ensure that the students’ expectations are addressed and that the exit-levels are heeded.

In Chapter Five the question of whether the curriculum proposed in Chapter Two, when measured against the forms of assessment identified in Chapter Three, was found to be appropriate for CLE courses in South Africa. In answer to this question a table, providing an evaluation of the variety of assessment tools with an indication to which would be an optimal tools for a specific task in the proposed South African CLE curriculum, was provided. The

outcome further indicated that the proposed curriculum can be assessed by the identified and proposed assessment methods.

RECOMMENDATIONS FOR SOUTH AFRICAN UNIVERSITY LAW CLINICS

I will now consider what can be done by South African universities, university law clinics and those working in clinical programmes.

Law schools and university law clinics should define clear mission statements. University law clinics should determine the focus of their clinics and the roles of the clinicians. I recommend, in agreement with scholars from multiple jurisdictions, that the focus of the clinics must be CLE, i.e.: the teaching of students by the clinicians and secondary to that, the provision of free legal services to indigent people and communities.

University law clinics must determine the outcomes, skills and values they wish to advance in their CLE courses. The outcomes, skills and values were identified as preconditions in designing a curriculum that can be assessed effectively. In determining these, the outcomes of a clinical programme must be relevant to the needs of the society, students and the profession. I also indicated that without explicit outcomes, and appropriate curriculum and teaching methods, any assessment ‘program’ will be fragmented and lack cohesiveness.”¹⁰⁴⁹

I identified the important, but mostly neglect skills of language and writing. I recommend the incorporation of these skills not only into the CLE programme, but throughout the LLB curriculum.

I recommend that university law clinics, in conjunction with the law schools, ensure that their CLE programmes are mandatory or core courses in the LLB curriculum.

The study found that the CLE pedagogy should consist of the clinical experience, as well as classroom and tutorial components. I recommend that clinics run a seminar and tutorial programme alongside their live-client work. This will support and expand the legal skills learnt in the clinical environment. Specialised units within the larger clinical setting are recommended, but students must be trained within set parameters to ensure that they are assessed in an even-handed manner across the different specialised units.

¹⁰⁴⁹ Munro 2002 : 230.

I identified the required components for a curriculum in CLE and suggested that all should form part of the teaching of CLE. I recommend that clinicians structure these components according to their students' and clinics' needs. It is important that valid assessments and continual feedback sessions form an integral part of the curriculum.

I recommend that university law clinics, in conjunction with the law schools, ensure that their CLE courses are assessed, both formatively and summatively, within set parameters for assessments and mark allocations. I further recommend the use of different assessment methodologies. Assessments must be graded. Grade descriptors will suffice, especially where students work in pairs and/or groups and in instances where a large number of student are enrolled in the CLE programmes. I recommend the introduction of moderation systems and I strongly recommend that CLE programmes make use of assessment rubrics as scoring tools.

Factors that may influence assessments in CLE courses were explored and solutions to the challenges that they pose were suggested. I recommend that university law clinics, in conjunction with the law schools, run the appropriate surveys to identify the assessment challenges within their CLE programmes and apply solutions, as suggested, to ensure integrity and fluency.

Ultimately, in this study, I proposed a menu of possible assessment methods, the application of which I recommended to South African university law clinics.

Finally, I reiterate that I strongly believe not one form, but every module, for both curriculum and assessment methods employed, must be informed by full possibility of mechanism and that it must be selected by those working closely with students, such as clinical directors, course-coordinators and clinicians, to determine methods most optimum for students, law clinics and law schools in general.

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