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Clinical legal education: Planning a curriculum that can be assessed

Summary

Surveys conducted in a selection of jurisdictions are discussed to determine whether clinical legal education should be a core and mandatory course in the LLB curriculum. The focus of a university law clinic and the role of the clinician are examined. The pedagogy that must be used in clinical legal education is explored. The discussions specifically consider skills, values and expected outcomes for the course, as well as effective assessment programmes and common requirements for the design of a curriculum.

Kliniese regsopleiding: Die beplanning van 'n leerplan wat geassesseer kan word

Ten einde te bepaal of kliniese regsopleiding 'n basiese en verpligte kursus in die LLB-leerplan moet wees, word ondersoek oor 'n seleksie van jurisdiksies bespreek. Daar word gekyk na die fokus van 'n universiteit regslyn, die rol van die kliniektoesighouer en die pedagogie wat in kliniese regsopleiding gebruik moet word. Die besprekings konsentreer spesifiek op die vaardighede, waardes en verwagte uitkomst vir die kursus, asook 'n effektiewe assesseringsprogram en die algemene vereistes vir die opstel van 'n leerplan.

1. Introduction

But the landscape encountered in law practice is different. It is not populated with cases and doctrine, but with clients and their problems. The lines between the fields of law are blurred or missing altogether. The landscape is messy and unfamiliar. Not surprisingly, new lawyers report being disoriented and unprepared for this world. Some feel cheated by their legal education as they are left to construct a new map and to do so often without the help of an experienced guide.¹

The best guide which can assist law students in this unfamiliarity associated with the transition from law school to practice is in clinical legal education, a teaching methodology that is used in the teaching of clinical programmes.² The Association of University Legal Aid Institutions (AULAI) produced a standard curriculum and teaching manual, which

1 Mudd 1986:189.

2 Haupt 2006:231.

includes an assessment guide,³ as well as a textbook.⁴ Although De Klerk heralds these achievements as significant, he indicates that clinical legal education not only remains largely marginalised at law schools, but that the clinical courses have also become stale.⁵

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.⁶ To determine whether a curriculum is effective, an effective assessment programme must be designed and implemented.⁷ This article will focus on factors to be taken into account in the design of an assessable curriculum in clinical legal education. An effective assessment programme, which is designed to determine the success of the curriculum, apart from the mission of the clinic, assumes certain preconditions,⁸ such as whether the clinical legal 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).⁹ The strength of the curriculum is accentuated when the clinical course is mandatory. In determining an assessable curriculum, these conditions will be discussed. The aim of this article is not to design a specific curriculum, or to discuss assessment methods, but to provide guidance to university law clinics in the design or review of their clinical programmes that will incorporate clinical legal education.

3 Vawda (ed) 2005.

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

5 De Klerk 2006b:245.

6 Evans & Hyams 2008:60. Students at Monash 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. 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. 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. See De Klerk *et al.* 2006:264. At the university of Pretoria the students attend an intensive two-day workshop, whereafter they consult with clients, initially in groups, later in pairs and eventually as individuals. See Haupt 2006:234, 235.

7 A comprehensive assessment programme includes both institutional assessment and student assessment. See Munro 2002:1. In South Africa, the first university law clinics were established in 1973 and several other universities established law clinics in the late 1970s and early 1980s. The Association of University Legal Aid Institutions (AULAI) was formed in 1987. See De Klerk *et al.* 2006:264. Most of the university law clinics have been assessing students' participation in the clinics from the onset.

8 Munro 2002:2.

9 Munro 2002:2.

2. Determining the mission of the clinic

In most law schools, clinical legal education is taught in a live-client environment, generally referred to as a university law clinic. It is imperative that the clinic has a clear mission.¹⁰ When formulating a mission statement,¹¹ the clinic's primary constituencies need to be identified,¹² whereafter the framework for dialogue on the mission should be established.¹³ 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.¹⁴

3. Should clinical legal education be a mandatory course in the LLB curriculum?

Integration of clinical legal education into the core curriculum of the law school is important, as it reveals its value as a teaching methodology and enhances its prospects of surviving and prospering in the long term.¹⁵ A further motivation for such integration is that the pedagogic aims can be set and achieved. Clinical education has intellectual worth in the extent to

10 Hyams 2008:25: "Clinic 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."

11 The mission statement of the law clinic at the university of the Witwatersrand 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; Provide quality legal services to the community." See Mahomed 2008:63.

12 The following groups were identified as potential constituencies: the public that is served, students, employers of law graduates, law faculty or school, applicants for admission, taxpayers (for state-supported institutions), alumni, courts, all licensed attorneys (or all the role players in the legal profession) and the university to which the clinic is attached. See Munro 2002:2. For the legitimate interest of stakeholders in South Africa, see Swanepoel *et al.* 2008:100, 101.

13 Some important questions that need to be considered are: what knowledge, skills and values will a lawyer need to serve society during the next 10 to 20 years?; what technology must we prepare our graduates to master?; should students be equipped with a broad base of knowledge and a wide range of skills, or should they be trained as specialists?; what emphasis must be placed on scholarship?; how will teaching, research and service be prioritised?; will the clinic hold itself out as featuring any legal specialties?; what will the clinic's niche be in the admissions market?; what will society's need for lawyers be in the future, both in terms of numbers and specialties?, and should the clinic train lawyers for multidisciplinary practice? See Munro 2002:2-3.

14 Munro 2002:2-3.

15 "While clinical legal education 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." See Hall & Kerrigan 2011:30.

which it enables students to better understand concepts and principles of law and the context within which these operate.¹⁶

Whereas students may spend up to 95 per cent of their time in law school reading and discussing law and cases, the same students will, in practice, go days or weeks at a time without picking up a law book or case law. Their days will instead be filled with drafting, reviewing, negotiating with opposing counsel, and composing memos, emails and letters to colleagues and clients.¹⁷ Students can only acquire these skills when clinical legal education is made mandatory. Students, as consumers of their education, are craving structured, practical experiences. Through clinical teaching students learn to formulate an action plan, they enact those plans through structured experiences, and reflect on the experiences and modify future action accordingly.¹⁸

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".¹⁹ De Klerk agrees and posits that he "cannot see how any law school could claim to produce competent graduates without requiring them to undergo a clinical experience".²⁰ He is of the opinion that "(t)here is no substitute for the real thing, and clinical legal education should therefore form a core part of any law degree".²¹ A practising advocate, in noting on pupillage and access to the profession, calls for aspirant jurists to be exposed to a more learn-by-doing experience.²² She calls on law schools to be more proactive in producing lawyers, for which a solution can be found in clinical legal education.²³ McQuoid-Mason holds that "(f)or the practicing lawyer ... 'known facts' are a luxury ...".²⁴ "The ability to handle facts ... must be developed in an environment in which the presentation of facts resembles that in the real world".²⁵ This can be achieved through clinical legal education.

American students across a number of universities commented as follows on their experiences of clinical legal education:

16 Model standards for live-client clinics. A Clinical Legal Education Organisation (CLEO) document. <http://www.ukcle.ac.uk/resources/teaching-and-learning-practices/clinical-legal-education/> (accessed on 14 June 2011).

17 Ortiz 2011:6.

18 Ortiz 2011:6.

19 O'Regan 2002:247.

20 De Klerk 2006b:246. De Klerk (2006b:246) is critical of law schools in South Africa where the clinical course is an elective and students are able to choose to avoid the clinical experience altogether. These students are therefore allowed "to enter the practice of law without ever having seen a client, been inside a courtroom or interviewed a witness".

21 De Klerk 2006b:250.

22 Parmanand 2003:201.

23 Parmanand 2003:202-204.

24 McQuoid-Mason 1982:162.

25 McQuoid-Mason 1982:162.

[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.²⁶

These sentiments were echoed by South African students:²⁷

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.

26 Ortiz 2011:8-12.

27 Extracts from students' evaluation of the clinical course at the University of the Witwatersrand Law Clinic, 2011.

The practice is vastly different from the theory. It is good to be exposed to practice now as opposed to the first time during 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 clinical legal education and the role of the clinician

South African universities state their objectives as threefold, namely teaching, community service and academic research. 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.²⁸ During the 2011 Association of University Legal Aid Institutions (AULAI) winter conference, the delegates confirmed that such research output should form an essential objective for all South African law clinics.²⁹

Although tension exists between the teaching of students and service to the indigent members of the community frequenting the clinic,³⁰ the general view across a number of jurisdictions is that the main focus of a university law clinic should be clinical legal education *i.e.* the teaching of students by the clinicians and not the provision of free legal services.

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.³¹

De Klerk echoed this view:

28 Du Plessis 2007:46.

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

30 Stuckey 2007:197.

31 Du Plessis 2007:46. See also De Klerk & Mahomed (2006:316) where they confirm that the core business of a university law clinic is to teach, which needs to be balanced against the need to provide access to justice. See also Haupt (2006a:237) who states that the clinical law practice is "... to provide legal aid without sacrificing its primary responsibility, *i.e.* providing clinical legal education to students ...".

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.³²

The Clinical Legal Education Organisation, UK (CLEO) 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”.³³ 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 ...”.³⁴

Clinic is about the student experience and therefore it should be the student who conducts a case, not the clinician.³⁵ The concept of what clinic in the USA actually is, which will determine who the clinic file belongs to, is summed up by Stephen Wizner:

On the most basic level, the law school clinic is a teaching office where students can engage in faculty-supervised law practice in a setting where they are called upon to achieve excellence in practice and to reflect upon the nature of that practice and its relationship to the law as taught in the classroom and studied in the library. It is a method of teaching law students to represent clients effectively in the legal system, and at the same time to develop a critical view of that system. Law students in the clinic learn that legal doctrine, rules and procedure; legal theory; the planning and execution of legal representation of client; ethical considerations; and social, economic and political implications of legal advocacy, are all fundamentally interrelated.³⁶

The file therefore belongs to the student, as it is a teaching tool and the student must do the work, not observe it being done. Clinicians therefore teach and assist. Stuckey supports the focus of the clinic to be that of student training and, whilst acknowledging the needs of the community, emphasises that “education should be the first priority”.³⁷ He further warns that a clinician should be careful when attempting to shape a student’s experience – the student must develop a reflective and critical approach to

32 De Klerk 2007:98.

33 Model standards for live-client clinics. A Clinical Legal Education Organisation (CLEO) document. <http://www.ukcle.ac.uk/resources/teaching-and-learning-practices/clinical-legal-education/> (accessed on 14 June 2011).

34 Du Plessis 2008:14.

35 MacFarlane & McKeown 2008:65.

36 Wizner 2001-2002:13.

37 Stuckey 2007:197.

his/her own experience.³⁸ The clinician should therefore not practise, but train the student to practise.³⁹

The focus of the clinic and clinical legal education furthermore determines the role of clinicians in academia and where they fit into the university system. Findley opines that “[i]n today’s law schools, the apparent dichotomy between professional and scholarly purposes has developed into what has been called ‘a massive case of intellectual schizophrenia.’”⁴⁰ He refers to a suggestion that

[t]he fact that law teachers achieved academic respectability only with great difficulty may account for the fear among modern legal educators of skills-training, for their zealous desire to avoid semblance of a vocational trade school, and for their belief in the case method as the only legitimate tool for training law students.⁴¹

Furthermore,

[b]ecause [law professors traditionally] thought of themselves as lawyers (and because they often received higher salaries than their university colleagues), law professors were never completely accepted or comfortable in the universities, though they also were never fully accepted as legal practitioners (because, after all, they were not the same as other lawyers).⁴²

Findley 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. The challenge of moving law schools toward performance-referenced legal education is not that teaching for performance is beneath their academic dignity as members of the academic community, but that it is terribly demanding precisely because it is so rich in both conceptual and practical elements.⁴³

These arguments should put to rest the misconception that clinicians may not be fully fledged academics merely because they teach in a clinical

38 Stuckey 2007:195.

39 “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 and there are no student practice rules. For a discussion of student appearances and practice rules in the USA, see Sarkin 1993:231. For a discussion of (the lack of) student practice rules in South Africa, see McQuoid-Mason 2008b:580-595.

40 Findley 2006-2007:310, 311.

41 Findley 2006-2007:310, 311.

42 Findley 2006-2007:310, 311.

43 Findley 2006-2007:310, 311.

and practical environment. The academic role of the clinician is further acknowledged when the focus of clinical legal education, as a core and fully assessed compulsory subject in the LLB curriculum, is on student training. This further accentuates the importance of a well-planned curriculum for clinical legal education that can be properly assessed.

5. Pedagogy: Inclusion of a classroom and tutorial component

5.1 The clinic experience

The infrastructure for an in-house live-client model is well established in South Africa.⁴⁴ In-house live-client courses can be 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 in-house live-client clinics. Students need to be taught about their relationships with the clinicians and the restrictions placed on their freedom to act as lawyers.⁴⁵

Practice-oriented 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 realized”.⁴⁶ In a live-client clinic, students are required to learn and absorb information whilst in the process of interviewing clients.⁴⁷ “Real cases enable students to scratch beneath the surface of the legal system and explore the hinterland of expectations, promises and gears engendered by the legal process”.⁴⁸ Students generally respond positively to real experience.⁴⁹

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

45 Stuckey 2007:189.

46 Findley 2006-2007:311.

47 This echoes the statement that the “[i]ncreased interest in clinical legal education has tended ... to focus increased attention on the importance of learning how to learn and the importance of developing and nurturing good habits of learning” and clinical legal education therefore prepares graduates who are “poised to learn”. Findley 2006-2007:312.

48 Hall & Kerrigan 2011:34.

49 Students’ responses in a 2011 essay competition on ‘Is the law degree fit for purpose?’ (<http://www.ukcle.ac.uk/students/competition/2011> [accessed on 14 June 2011]), run by UKCLE (UK Centre for Legal Education) the winner reveals that: “the research, interpretation and analytical skills gained ... are outstanding ... and alongside these skills comes an attention to detail which can only come with time” (Lisa West, Liverpool John Moores University). The runner-up comments on “excellent analytical skills and a heightened facility for succinct written and oral expression”. She closes her essay with the following:

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".⁵⁰ 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.⁵¹ 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.

Stuckey confirms the requirement of a classroom component, as it will help to accomplish the educational goals of the course. He states that "[t]his reinforces and advances the shared learning experience of students enrolled in an in-house clinic".⁵² 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".⁵³ 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.⁵⁴

Better and wider classroom content is required to support a focus on professionalism and ethics.⁵⁵ This will require a concomitant reduction in casework load.⁵⁶ This is required, as the focus of clinical legal education is rather on training students than (uncontrolled) client services. Hyams holds that

[c]linics cannot take on additional areas of student learning without having to re-assess the requirements that are placed on the students' shoulders. If clinicians wish to emphasise the importance

"Winston Churchill once observed that his early education enabled him to absorb 'the essential structure of the ordinary British sentence – which is a noble thing.' The LLB provides the grammatical foundation for the common law and its relation to society at large, while professional training supplies the vocabulary, in the form of explicit instruction, required to put that learning into practice" (emphasis added) (Sitanta Ni Mathghamhna, Birbeck College, University of London).

50 Evans & Hyams 2008:63.

51 Evans & Hyams 2008:63.

52 Stuckey 2007:196.

53 Stuckey 2007:189.

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

55 An increasing importance of legal education goals related to the development of professional ethics and student-centred learning along with development of student understanding of the relationship between theory and practice and the development of technical skills was identified. See Styles & Zariski 2001:65; Giddings 2008:12.

56 Hyams 2008:31, 32.

of students learning skills of professionalism, then adequate 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.⁵⁷

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.⁵⁸

There is value in integrating practising 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.⁵⁹

5.3 The tutorial component

Clinicians need to consider seriously the regularity of tutorial meeting,⁶⁰ case file work attendances and how regularly clinicians will make themselves available outside set tutorial and clinic times.⁶¹ The clinician:student ratio impacts on these decisions, as well as the overall load the clinician is expected to carry.⁶² The relationship between clinicians and their students is about managing expectations, which need to be dealt with consistently among clinicians, and these are mostly encountered during tutorial sessions. Student feedback norms are a critical quality control issue,⁶³ as this can serve as an examination of the clinical curriculum and for clinician and other staff performances.⁶⁴ Student assessment is continuous, as the clinician will, during the tutorial, approve students' work in advance and observe or record student performances.⁶⁵

Tutorials are the appropriate forum where student autonomy can be balanced with client protection.⁶⁶ Under the guidance of the clinician, the student must develop a reflective and critical approach to his/her own experience without risking harm to the client. The highest quality experience comes from a clinician who can strike the appropriate balance

57 Hyams 2008:31, 32.

58 Hyams 2008:31, 32.

59 Stuckey 2007:157, 158.

60 Although the tutorial method of teaching 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.

61 Evans & Hyams 2008:73.

62 On clinician: student ratio, large student numbers, clinician loads and time constraints, see Du Plessis 2009:92-94, 107-108; Du Plessis 2008:11.

63 Evans & Hyams 2008:73.

64 Consistent discussion and feedback during tutorial sessions not only informs the students about the work they are learning and what is expected of them, but also serves as constant formative assessment of the students' progress.

65 See Stuckey 2007:194.

66 Stuckey 2007:195.

between allowing the student the freedom to explore, whilst protecting the client from harm.⁶⁷ 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 merely to memorise material to pass an imminent examination.⁶⁸

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.⁶⁹ 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.⁷⁰ 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”.⁷¹

Tutorials in clinical legal education should be compulsory,⁷² especially where the course is taught in a live-client environment, to enforce the necessity of proper case management, legal ethics and professionalism.

6. Specialisation

When planning and setting a curriculum, the possibility of operating the clinic in specialised units, needs to be considered.⁷³ 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”.⁷⁴ He suggests that clinics could either prepare students to provide a limited range of legal services, or prepare students for very specific areas of practice, or help students develop fundamental competencies common to multiple practice areas, counting on students to acquire specialised knowledge and skills after graduation.⁷⁵

Specialised units within the larger clinical setting, which are becoming the norm at more South African university law clinics,⁷⁶ may also assist

67 Stuckey 2007:195.

68 Swanepoel *et al.* 2008:108, 109.

69 Ortiz 2011:3.

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

71 Findley 2006-2007:311.

72 For a discussion on the disadvantages of tutorials when they are not compulsory, see McQuoid-Mason 1982:163.

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

74 Stuckey 2007:41.

75 Stuckey 2007:41.

76 De Klerk 2006b:250. On the functioning of a specialised unit, see Du Plessis 2006b:284, 285. On the process of moving to and implementation of specialised

in reducing the volumes of cases experienced in the South African landscape.⁷⁷ Parameters defining the specific cases that will be taken on in such units must be set, for example, that the merits of a case should satisfy the criteria set for student learning. This will also have the effect of more manageable caseloads.⁷⁸ Strict guidelines for assessment are essential to ensure “that students are assessed in an even-handed manner across the different specialized units”.⁷⁹

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. 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.⁸⁰ 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 professional specialisation.⁸¹ It is, however, important that such specialised clinical units conform to the pedagogical aims of the clinical legal education programme. Clinicians need to decide what the important skills are that students need to be taught.⁸²

In South Africa, upon measuring the impact of specialisation, a number of successes were noted.⁸³ Among these are that the clinic supervisors not only developed specialised skills in their fields of practice, but also increasingly present papers which are published, and training in their respective areas of expertise is offered.⁸⁴ Students benefit through more intensive and focused training in smaller groups. Student assessment is also done by experts in the respective areas of the law.⁸⁵ Candidate attorneys rotate among the various specialised units, which improves their training.⁸⁶ The clinic’s networking improves as stronger links are

clinical practice, see De Klerk & Mahomed 2006: 306-318.

77 Most of the university law clinics in South Africa established specialist clinics. For example, the Universities of Kwa-Zulu Natal, Free State, Western Cape, Witwatersrand and Pretoria have a number of such units. See McQuoid-Mason 2008a:10. On specialisation at the university of Pretoria, see Haupt 2006:238-241.

78 Du Plessis 2008:14.

79 Du Plessis 2009:97, 98.

80 Evans & Hyams 2008:66, 67.

81 Evans & Hyams 2008:66, 67.

82 Evans and Hyams further suggest that, apart from the technical legal capabilities, clinicians have an overriding responsibility to provide students with a developed set of managerial and office skills, ethics, professional and social responsibility, advocacy, negotiation and interviewing techniques and how to ‘act like a lawyer’ (such as managing of time, people and cases). These are clearly more than technical skills – a holistic approach will ensure that students are left with skills that can be transported both inside as well as beyond the legal profession.

83 De Klerk & Mahomed 2006:312-314.

84 De Klerk & Mahomed 2006:312-314.

85 De Klerk & Mahomed 2006:312-314.

86 De Klerk & Mahomed 2006:312-314.

created with other role players in the specific field of the law.⁸⁷ The change to specialised clinical practice improved the clinic's ability to compete for funding.⁸⁸ These successes make the introduction of further such units possible, which also allows the clinic to respond effectively to the needs of the community it serves.⁸⁹ Challenges were identified such as the retaining of sufficient variety while still keeping within a framework of specialisation; identifying appropriate areas of specialisation which are conducive to good teaching; deciding on appropriate caseloads for students; choosing appropriate cases; replacing specialist supervisors when required; defining the boundaries of each unit, and keeping focus on the core business, which is to teach students.⁹⁰ McQuoid-Mason identifies the main challenge as ensuring that both students and clinicians develop the necessary expertise.⁹¹

7. Outcomes, skills and values

Expected outcomes, skills and values were identified as preconditions in designing a curriculum that can be assessed effectively.⁹² It is therefore necessary to formulate the values, skills and outcomes that are required for the course. As this in essence 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 skills and values were identified across a number of jurisdictions.⁹³

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 that the [law] school desires the students to exhibit on graduation".⁹⁴ The outcomes of a clinical programme are relevant to the needs of the society, students and the profession.⁹⁵

When planning a curriculum, certain outcomes are expected. Guidance for developing outcomes were suggested by a number of jurisdictions as:⁹⁶

87 De Klerk & Mahomed 2006:312-314.

88 De Klerk & Mahomed 2006:312-314.

89 De Klerk & Mahomed 2006:312-314.

90 De Klerk & Mahomed 2006:312-314.

91 McQuoid-Mason 2008a:6.

92 See the discussion in paragraph 1 hereof.

93 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; the Bar Council of India, see Bloch & Prasad 2006:209-212; for Australia, see Giddings 2008:12; for Germany, see Brückner & Woodruff 2008:579.

94 Munro 2002:3.

95 Osman 2006:275.

96 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

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 school and 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 school, the clinic and identified constituencies; 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.

CLEO suggests the following learning outcomes for the clinical programme:⁹⁷

the aim of the unit/module [i.e. clinical legal education course] is to introduce students to the key skills, values and professional attributes required of a legal practitioner through the medium of live-client, in-house clinical legal education. Therefore, at the end [thereof], the student will be able to demonstrate: sufficient knowledge and understanding of an area of law and of the rules of procedure applicable; professional conduct and client care; ethics; the ability to complete an initial interview and offer the client preliminary written advice in appropriate English; the ability to draft letters and any other formal documents; the ability to bring a case to an appropriate resolution; to work effectively in a group, and the capacity to reflect on his/her learning and performance.

In South Africa, seven main goals (outcomes), each with their own sub-goals, of clinical legal education have been identified:⁹⁸ the goal relating to professional responsibility;⁹⁹ judgment and analytical abilities;¹⁰⁰

Munro 2002:3, 4; the Bar Council of India, see Bloch & Prasad 2006:209-212; for Australia, see Giddings 2008:12; for Germany, see Brücker & Woodruff 2008:579.

97 Model standards for live-client clinics. A Clinical Legal Education Organisation (CLEO) document. <http://www.ukcle.ac.uk/resources/teaching-and-learning-practices/clinical-legal-education/> (accessed on 14 June 2011).

98 Steenhuisen 2006a:266-279.

99 The subgoals (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.

100 The subgoals (outcomes) are recognition of relevant facts and applicable law; understanding strategy, tactics and decision-making; understanding process and procedure; synthesis, and reflection.

substantive law;¹⁰¹ applied practice skills;¹⁰² legal services to the community; learning and working in groups, and integration of all or some of these goals. Mahomed opines that, although these outcomes were modelled on the live-client method, it does not make the method itself perfect.¹⁰³ Acknowledging the goals defined by Steenhuisen, Osman offers the following goals/outcomes to which the university of Kwa-Zulu Natal (Howard College Campus) are committed: the provision of legal services to indigent people; the provision of practical legal training to students; the provision of training to law graduates from historically disadvantaged backgrounds, and the promotion and advocacy for the public interest.¹⁰⁴ It is submitted that the majority of the South African university law clinics support the goals/outcomes identified by Steenhuisen,¹⁰⁵ which compares well to those identified by other jurisdictions to a large extent. As South Africa comprises a wider diversity relating to both clients, students and physical location of universities as those in other jurisdictions discussed, it needs to adapt these outcomes to accommodate the diversities experienced in their own universities.¹⁰⁶

7.2 Skills

The following skills were identified as essential skills law graduates should have or would need when entering the legal profession: 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; recognise 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

101 The subgoals (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.

102 The subgoals (outcomes) are consultation skills; client counselling; negotiation; trial advocacy; appellate advocacy; drafting of legal documents; legal research; factual investigation, and office management.

103 Mahomed 2008:58. She indicates that this model poses challenges for all parties concerned, namely clients, clinicians and students. The challenges include funding concerns, client numbers, supervision, infrastructure, assessment, the continuity of service, and a high standard of professionalism from both clinician and student.

104 Osman 2006:260, 261.

105 These outcomes are assessable. See discussion of the methods of assessment used by the universities of Pretoria and Witwatersrand in paragraph 9 hereof.

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

– if are you a teacher, then limit client intake to teach efficiently); to work as part of a team (the pairing of students or to do some activities in a group in the clinic is therefore valuable); problem-solving; legal analysis and reasoning; factual investigation; counselling (to establish a counselling relationship with a client); negotiation, and the skills applicable to litigation and alternative dispute resolution procedure, *i.e.* trial advocacy.

In South Africa, the following skills are taught:¹⁰⁷ professional and ethical conduct;¹⁰⁸ consultation skills;¹⁰⁹ file and case management;¹¹⁰ numeracy skills;¹¹¹ practice management;¹¹² legal research;¹¹³ drafting letters;¹¹⁴ drafting pleadings, notices and applications;¹¹⁵ the drafting of wills;¹¹⁶ the drafting of contracts;¹¹⁷ alternative dispute resolution,¹¹⁸ and

107 De Klerk *et al.* 2006:29-262.

108 This teaching will include the rules of professional ethics; 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 from which the rules of professional conduct originate; 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, and access to justice and rules of etiquette. See De Klerk 2006a:29-54. On the development of this skill, see Swanepoel *et al.* 2008:104.

109 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. See Haupt 2006b:55-72.

110 The teaching of this skill will include file management systems; opening case files; typical file structure; case management, and the closing of files. Haupt & Boniface 2006:73-82.

111 This 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. See Grove 2006:83-102.

112 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. See Swanepoel 2006:103-128.

113 The teaching will include legal research in a law clinic; suggested research methods, and the drafting of an opinion. See Kok 2006:129-154.

114 The teaching of this skill will include format; body of the letter; specific letters, and methods of delivery. See Wimpey 2006:155-172.

115 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. See Steenhuisen 2006b:173-192.

116 This will include general approach to drafting; prior considerations; interviewing; checklist contents, and order of a will and formalities. See Bodenstein 2006: 193-218.

117 The students will be taught on the law of contract, the art of drafting and exercises in examples. See Stilwell 2006b:219-232.

118 The teaching of this skill will include types of dispute resolution processes; negotiation; mediation, and arbitration. See Mahomed 2006:253-262.

trial advocacy.¹¹⁹ These skills, which compare well to those identified by other jurisdictions, are taught to both students and candidate attorneys. The candidate attorneys will, in addition, appear in the Magistrates' courts.

Swanepoel *et al.* note that "(s)o often in the South African context, we experience a perception that the primary objective of law students is to pass the LLB degree, and that learning practical skills will be achieved through their terms of articles and by attending the vocational training courses after graduation".¹²⁰ The authors raise the issue of an important further skill which is often neglected, namely the use of language both verbally and in writing.¹²¹ They also refer to a comment by the editor of the South African Attorneys' Journal, *De Rebus*, who wrote, among other things that "(t)here is much discussion nowadays about the poor quality of graduates ... there are two general areas of skills deficit that practitioners mention most – numeracy and literacy ... good students (who) ... achieved good results, cannot write an essay. Yet writing is an essential professional skill in almost every branch of legal practice".¹²² In evaluating social accounts of student learning, Watson observed the poor mastery of basic grammar and writing skills. She also found that students' writing is poorer in examinations than with assignments, which is evidence of the cognitive overload with which students struggle to cope.¹²³ It is submitted that these skills need urgent attention in both the law school and in clinical legal education. In both the US and Germany, foreign language skills and intercultural competencies are considered to be added to the curriculum, in view of internationalisation.¹²⁴

7.3 Values

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.

It is submitted 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.

119 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. See Stilwell 2006a:233-252.

120 Swanepoel *et al.* 2008:101.

121 Swanepoel *et al.* 2008:103.

122 Swanepoel *et al.* 2008:100.

123 Watson 2003:39.

124 Brücker & Woodruff 2008:615.

8. Curriculum

A curriculum which will serve the clinic's mission and the stated outcomes for the students must have certain characteristics.¹²⁵ The first characteristic is focus, meaning that the curriculum must be designed to provide students with the abilities, knowledge base, skills and perspective essential to the stated outcomes. The curriculum must also be coherent and logically coordinated so that all the components of the course address the clinic's mission and required outcomes. It must also provide for the incremental and developmental formation of student abilities.¹²⁶ The elements of the curriculum that are designed to address the outcomes should be required for all students.¹²⁷ It is important that valid assessment and continual feedback be an integral part of the curriculum.

Suggestions from the following jurisdictions were explored in an attempt to find a comprehensive and appropriate curriculum for South Africa: the UK, the USA, Australia, India and Germany.¹²⁸

As part of the clinical curriculum as it relates to student activity, it is recommended that: students receive formative feedback on their clinical work; a minimum of two students be responsible for each client/case;¹²⁹ 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 clinical legal education, each student should receive substantial instruction in: the substantive law necessary for effective and responsible participation in the legal profession; legal analysis

125 Munro 2002:5, 6.

126 This means that tasks should be broken down in parts and then built one upon the other in increasing complexity. See Munro 2002:5.

127 This characteristic should specifically be heeded when a clinic operates in specialised units where students may be exposed to different styles of practice and different experiences.

128 For the UK (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 2002:3, 4; the Bar Council of India, see Bloch & Prasad 2006:209-212; for Australia, see Giddings 2008:12; for Germany, see Brücker & Woodruff 2008:579.

129 Chavkin (1994:213) 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 with whom to discuss the case, 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".

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, as well as negotiation techniques and writing programmes. In the South African context, dissatisfaction was voiced on the poor drafting and writing skills of graduates.¹³⁰ Findley correctly 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”,¹³¹ It is submitted that writing courses be introduced in the LLB curriculum from the first year. Intensive focus on drafting skills is required in the clinical legal education programme.

In 2005, in South Africa, the Association of University Legal Aid Institutions (AULAI), compiled a manual which lists topics that may be covered in the clinical legal education 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. Some of the topics covered are: Land, housing, business reforms, and social justice;¹³² practice management: file and case management;¹³³ financial management;¹³⁴ office administration;¹³⁵ consultation and analysis of facts

130 Du Plessis 2008:9; Van Der Merwe 2007:2. See also the discussion in paragraph 7.2 above, specifically by authors Swanepoel and Watson.

131 Findley 2006-2007:315, 326.

132 Vawda (ed) 2005:15-31, Vol 1. Legal issues relating to land, housing and evictions can be successfully accommodated in the course, as the content of these procedures is appropriate for student training, both in relation to clinical work and the classroom component. The law clinic at the University of the Witwatersrand operates a specialised unit in this field. AULAI suggests assessment as a field trip essay, case studies and role analysis. It is submitted that assessment can also be conducted in the form of file work, written test and oral examination. It is submitted that the topic of business reforms does not lend itself to student training and assessment, and that the concept of social justice, apart from the awareness thereof throughout the clinical experience, is also suitable for teaching in a classroom environment. This can be assessed successfully in written and oral examinations.

133 Vawda (ed) 2005:32-33, Vol 1. It is submitted that these are key topics of a clinical legal education course. AULAI suggests assessments in the form of file evaluations and case reports.

134 Vawda (ed) 2005:34-35, Vol 1. 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 it is submitted 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. It can also be tested as part of an oral examination.

135 Vawda (ed) 2005:36-39, Vol 1. The suggested contents include a general component [consisting of reception, telephone/fax (e-mail can be included in this instance) post, deliveries by couriers and docex and the receipt of monies]; staff management; insurance, and asset management. AULAI does not suggest the

and law;¹³⁶ letter writing;¹³⁷ drafting of pleadings, notices and applications;¹³⁸ ethics and professional responsibility;¹³⁹ labour;¹⁴⁰ preparation for trial;¹⁴¹

manner of teaching and it is submitted that this topic can be taught in a classroom environment. AULAI suggests assessment by way of a written or an oral test.

- 136 Vawda (ed) 2005:40-45, Vol 1. The suggested contents include different types of consultation (first contact session/interview, counselling, telephone consultation and updates/progress reports by and to client); interview/counselling; 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 it is submitted 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 supervisor (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, give feedback and explore various issues), and/or provide students with an incomplete set of facts, requiring them to compile a list of additional questions that will complete the picture.
- 137 Vawda (ed) 2005: 46-50, Vol 1. 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. It is submitted that these can form part of a formal lecture, as well as continuous training during weekly tutorials. 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.
- 138 Vawda (ed) 2005:51-55, Vol 1. The suggested contents include the purpose and aim of a pleading; pre-requisites of pleadings; technical requirements of pleadings; the plea; notices; criminal courts, and construction of draft documents. AULAI does not indicate the method of instruction of this topic. It is submitted 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.
- 139 Vawda (ed) 2005:56-59, Vol 1. AULAI does not indicate the method of instruction of this topic. It is submitted 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.
- 140 Vawda (ed) 2005: 60-63, Vol 1. Legal issues relating to unfair labour practices can be successfully accommodated in the course, as the content of these procedures is appropriate for student training, both in relation to clinical work and the classroom component. The law clinic at the University of the Witwatersrand operates a specialised unit in this field. AULAI suggests assessment as a combination of oral examinations, written tests, assignments and file assessments.
- 141 Vawda (ed) 2005:64-67, Vol 1. AULAI does not indicate the method of instruction of this topic. It is submitted that these can be taught in formal lectures, as well

trial advocacy;¹⁴² motor vehicle accidents: damage to motor vehicle;¹⁴³ HIV/AIDS;¹⁴⁴ medical malpractice;¹⁴⁵ environmental law;¹⁴⁶ welfare;¹⁴⁷ alternative dispute resolution;¹⁴⁸ family law: divorce, maintenance, access, custody, guardianship, domestic violence, customary marriages, and children's

as continuous training during weekly tutorials. AULAI suggests assessment as a combination of drafting tests, file assessment, tutorial assessment, written class tests and oral examination.

- 142 Vawda (ed) 2005:68-70, Vol 1. AULAI does not indicate the method of instruction of this topic. It is submitted 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 therefore.
- 143 Vawda (ed) 2005:73-74, Vol 1. Legal issues relating to this topic can be successfully accommodated in the course, as the content of these procedures is appropriate for student training, both in relation to clinical work and the classroom component. The law clinic at the University of the Witwatersrand operates a specialised unit in the field of the law of delict. AULAI suggests assessment as a combination of written assignments, written tests, file assessments and oral examinations.
- 144 Vawda (ed) 2005:75-77, Vol 1. Although AULAI discusses this topic, it will only be possible to teach this by means of lectures in a classroom setting and not in a live-client environment. It is submitted that this should not be an individual component of the clinical legal education course, but form part of the overall social justice component of the course.
- 145 Vawda (ed) 2005:78-79, Vol 1. Legal issues relating to this topic can be successfully accommodated in the course, as the content of these procedures is appropriate for student training, both in relation to clinical work and the classroom component. The law clinic at the University of the Witwatersrand operates a specialised unit in the field of the law of delict. AULAI suggests assessment 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. It is submitted that file assessments and oral examinations are also appropriate methods of assessment.
- 146 Vawda (ed) 2005:80, Vol 1. Although AULAI discusses this topic, it will only be possible to teach this by means of lectures in a classroom setting and not in a live-client environment. It is submitted that 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 clinical legal education.
- 147 Vawda (ed) 2005:81-82, Vol 1. 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 by means of lectures, but does not warrant assessment separate from file assessment. It is submitted that this should not be an individual component of the clinical legal education course, but form part of the overall social justice component of the course.
- 148 Vawda (ed) 2005:83-86, Vol 1. It is submitted that this topic should not be a separate component, but form part of the labour component of clinical legal education.

court proceedings;¹⁴⁹ administrative law;¹⁵⁰ constitutional litigation;¹⁵¹ small claims court;¹⁵² drafting of contracts;¹⁵³ enforcement of civil judgments in Magistrate's courts (debt collection);¹⁵⁴ consumer law: credit agreements and micro-lenders,¹⁵⁵ and criminal law.¹⁵⁶ 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.

149 Vawda (ed) 2005:87-106, Vol 1. Legal issues relating to family law can be successfully accommodated in the course, as the content of these procedures is appropriate for student training, both in relation to clinical work and the classroom component. The law clinic at the University of the Witwatersrand operates a specialised unit in this field. 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. It is submitted that this component can also be successfully assessed by means of oral examinations and the students' case file work.

150 Vawda (ed) 2005:107-110, Vol 1. Although not specifically discussed in the AULAI Manual, this topic can be taught by means of 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.

151 Vawda (ed) 2005:111-116, Vol 1. Although AULAI discusses this topic, it will only be possible to teach this by means of lectures in a classroom setting and not in a live-client environment. It is submitted that clinics will seldom be confronted with this type of litigation, that it will not specifically focus on student training and is therefore not a viable option for clinical legal education.

152 Vawda (ed) 2005:117-118, Vol 1. 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.

153 Vawda (ed) 2005:125-130, Vol 1. AULAI provides valuable course content. It is submitted that the drafting of contracts in the live-client environment should be limited to simple contracts at a student level appropriate for student training. AULAI recommends assessments in the form of role-play and drafting, consultation notes and the contract drafted therefrom.

154 Vawda (ed) 2005:131-136, Vol 1. AULAI provides valuable course content. It is submitted 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.

155 Vawda (ed) 2005:137-142, Vol 1. Legal issues relating to consumer law can be successfully accommodated in the course, as the content of these procedures is appropriate for student training, both in relation to clinical work and the classroom component. The law clinic at the University of the Witwatersrand 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.

156 Vawda (ed) 2005:143-152, Vol 1. In clinical legal education, criminal law will only find application in a classroom component, through practical exercises and assignments on attending a criminal trial. This component is, however, very well suited for the training of candidate attorneys.

9. Assessment

There is a definite alignment between curriculum and assessment,¹⁵⁷ in that “indifferent assessment arrangements can poison otherwise well-conceived curricula”.¹⁵⁸ Student assessment, for which there should be protocols for monitoring the quality of practice,¹⁵⁹ is the process whereby student performance is observed and evaluated, and includes the provision of feedback to the student.¹⁶⁰

As students often perceive their clinical experience as a ‘testing ground’ for their abilities to become lawyers, assessment of the course provides an 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. Clinical programmes are often marginalised in their faculties to some extent and therefore cannot afford to be subjected to “allegations of slipshod assessment regimes”.¹⁶¹ The importance of proper assessment, which may, in turn, counter this marginalisation, is highlighted by Watson who proposes that “(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”.¹⁶²

In clinics grades are often based on the subjective opinion of one clinician who supervises the students’ work. Grades tend to reflect an appraisal of students’ overall performance as lawyers, not necessarily what they learned or how their abilities developed during the course.¹⁶³

It is essential to heed the nature and content of assessment programmes when applying the assessment regime to the established curriculum, namely that student learning is a primary purpose of an educational institution; that assessment is integral to learning; that abilities must be developed and assessed in multiple modes and contexts, and that performance assessment is an effective strategy for ability-based, student-centred education.¹⁶⁴

The strength of the curriculum can be tested when the following principles of assessment are applied:¹⁶⁵ be clear about the goals of each

157 Osman 2006:271.

158 Osman 2006:271.

159 Stuckey 2007:194.

160 ‘Institutional assessment and student assessment will necessarily overlap because student performance is a major factor in institutional assessment.’ See Munro 2002:1.

161 Evans & Hyams 2008:71.

162 Watson 2003:30.

163 Stuckey 2007:238.

164 Munro 2002:5, 6.

165 Stuckey 2007:235-261.

assessment;¹⁶⁶ assess whether students learn what is taught;¹⁶⁷ conduct criteria-referenced assessments, not norm-referenced assessments;¹⁶⁸ use assessments to inform students of their level of professional development;¹⁶⁹ be sure the assessment is feasible;¹⁷⁰ use multiple methods of assessing student learning;¹⁷¹ distinguish between formative and summative assessments;¹⁷² conduct formative assessments throughout the term,¹⁷³ and conduct multiple summative assessments throughout the term, when possible;¹⁷⁴ ensure that summative assessments are also formative assessments¹⁷⁵ – students cannot learn unless the results of

166 State which component(s) of the performance will be assessed, e.g. knowledge, behaviour, performance, attitude, or a combination of these. See Stuckey 2007:240.

167 This is required for validity of the assessment. See Stuckey 2007:241. Before each assessment, consider what we expect students to learn and what is important to assess. Different assessment methods may be required. See Stuckey 2007:243.

168 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. See Stuckey 2007:243. Criteria-referenced assessments rely on detailed, explicit criteria that identify the abilities students should be demonstrating. The use of criteria minimised the risk of unreliability in assigning grades. The use of clear criteria helps students understand what is expected of them as well as why they receive the grades awarded. See Stuckey 2007:244, 245.

169 Stuckey 2007:245, 246. A way of indicating a student's progress towards expertise was developed by the Law Society of England and Wales for clinical legal education. The students are provided with a record indicating the level of achievement demonstrated. For example, a grid indicating that the student

- (a) is familiar with the skill, task or transaction, but not able to perform it.
- (b) can perform the skill, task or transaction, but requires closely supervised practice.
- (c) can perform the skill, task or transaction, with minimal supervision.
- (d) can perform the skill, task or transaction adequately without further training.
- (e) can perform the skill, task or transaction in an outstanding manner with virtually no supervision and could provide assistance to others.

170 Stuckey 2007:253.

171 Stuckey 2007:253.

172 Stuckey 2007:255. Osman (2006:271) quotes Boud and explains that formative assessment "intends to improve the quality of learning. Students engage in the problems and discourse of a given area and are given encouragement, response and feedback on what they do, as appropriate, with a view to them becoming more effective in their learning. This is very often regarded as assessment for learning." Summative assessment "'concerns the accreditation of knowledge or performance: students are assessed to certify their achievements'. This is usually referred to as assessment for certifying or assessment for the record." See also Haupt & Mahomed 2008:276.

173 Stuckey 2007:255.

174 Stuckey 2007:259.

175 Stuckey 2007:259, 260.

their summative assessments are explained to them, and require students to compile educational portfolios.¹⁷⁶

The South African Higher Education Quality committee (HEQC) defined assessment.¹⁷⁷ However, determining objective assessment methods within a clinical setting is challenging.¹⁷⁸ The University of Pretoria Law Clinic teaches clinical legal education using a combination of the live-client teaching model, simulations and plenary lectures. 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.¹⁷⁹ The summative student assessment comprises, in the first semester, a written test (25 per cent),¹⁸⁰ a practical assignment (10 per cent)¹⁸¹ and for attendance and participation (10 per cent). The summative assessment for practical work in the clinic comprises file assessments and fees written (30 per cent)¹⁸², peer assessment (5 per cent),¹⁸³ client assessment (5 per cent)¹⁸⁴ and drafting of documents (15 per cent). During the second semester, the peer and client assessments and the practical assignment are substituted with a written assignment following comprehensive research (20 per cent). The combined semester marks count fifty per cent towards the year mark. A final oral examination makes up the final fifty per cent of the year mark.¹⁸⁵

At the University of the Witwatersrand Law Clinic students, working in pairs, are taught in a live-client environment.¹⁸⁶ In addition to the clinical work, student pairs attend weekly compulsory tutorials. During weekly double plenary lectures ethics, numeracy skills, interviewing skills and statement-taking, trial skills and social justice are discussed. Students

176 Stuckey 2007:261. This can be effectively applied when students' case file work is assessed.

177 "The assessment of student learning is generally understood to mean the practice of designing formal tasks for students to complete and then of making inferences from and estimating the worth of their performances on these tasks. One can also understand assessment to be a form of research that aims to find out what students know and can do. As with the principles of triangulating research methods, so with assessment, and one is likely to ascertain better what students can do if a range of different assessment (research) methods are employed and if the research instruments are determined by their purpose. It is important to note that assessment is used for a wide range of purposes that may be more or less explicit." As quoted by Osman 2006:271.

178 Haupt & Mahomed 2008:276.

179 Haupt & Mahomed 2008:279.

180 For a discussion on the written tests assessment, see Haupt & Mahomed 2008:286-287.

181 For a discussion on assignments/case reports assessment, see Haupt & Mahomed 2008:288-289.

182 For a discussion on portfolios/file evaluations, see Haupt & Mahomed 2008: 283-285.

183 For a discussion on peer assessment, see Haupt & Mahomed 2008:290-291.

184 For a discussion on assessment by clients, see Haupt & Mahomed 2008:291-292.

185 Haupt & Mahomed 2008:279, 280.

186 Haupt & Mahomed 2008:277, 278.

also receive specialised unit-based lectures. A simulation method is used to teach trial advocacy skills. The assessment regime during 2010 comprised¹⁸⁷ case file work (50 per cent);¹⁸⁸ written test at the end of the first term (covering the substantial and procedural law pertaining to the specialised unit) (10 per cent); a written assignment on the attendance and review of a court case (10 per cent);¹⁸⁹ a written test on the drafting of court pleadings (10 per cent);¹⁹⁰ an oral examination (15 per cent),¹⁹¹ and trial advocacy skills (5 per cent).¹⁹² Formative assessments are conducted throughout the year, particularly during clinic duties and tutorials. These formative assessments did not count towards the year mark, but were used for students' performance improvement. Assessment rubrics were designed and will be introduced during 2011, which will assist the clinicians with the formative assessment process, which will count towards the year mark.¹⁹³ Reflective journals by students have been widely adopted and it is submitted that it can be used as a valuable assessment tool.¹⁹⁴

AULAI also provides guidelines for assessment in South African university law clinics, which is regarded as a crucial part of the learning process.¹⁹⁵ AULAI states assessment to be "a part of learning, rather than something added at the end of a course".¹⁹⁶ It distinguishes the forms of assessment to be applied as summative,¹⁹⁷ formative¹⁹⁸ and diagnostic.¹⁹⁹ AULAI sets the criteria for assessment as "linked to learning outcomes, clearly understood by all, clearly expressed, free of jargon, fully and clearly communicated, detailed in explaining what is expected and integrated",²⁰⁰ It also states the objectives in designing an assessment plan to be reliable, transparent, fair, and with appropriate feedback.²⁰¹ As a guide to clinicians,

187 Du Plessis 2009:103.

188 For a discussion on case file work assessment, see Du Plessis 2009:103-105.

189 For a discussion on the written assignment assessment, see Du Plessis 2009:105-106.

190 For a discussion on the assessment of both written tests, see Du Plessis 2009:105.

191 For a discussion on the oral examination assessment, see Du Plessis 2009:106.

192 For a discussion on the trial advocacy skills assessment, see Du Plessis 2009:106-107.

193 For the development of rubrics, see University of Connecticut Assessment Primer <http://assessment.unconn.edu/primer/> (accessed on 19 July 2011) and Sparrow 2004.

194 Swanepoel *et al.* 2008:108. For a discussion on the use of reflective journals and their uses in other jurisdictions, see Du Plessis 2009:109-110.

195 Vawda (ed) 2005:1-70, Vol 2.

196 Vawda (ed) 2005:6, Vol 2.

197 Vawda (ed) 2005:6, 7, Vol 2. Described as "learning for assessment" and used to measure the extent of learning at the end point of a learning opportunity.

198 Vawda (ed) 2005:6, 7, Vol 2. Described as "learning from assessment" and used during the learning exercise to provide feedback to students, affording them opportunities to improve.

199 Vawda (ed) 2005:6, 7, Vol 2. This is used to determine students' potential, strengths, weaknesses and what is appropriate for them to learn.

200 Vawda (ed) 2005:8, Vol 2.

201 Vawda (ed) 2005:9, 10, Vol 2.

AULAI provides definitions for some of the concepts associated with assessment.²⁰²

CLEO developed and suggests the following sample set of learning outcomes and assessment regime for a live-client clinic.²⁰³

For learning outcomes: demonstrate a level of understanding of the substantive law and procedure relevant to the case work; show competence in the relevant legal and transferable skills including interviewing, research, drafting, problem-solving and office management, and behave in a professional and ethical manner.²⁰⁴ The requirements of students were stated as follows: to take responsibility for the clients' cases to meet the learning outcomes; to engage in the interviewing of the client, the research of identified legal and factual matters, the giving of advice in written form and the maintenance of the case files; to work collaboratively with other student advisors; at all times to be aware of the need to meet the standards expected of a practising attorney, and to maintain a personal portfolio detailing the work carried out and the reflections on the nature and consequences of such work.²⁰⁵

9.1 Group work and group work assessment

Students working in pairs and in groups were an identified outcome.²⁰⁶ Group work assessment may pose specific challenges, as students will take group work more seriously if they know that they will be judged on their efforts.²⁰⁷ It is important to design an assessment scheme which specifically relates to the learning model.²⁰⁸

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 behaviour with in groups,²⁰⁹ as assessed group

202 Vawda (ed) 2005:11-13, Vol 2. The concepts defined are assessment, continuous assessment, integrated assessment, group assessment, peer assessment, self assessment, self reflection, authentic assessment, quantitative assessment, qualitative assessment, external assessment, external moderation, and outcomes.

203 Model standards for live-client clinics. A Clinical Legal Education Organisation (CLEO) document. <http://www.ukcle.ac.uk/resources/teaching-and-learning-practices/clinical-legal-education/> (accessed on 14 June 2011).

204 From the discussion of the procedures followed at the universities of Pretoria and Witwatersrand, it is apparent that these outcomes are applicable in the South African context and that they are assessed.

205 These outcomes are also applicable in the South African context as indicated above.

206 See discussion of outcomes in paragraph 7.3 above.

207 This is particularly applicable when a group of students work together during trial advocacy exercises. See Du Plessis 2009:106-107.

208 Hewitt 2008:95.

209 A possible solution to counter the destructive behaviour may possibly be found in a combination of assessment methods, such as peer assessment, self-assessment (discussed below) and reflective journals (discussed in paragraph 9 above).

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.²¹⁰

When assessing group work, it is important to distinguish what is being assessed.²¹¹ The key to managing this problem lies in determining the answer to the question: What are you testing – the *product* or the *process* of the group work?²¹² In assessing the product, students share the assessment mark allocated for the final product. When assessing the process, different methods are suggested. One suggestion is that of academic (tutor) assessment. The clinician could assess the teamwork process by way of direct observation, or by asking teams to provide feedback which will be assessed. A difficulty with this suggestion is the impossibility of a clinician to observe all students at all times. The second suggestion is that of peer assessment. This takes advantage of students' intimate knowledge of the contribution made by each team member. The clinician could either develop a survey form to be completed by the team members, or leave it to the individual members to reflect in writing on the contribution of the various members during the process. The final suggestion is the option of self-assessment, which requires students to engage in self-evaluation of their own demonstrated group work process skills. The problem with this suggestion is the issue of reliability – *i.e.* students either over- or underassess themselves. Self-assessment may be valuable if used in combination with other forms of assessment.²¹³ The final assessment mark may be a combination of the product and the process of the group work.

10. Conclusion

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

210 Hewitt 2008:101.

211 There are two scenarios in group work. First, in a group of four members, three members do all of the work, but each one as individual does not do any more than what is expected. The overall quality of the work will as a consequence be poorer, resulting in an overall lower mark for the group. Secondly, where only three of the four members of the group do the work, but each delivers more than is expected, the overall mark will be higher, which will result as a huge benefit for the freeloading member. See Hewitt 2008:103.

212 A secondary question should also be asked, namely what particular substantive knowledge or skills are students expected to demonstrate in the assessment? See Hewitt 2008:103.

213 Hewitt 2008:104-106.

for purposes of clinical legal education and their main focus should be the training of the students.

In a live-client clinic students will learn certain skills through the 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.

The skills, values and expected outcomes of the course were surveyed across a wide selection of jurisdictions. Effective assessment programmes, taking these factors into account, were explored. From the jurisdictions surveyed, a set of 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.

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