1992

Teaching Appellate Advocacy in an Appellate Clinical Law Program

J Thomas Sullivan

University of Arkansas at Little Rock William H. Bowen School of Law, jtsullivan@ualr.edu

Follow this and additional works at: http://lawrepository.ualr.edu/faculty_scholarship

Part of the Legal Education Commons

Recommended Citation


This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.
TEACHING APPELLATE ADVOCACY IN AN
APPELLATE CLINICAL LAW PROGRAM

J. Thomas Sullivan*

The predominantly urban location of most American law schools offers a particularly fertile environment in which clinical legal education thrives. Proximity to major court systems and a significant potential client population, which is typically indigent and underrepresented by legal services programs and pro bono representation projects, affords law school clinical programs both the necessary base for operation and access to litigation institutions that make clinical training uniquely valuable within the law school curriculum.

Clinical legal education does not, of course, function primarily as a means to provide representation for a potential client population otherwise unable to obtain counsel due to lack of economic resources. In fact, it may not even encompass live client representation at all to qualify as “clinical” course content within the curriculum. "Live client" clinical programs, however, do necessarily provide some measure of representation assistance to the economically disenfranchised. In so doing, these programs are a part of the total package of uncompensated legal services available to the population, though a clearly less significant one in terms of caseload or numbers of clients served, to more formal efforts directly targeted at the need for indigent representation.

* Associate Professor of Law, University of Arkansas at Little Rock; Director of SMU Appellate Clinic, 1984-86; formerly Appellate Defender, New Mexico Public Defender Department. The author has practiced in the appellate courts of Texas, New Mexico and Colorado, the Fifth, Eighth and Tenth Circuits Courts of Appeals, and the United States Supreme Court. The author wishes to acknowledge the comments and support offered by Professor Roark M. Reed, Director of the SMU Criminal Justice Clinic.

1 For lively discussion on the emerging role of pro bono projects as a response to the needs of indigent and near-indigent clients, see Esther F. Lardent, Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question, 49 Md. L. Rev. 1 (1990) (considering whether pro bono representation should be mandatory and enforceable or remain essentially voluntary in nature).

2 See ABA Comm. on Guidelines for Clinical Legal Education, Report of the Association of American Law Schools—A.B.A. COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, (1980)[hereinafter AALS/ABA Guidelines]. The Committee report included a broad definition of “Clinical Legal Studies” encompassing “law student performance on live cases or problems, or in simulation of the lawyer’s role.” Id. at 12.
particularly in civil matters.  

Moreover, clinical programs ultimately serve to promote the interests of indigent client populations in access to representation by exposing law students to career choices that are directly related to providing representation to the poor. For instance, many students will be introduced to the interesting possibilities for career development offered by public defender and legal services offices as a result of their exposure to similar caseloads in clinical law programs. Even if long range commitment to poverty law or indigent criminal defense is a less compelling factor in the initial career choice than the immediate opportunity for courtroom work or the reality of a shrinking private sector job market, indigent clients may nevertheless be well served by these choices.

3 The right to counsel in most phases of criminal litigation without regard to economic means for compensation of counsel is well established in United States Supreme Court decisions. Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony cases); Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending right to counsel to misdemeanor cases involving loss of liberty); Scott v. Illinois, 440 U.S. 367 (1979) (limiting right to counsel in misdemeanor cases to those in which defendant actually sentenced to jail term); Evitts v. Lucey, 449 U.S. 387 (1985) (extending Sixth Amendment right to effective assistance of counsel to appellate process). But see Murray v. Giarratano, 492 U.S. 1 (1989) (no right to counsel in post-conviction proceedings conferred by Constitution, even in capital cases where death sentence has been imposed). Even though indigent criminal defendants are entitled to representation by publicly-paid counsel, the lack of adequate funding to support the system providing for indigent defense has generated an on-going crisis. This crisis focuses on both the quality of representation rendered and the obligation of private attorneys to assist with indigent defense when the system is unable, due either to ethical conflicts or increasing caseloads, to meet the need. See, e.g., Paul C. Dreksel, The Crisis in Indigent Criminal Defense, 44 Ark. L. Rev. 363, 402-08 (1991) (setting forth comparative figures for indigent defense expenditure by jurisdiction).

4 These career choices are clearly significant in terms of long-term availability of representation because mandatory pro bono programs may run afoul of constitutional protections that prevent the judiciary from imposing a duty on private attorneys to represent indigent civil litigants, even though courts encourage counsel to undertake such representation. Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296 (1989) (holding that federal judges could not compel private attorneys to provide representation in civil matters, despite language in 28 U.S.C. § 1915(d) that authorizes courts to request counsel to represent litigants proceeding in forma pauperis).

5 When the issue of imposition of a mandatory pro bono requirement was presented to the Florida Supreme Court as a means of ensuring representation for indigent civil litigants, the court rejected mandatory representation. In re Emergency Delivery of Legal Serv. to the Poor, 432 So. 2d 39, 41 (Fla. 1983). The court observed and probably quite correctly:

We believe that a person's voluntary service to others has to come from within the soul of that person. Our canons in this area are designed to be directory, to enlighten one's conscience, to focus at-
At least in part, an important function of urban legal education will continue to be to use clinical education as a vehicle for introducing law students to the possibilities of representing indigent citizens. Because impoverished Americans are intensely concentrated in our nation's major cities, clinical legal education will play a key role in furthering the goal of representation for traditionally under-represented urban populations.

Within the traditional clinical law framework, certain litigation experiences are most suggestive of an "urban orientation," as opposed to those experiences that are essentially geographically neutral. For example, because of the significant problems related to public assistance and leased housing that are aggravated by urban population growth, clinical programs focusing on adjudication, litigation or negotiation of issues relating to assistance eligibility or access to housing will have a peculiarly "urban" orientation on what is right for lawyers to do, but, historically, have not meant to force an involuntary act.

Id. Despite the best intentions of those who argue for mandatory pro bono programs, it is difficult to imagine that such a program will truly address the problems of building and maintaining attorney/client relationships when counsel is hostile to the very notion of such service. Instead, the preferable course is probably institutionalization of representation in offices specifically designed to provide representation for the poor, such as public defender and legal services offices, and development of voluntary pro bono programs as a means of involving private practitioners interested in making the commitment necessary to undertake representation without compensation. Law school clinical programs are valuable in exposing students to these options in the context of skill-building experiences.

6 Exposure to the potential for professional and personal satisfaction from poverty or public interest law practice is invaluable because of the continuing need for attorney availability to the poor and traditionally under-represented segments of the community. In the absence of mandatory pro bono requirements, which call into question both the obligation of private counsel to provide services without charge and the commitment of counsel performing under "duress," the long range interests of those client populations is probably best served by stimulation of lawyer interest in representation of the poor or public interest during the law school years. A personally rewarding clinic experience is one significant way to influence students to choose careers involving representation of the poor or career commitment to voluntary pro bono effort as a component of professional life.

The Model Rules of Professional Conduct couch the lawyer's duty to engage in pro bono representation in terms of encouragement only:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession. . . .


7 For instance, the University of Baltimore Housing Law Clinic represented the respondent in Housing Opportunities Comm. of Montgomery County v. Lacey, 585 A.2d 219 (Md. 1991), an action challenging repossession of a public housing unit based
ban" dimension appropriately addressed at urban-based centers of legal education. Similarly, the sheer number of families suffering domestic problems, such as abuse, dissolution of marriages, adoption and interaction with public agencies involved with child supervision, and non-payment of court-ordered spousal or child support, lend themselves to legal services focused on family law problems. These same concerns may serve to underwrite specialized clinical practice programs, focusing on family law problems, that provide students with valuable exposure to the problems confronting families suffering domestic tension and the judicial system's limitations in responding to their needs.

Other potential clinical experience subjects may be peculiarly linked to urban legal education, not because they reflect the nature of urban life generally, but because access to specialized systems of regulation or litigation are traditionally located in urban areas. For instance, a clinical program featuring resolution and litigation of claims over disputed federal income taxation may be well-suited to an urban law school, not because the claims are peculiarly "urban" in nature, but because the Internal Revenue Service may maintain an urban office through which these

on the respondent's alleged constructive possession of a controlled substance found in her son's bedroom and paraphernalia found in the bedroom of her apartment.

8 In fact, the Rutgers Urban Legal Clinic filed as amicus curiae in In Re Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 116 N.J. 216, 561 A.2d 542 (1989). The designation of the clinical program as an "urban" law clinic suggested the orientation of the program to problems of a peculiarly "urban" nature, such as availability of housing. Similarly, the Urban Law Clinic at the University of Detroit is identified as counsel of record in People v. Austin, 257 N.W.2d 120 (1977).

9 For example, the University of Texas Children's Rights Clinic served as guardian ad litem and appeared on appeal in E.B. v. Texas Dept. of Human Servs., 766 S.W.2d 387 (Tex. Ct. App. 1989). Similarly, decisions identify the University of Michigan Child Advocacy Clinic in Bates v. Sanchez., 375 N.W.2d 353 (1985), and the University of Richmond Youth Advocacy Clinic in Grigg v. Commonwealth, 297 S.E.2d 799 (1982), as counsel of record and amicus curiae, respectively, in those actions.

10 For instance, clinics specializing in addressing problems of women in legal contexts have operated at American University's Washington College of Law, see Fitzgerald v. Fitzgerald, 566 A.2d 719 (D.C. 1989) (Women and the Law Clinic filed as amicus curiae), and Rutgers University, see Fischer v. Commonwealth of Pa. Dept. of Pub. Welfare, 482 A.2d 1148 (1984) (Women's Rights Litigation Clinic filed brief as amicus curiae).

11 Disputes over state taxation may also provide a basis for litigation in the clinical law setting. In Nagaraja v. Comm. of Revenue, 1983 WL 1847 (Minn. Tax Ct. Mar. 3, 1983), for example, the University of Minnesota Legal Aid Clinic represented aggrieved taxpayers in a property tax refund dispute before the state tax court.
claims may be processed and resolved. This is also true of social security disability claims, which are most likely heard by administrative law judges sitting in urban locations.

Of particular interest here is the creation of a clinical law program to handle appellate matters, which may be facilitated by the urban location of state or federal appellate courts, occasionally adjacent to a law school facility.

Professor Robert Martineau has authored a compelling examination of the absence of formal study of the appellate process and practice in most American law school curricula. Perhaps

---

12 For example, Southern Methodist University has operated a Tax Clinic which handles claims for qualifying taxpayers for a number of years. The program includes litigation of claims that cannot be resolved by negotiation in the United States Tax Court. The program is unique because its client population is not necessarily indigent and many of the clients stand to receive money from the government if successful.

13 Even a superficial search of current law school catalogs reveals a considerable interest in appellate clinical law programs in the nation's law schools. The following law schools indicate operation of an appellate clinical law program: Akron, American, Brooklyn, Capital, Franklin Pierce, Georgetown, Kansas, Lewis and Clark, Northern Illinois, Notre Dame, Pace, Tulane and Yale. Emory operates the Georgia Appellate Resource Center and Loyola of Chicago offers an appellate program. Other schools operate post-conviction representation programs or projects: Georgia State, Montana, New England, Southern California, Virginia and William and Mary. St. Mary's offers a capital punishment clinical law program and Yeshiva/Benjamin Cardozo and Duquesne indicate formal appellate externships are available to students.

14 For instance, the South Texas College of Law shares its facility with the Texas Court of Appeals for the 14th Judicial District in Houston. Similarly, the University of Puget Sound in Tacoma shares its facility with Division II of the Washington Court of Appeals. In many smaller states, the state appellate courts are located typically in the state capital. When the law school is also located in the capital city, easy access to the appellate process is afforded by the geographic proximity. Of course, the location of major state facilities is such that, historically the major state institutions, such as the capital, penitentiary and state university, often were decentralized to appease different constituencies. Although prison facilities are infrequently located in close proximity to law schools, a number of schools have undertaken clinical law programs directly related to representing the incarcerated clients. See, e.g., State v. Ramseur, 106 N.J. 125, 524 A.2d 188 (1987) (amicus curiae brief filed by Rutgers Prison Law Clinic); Riley v. State, 585 A.2d 719 (Del. 1990) (appellant represented by Widener Post-Conviction Relief Clinic); Kyle v. State, 364 N.W.2d 558 (Iowa 1985) (appellant represented by University of Iowa Prisoner Assistance Clinic).


One of the most curious aspects of the law school curriculum is the apparent inconsistency between its almost total reliance upon the opinions of appellate courts as the vehicle for teaching both procedural and substantive law and the paucity of courses that deal with appellate courts as institutions, the law of the appellate process, appellate procedure, or the skills of the appellate litigator.
the leading proponent for including appellate litigation in a curriculum otherwise typically dominated by the study of appellate judicial opinions, Professor Martineau suggests that relegating the study of appellate process and practice to moot court programs may fail to satisfy the need for educating students in skills and thinking assumed to represent only a minor portion of actual work of practicing attorneys. Of course, to the extent that the development of legal principle is intimately tied to appellate work, even if the perception that a relatively small part of practice involves appellate litigation were correct, that percentage undoubtedly has an impact far beyond the billable hours devoted to the preparation of appellate briefs and presentation of oral arguments. Moreover, one might conclude that the skills necessary for effective appellate advocacy are those skills which are of greatest significance for litigators and non-litigators alike: the ability to develop legal issues and marshal supporting facts to support the client's position, the integration of precedent and evaluation of impact of unique fact settings upon application of

*Id.* (citations omitted).


The core problem noted by the *Appellate Skills Training Report* is set forth in the preface authored by Committee Chairman John Frank:

A lifetime of working with appeals has led me to some personal convictions:

1. Most moot court programs for most students have very little educational value. As an employer, often of second year law clerks with little more than a first year of law school, I see about 100 moot court briefs a year drawn from the national market; they are the typical writing sample. For research, writing, or advocacy they are not worth much.

2. Trial court procedure is in all curricula. Appellate procedure is in very few.

3. The use of feigned cases for moot court problems instead of actual records makes a bad matter worse.

4. These are at root economic problems. Appellate procedure can be taught as any other class, but actual doing requires a high personnel commitment.

*Id.* at III.

17 See *id.* at 4.

18 See *Report and Recommendations to the Task Force on Lawyer Competency: The Role of the Law Schools, A.B.A. Sec. of Legal Educ. and Admission to the Bar,* (August 10, 1979). This report identified fundamental skills to include the ability to:
1992] TEACHING APPELLATE ADVOCACY 1283

legal principle, and the need to cogently express the position developed in support of the client's needs and interests. 19

The operation of an appellate clinical law program within the law school curriculum affords one alternative for teaching both the principles of appellate process and the skills necessary for practice. This article focuses on the potential for teaching appellate litigation theory and skills through an appellate clinical law program. 20 The program is certainly not necessary to the development or maintenance of a sound legal education program, but it does offer an alternative to reliance on occasional references concerning appellate decision-making in traditional course offerings 21 and relegation of skills training to moot court pro-

1) analyze legal problems;
2) perform legal research;
3) collect and sort facts;
4) write effectively (both in general and in a variety of specialized lawyer applications, . . .);
5) communicate orally with effectiveness in a variety of settings;
6) perform important lawyer task calling on both communication and interpersonal skills:
   (i) interviewing
   (ii) counseling, and
   (iii) negotiating; and
7) organize and manage legal work.

Id. at 9-10.


19 For an additional perspective on the relation between appellate clinical programs and the training of lawyers for practice, see Steven H. Goldblatt and Susan L. Siegal, Training the Appellate Advocate: Strategies Firms Can Adopt from a Law School-Program, 20 TRIAL 56 (June 1984). Goldblatt directs the appellate litigation clinic at Georgetown. Id. at 57.

20 The Appellate Skills Training Report noted that a 1985 survey undertaken for the Committee showed:

There are approximately sixty-five law schools that have one or more courses [in appellate advocacy] for upper-level students taught by full-time or adjunct faculty members. Twenty-three schools have courses that cover both appellate process and procedure and brief writing and oral argument, twenty-four have courses limited to brief writing and oral argument, ten have courses limited to appellate process and procedure, and twelve have clinical programs with students writing briefs in actual appeals. Most of these courses are of only recent origin, a number having been added only in the past year.


21 Of course, it is far more affordable to simply add a formal course in appellate process and practice to the traditional curriculum, considering the relative expense of focusing on appellate process in the context of a traditional classroom course and operation of a clinic specializing in appellate work. See Appellate Skills Training Report, supra note 16, at 25.
grams as a means of training appellate advocates.

The article discusses the author's experience in directing an appellate clinical law program at Southern Methodist University over a two and one-half year period. The observations are personal and certainly not intended to provide an exhaustive insight into appellate clinic operations or the benefits students may enjoy from clinic participation. Other successful programs have operated in different settings utilizing different approaches for far longer periods of time. For example, the Georgetown Appellate Litigation Clinic has operated for many years as a much larger and better-staffed appellate law office, while Franklin Pierce has enjoyed the advantages of housing the New Hampshire appellate defender office and providing an intensive experience in the development of criminal law and procedure in a relatively rural setting. Any comprehensive study of appellate clinical education would necessitate an investigation of these and other programs, which have offered a comparable or diverse appellate practice experience.

22 One positive consequence of the appellate clinical law experience for students is the highly specialized training provided in the clinic program, which enhances marketability of the students' skills, particularly with regard to positions that feature significant amounts of appellate work with large civil practice firms, prosecutors' offices and defenders' offices.

23 In fact, Georgetown offers graduate fellowships supporting work for the L.L.M. in conjunction with the Appellate Litigation Clinic. Fellows participate as counsel of record in appellate cases, supervise students in the preparation of their briefs and assist the Director in teaching the seminar portion of the course. ANNUAL DIRECTORY OF GRADUATE LAW PROGRAMS IN THE UNITED STATES 30 (1st ed. 1990).

24 Even a cursory examination of published opinions available in a Westlaw survey demonstrates the significant amount of appellate litigation engaged in by law school clinical programs in recent years. A sample of published opinions, by clinical program, follows:

Comparison of the clinical law experience with practice is also based upon personal observations of the author reflecting on more than a dozen years of experience as an appellate lawyer in a numerous settings. While these observations may be shared by other appellate lawyers, the context in which the experience occurs generally tends to shape that lawyer's perspective. For example, an appellate public defender suffers from frustrations not altogether parallel with her counterpart on the other side of the docket. Similarly, while the approach to formulating issues and briefing may be roughly the same regardless of whether the case is civil or criminal in nature, the lawyer's obligations in directing


For example, counsel in criminal appellate matters are obligated to perform within what may often be an involuntary context because the courts appoint counsel to represent an accused otherwise unable to afford to hire an attorney. Penson v. Ohio, 488 U.S. 75, 80 (1988) (citation omitted). Representation may entail, imposed by court rule or decision, to determine whether the client's appeal is frivolous and require counsel to provide authority demonstrating that the appeal lacks merit. Anders v. California, 386 U.S. 738, 744 (1967). Counsel must, nevertheless, continue to act as an advocate for the client throughout the procedure. Id. at 744-45. This apparent conflict between the allegiance that the attorney owes to the client and the allegiance owed to the court is most apparent when the criminal appellant seeks to have non-frivolous points presented when counsel's judgment is that their weakness may dilute the strength of other issues. Jones v. Barnes, 463 U.S. 745, 753 (1983). The conflict is also apparent when counsel is duty-bound to prove the lack of merit in his own client's appeal. McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429, 437 (1988).
the appeal may differ for individual appellate attorneys as a result of the operation of different procedural rules.

Thus, the article is meant to be informative only, and reflect the author's personal experiences operating in a single appellate clinical law program, which itself had only a limited lifespan. Hopefully, it might prove instructive for others who would undertake a similar type of program, just as Professor Martineau's article offers a rationale for curriculum innovation that might lead to the adoption of more traditional courses focusing on the art and practice of appellate court decisionmaking.

THE SMU APPELLATE CLINIC: AN OVERVIEW

During the calendar years 1985 and 1986, Southern Methodist University School of Law (SMU) operated an Appellate Clinic as a component of its clinical education program. Financed principally by Department of Education grants,26 the program terminated due to lack of institutional funding in 1987. In its two years of operation, however, the Appellate Clinic provided an appellate advocacy opportunity for a limited number of SMU students, which afforded far greater insight into the appellate decision-making process than the typical exposure provided by legal writing and moot court programs.27

At the outset, the Appellate Clinic fit comfortably into an existing clinical education scheme in which SMU ambitiously sought to provide training experiences that reflected not only the faculty's strengths, but also the diversity of practice in Dallas.28

---

26 These grants were made available under Part F of Title IX of the Higher Education Act of 1965, as amended, which creates the Law School Clinical Experience Program. 20 U.S.C. § 1136 (1988). The grants program is administered by the Department of Education.
27 SMU clinical faculty and students had practiced on a limited basis in Texas appellate courts prior to the operation of the Appellate Clinic and continue to litigate appellate issues arising in the context of clinic representation. See, e.g., Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), rev'd 732 S.W.2d 437 (Tex. Ct. App. 1987). The Civil Cases Clinic successfully challenged a trial court's order denying a free transcript for purposes of appeal for an indigent appellant whose parental rights had been terminated in a clinic-tried jury trial. The termination was later affirmed after appeal on the record. Jones v. Dallas County Child Welfare Unit, 761 S.W.2d 103 (Tex. Ct. App. 1988).
28 The court system operating in Dallas is divided according to function with general jurisdiction courts in civil matters (district court), felony criminal matters (district and criminal district courts), family law, and juvenile courts. County courts are divided into those that have limited jurisdiction in civil matters (county courts at law), misdemeanor matters (county criminal courts) and probate and mental illness matters (probate courts). A county court of criminal appeals hears de novo appeals
The program included alternatives in the Civil Cases Clinic and the Criminal Justice Clinic, which provided state court litigation experience roughly paralleling the jurisdictional separation of the Dallas County and Texas court system into criminal and civil courts. In addition, the program supported a Tax Clinic that afforded students an entre into the world of tax litigation and negotiation, complementing SMU’s traditionally strong taxation program. An expansive externship program placed students as unpaid student clerks with state and federal courts and agencies, corporate legal departments and non-profit interest groups. The externship program has now been terminated but, with the exception of the Appellate Clinic, the clinical program remains intact.

The Appellate Clinic gained judicial support during its brief existence, as reflected in a number of published opinions rendered in clinic cases and the willingness of state trial and appellate judges to entertain student representation in appellate proceedings. From those municipal courts that are not courts of record and justice of the peace courts, which have jurisdiction over traffic violations and the lowest class of misdemeanors not subjecting the offender to incarceration. The Texas Court of Appeals for the Fifth District also sits in Dallas.

29 The SMU approach comports with the goal of organizing clinical education into specific courses emphasizing discrete subject areas set forth in AALS/ABA Guidelines for Clinical Legal Education, supra note 2, at 19.

A cursory review of published decisions indicates that other law schools have utilized this approach in tying clinical education to discrete curriculum areas. For instance, the Southern Reporter includes published decisions reflecting representation in Louisiana appellate courts by the Tulane Environmental Law Clinic—Louisiana Chemical Assoc. v. Dept. of Environmental Quality, 577 So. 2d 230 (La. Ct. App. 1991); Tulane Juvenile Law Clinic—In re Gray, 454 So. 2d 307 (La. Ct. App. 1984); Tulane Appellate Advocacy Clinic—State ex rel. Womack v. Blackburn, 393 So. 2d 1216 (La. 1981); Tulane Criminal Law Clinic—State v. Dawson, 490 So. 2d 560 (La. Ct. App. 1986); and finally, Tulane Law Clinic—State v. Wilson, 508 So. 2d 960 (La. Ct. App. 1987). The different designations may reflect changes in names applied within the clinical law program, particularly as programs evolve, but nevertheless, serve to underscore the diversity potential in a comprehensive clinical law approach.

The Goal of the Appellate Clinical Law Experience

As with any clinical law program, the central goals of the SMU Appellate Clinic were to provide students with a controlled opportunity to develop litigation skills and to provide clients with effective representation in the cases where clinic students served as counsel. The program combined a classroom component with case representation and was established as a four-hour, graded course. The intensive nature of the case workload, however, severely limited the number of students who could be managed adequately by the single supervising attorney available under the budget. In retrospect, this resulted in some de-emphasis in the course’s classroom component.

The appellate clinical law experience will generally serve three distinct purposes for the student and institution. First, in contrast to the typical legal writing experience devoted to brief writing and oral advocacy, and contrary to moot court experiences, the student in the clinical law program is forced to confront problems on appeal that do not offer the balanced equities and legal authorities that are usually built into simulated efforts. As with all clinical training, the benefit derived from actual representation flows not only from the practice and

31 For example, clinic students gained a reversal of the defendant’s conviction and ninety-nine year sentence imposed for aggravated robbery in Thompson v. State, No. 05-85-01022-CR (Tex. Ct. App. 1986) based on the trial court’s failure to give a robbery instruction as a lesser-included offense. Clinic student Carol Vaughn relied on medical records offered by the State at trial, which failed to show that the complainant suffered substantial bodily injury—a necessary element of proof for aggravated robbery.

32 The range of duties required of the clinic director almost necessarily limits the number of students who can be supervised adequately during the term without additional supervisory personnel to six to eight. For ABA/AALS recommendations on the ratio of students to faculty, see AALS/ABA Guidelines, supra note 2, at 24-25.

33 The ABA Appellate Litigation report specifically points out the problem from the standpoint of appellate judges:

There are several reasons for these inadequacies [of traditional moot court programs]. First and foremost, these programs treat appellate litigation as involving only two aspects—writing a brief and making an oral argument. They ignore all of the other important ingredients of appellate litigation. . . . Second, and just as fundamental, because they lack a realistic appeal record they do not aid in the development of the skill that is unique to appellate litigation: building a case out of a record. Third, as a result of the first two defects, the issues argued in these programs are usually abstract legal questions without the factual content upon which most appeals are decided.

development of skills, but from the strategical and tactical constraints imposed by the facts and limitation on resources involved in representing indigent clients. In undertaking appellate representation, students are thus obliged to deal with the realities of factual limitations imposed by the record, errors by trial counsel in terms of strategy or failure to preserve issues for appeal, and the often hostile body of caselaw available to answer those questions. The only two features that really distinguish appellate clinical practice from post-graduate practice are the absence of fee setting and collection as a component of the attorney/client relationship, and the availability of experienced supervision of the process in every case.

Second, the clinical program provides an opportunity for both the controlled development of litigation skills and the understanding of appellate practice rules. The former is significant because it allows advanced students to review their research and writing skills, under faculty supervision, in the context of actual cases. A comparable opportunity for review of the writing and research skills developed in the first year research and writing course does not exist anywhere else in the typical curriculum. Even in the most concentrated law review work, the focus of research is not generally derived from a set of facts, but usually flows from an existing article or case that focuses research at the outset on a particular conclusion. In addition, the attention devoted to rules relating to appellate practice and preservation of error may be unique within the typical curriculum unless an offering in appellate practice and process is available as a non-clinical course.

34 In Coleman v. Thompson, 111 S. Ct. 2546, 2568 (1991), the Supreme Court underscored once again the roles of preservation of error and procedural default as critical elements of the appellate decisionmaking process. The Supreme Court held that a state court’s rejection of federal constitutional claims on the basis of procedural default precludes reconsideration of the federal claims in a habeas corpus action unless petitioner argues that there has been a fundamental miscarriage of justice. This decision amplifies the need to teach students concerning the impact of procedural rules upon substantive rights in basic litigation courses. See also Murray v. Carrier, 477 U.S. 478, 485-97 (1987) (applying cause and prejudice standard, and noting innocent-accused exception to federal review of claims defaulted in state proceedings).

35 The Appellate Skills Training Report observes:

Appellate rules expressly regulate many aspects of the appeal process. These rules govern not only the notice of appeal and the format of the brief but a wide range of other matters including interlocutory appeals, cross appeals, the record on appeal, relief pending appeal, petitions for extraordinary relief such as mandamus, motions, settlement
Third, an appellate clinical program thrusts the institution and student attorneys into the development of case law in the jurisdiction where the students are practicing.\(^3\) This can bring recognition to the program and institution through the designation of the clinical law program as counsel of record for the litigant in a published opinion,\(^7\) and also can extend recognition to the individual student attorneys.\(^8\) To the extent that the appellate clinic interacts with the trial clinics in providing representation in student-tried cases,\(^9\) the interplay can give the overall program the range of functions in litigation characteristics of law firms, prosecutor’s office or public defender’s office. Moreover, active interaction between the two clinical programs can provide valuable instruction in the necessity of protecting the trial record for appeal, while students researching issues in the appellate

---

\(3\) For example, in Juan A. v. Dallas County Child Welfare Unit, 726 S.W.2d 241, 242 (Tex. Ct. App. 1987), the court of appeals considered an issue of first impression. The court examined impeachment in a parental right termination case by using criminal conviction in a prosecution arising from the same facts. The court held that the conviction was not admissible under either Rule 609 or Rule 803(22) of the Texas Rules of Evidence because the case was still pending disposition on appeal at the time the conviction was offered at appellant’s parental rights termination trial.

\(7\) For example, in Bickems v. State, 708 S.W.2d 541 (Tex. Ct. App. 1986), the Southwestern Reporter indicated counsel as follows:

\[\text{J. Thomas Sullivan, Director, Charles Glanville, Student Counsel, SMU Appellate Clinic, Dallas, for appellant.}\]

\(8\) See, e.g., State v. Cook, 404 So. 2d 1210 (La. 1981). Counsel were identified as follows:

\[\text{Elizabeth Cole, Supervising Atty., New Orleans, John A. Murphy, Student Practitioner, Tulane Appellate Advocacy Clinic, for defendant-appellant.}\]

\(9\) See, e.g., King v. State, 733 S.W.2d 704, 705 (Tex. Ct. App. 1987), rev’d, 800 S.W.2d 528 (Tex. Crim. App. 1990). This was a drunken driving prosecution tried and appealed by SMU Criminal Justice Clinic students. The case ultimately resulted in reversal on state law grounds after the Court of Criminal Appeals remanded for reconsideration of the reversal in light of United States Supreme Court’s decision in Michigan v. Sitz, 496 U.S. 444 (1990) (holding Fourth Amendment not necessarily violated by operation of sobriety check-point or roadblock by police pursuant to administrative plan).
The Clinic may direct trial counsel to issues that should be developed for future appellate challenges.

The Appellate Clinic Caseload

The source of appellate cases poses a problem for any clinical law program designed to provide students with experience in a number of pending appeals. Given the length of time for preparation of the record on appeal in many jurisdictions, it is difficult for students enrolled in a semester-format clinical program to complete all the steps in a single appeal—even excluding post-decision motions—over the course of a single term. To expose students to the range of activities involved in appellate representation, it is necessary to maintain a steady flow of appellate matters so that case experience may be adjusted to permit students an opportunity to engage in as many significant aspects of appellate representation as possible. This requires a steady flow of cases that will permit relatively stable work assignments that broaden the student's perspective through representation in several cases, as opposed to a single case.

Typically, counsel will face the preparation of three distinct types of documents during the course of an appeal. First, the opening and answer briefs will focus on the development of issues from the trial record and response. Second, following decision, counsel will be involved in evaluating the need for a motion for rehearing, a prerequisite to seeking further review in many jurisdictions. Counsel will also participate in preparing the motion or response, which requires reviewing the court's holding in light of the record and controlling case law. Third, following disposition in the intermediate appellate court, counsel must evaluate the option of seeking review in the court of last resort by preparing an appropriate petition or writ, or response, which will either challenge the disposition in light of existing law by the court of appeals or petition the court to change the law. By having students participate in each phase of the appeal, even if not undertaken in the same case, students become aware of the different approaches counsel must take to the problems posed by the peculiar nature of each step in the appellate process.

The assignments involved in each stage of the process necessarily involve an initial understanding of the standard used by appellate courts in deciding questions on appeal, such as whether an abuse of discretion standard or manifest error standard, must be met to reverse a trial court's discretionary act. Once a deci-
sion has been rendered, on the other hand, the student must de-
termine whether the decision correctly relates the facts
developed at trial and correctly applied the facts to the legal prin-
ciple involved. The decision to seek further review focuses on
policy and justice arguments, which may afford a basis for relief
even when existing law has been correctly applied by an interme-
diate court.40

To ensure student exposure to the different concerns of the
common steps in an appeal, the overall program may be
designed to involve each student in preparation of a sampling of
appellate documents. In a direct appeal, for example, students
may be required to draft the opening or answer brief, a motion
for rehearing or response. This will necessitate an evaluation of
the merits of seeking further review and preparation of the re-
quired petition or response for filing in the court of last resort.

The SMU Appellate Clinic had three sources of appellate
cases. First, the clinic was appointed to represent a number of
appellants who had been convicted of felonies by the Dallas
County criminal district courts.41 Second, the clinic served as ap-
pellate counsel in a small number of cases tried by the civil and
criminal trial clinics.42 Third, the Clinic was available for referral

---

40 The Supreme Court's recent decision in *Payne v. Tennessee*, 111 S.Ct. 2597
(1991), overturned four-year old precedent in *Booth v. Maryland*, 482 U.S. 496
(1991). The Court rejected *Booth's* proscription against the use of the so-called
"victim impact statement" during punishment phase testimony and arguments in
capital murder prosecutions. This suggests that counsel may now routinely assert
arguments for overruling recent authority reached on the narrow vote of a split
court. *Payne* suggests the need to incorporate discussion in the appellate advocacy
course of the role appellate counsel should undertake in challenging adverse au-
thority—particularly of recent, but non-unanimous decisions—as a tactic in prose-
cuting appeals.

41 A virtue of reliance on appointments from felony courts is the relatively large
number of appeals available for clinic referral. This affords security in the flow of
cases necessary to ensure a steady stream of new cases into the clinic. A formal
arrangement with a local defender or prosecutor's office will afford the same regu-
larity that facilitates intra-term scheduling or assignments. An important example
of the institutionalized relationship between the clinical law program and a public
agency for securing a steady flow of appellate cases is the program at Franklin
Pierce that serves as the appellate defender for the New Hampshire state public
defender system.

42 See *Mattias v. State*, 683 S.W.2d 789 (Tex. Ct. App. 1984), *rev'd 731 S.W.2d
(Tex. Ct. App. 1987); *Juan A. v. Dallas County Child Welfare Unit*, 726 S.W.2d 241
(Tex. Ct. App. 1987). Reliance on clinic-tried cases from the law school's trial clin-
ics should enhance the appellate experience because supervision at the trial court
level should afford a better protected record for appeal than is often the case. This
conclusion presupposes that the trial-level supervisors and student counsel are do-
to indigent litigants who had previously been represented by private counsel. Though the second two sources of cases were statistically less significant than the felony appointments, they afforded exposure to the broader substantive law issues involved in civil litigation and provided a basis for comparison between the ways in which the civil and criminal rules of procedure emphasize the development of testimony and role of counsel.

Moreover, the availability of civil appeals for student practice facilitated discussion of the significance of preservation of constitutional claims in the appellate process when comparing criminal and civil litigation. Early on, students involved in criminal appellate and trial work should understand the need to preserve federal constitutional claims in the trial record and, in briefing issues on appeal, to afford their clients the benefit of exhaustion of state remedies in the event they ultimately intend to attempt federal review by certiorari or writ of habeas corpus. Preservation of these claims is also significant in avoiding subsequent ineffective-assistance claims based on failure of state trial and appellate counsel to raise and preserve federal constitutional claims. In contrast, civil litigation typically presents a more localized set of problems and is more often confined to the jurisdiction's substantive and procedural law.

43 For example, it is important for the practitioner and student counsel to understand the role of fundamental error; that is, error which may be considered on appeal, even if not preserved at trial, in the jurisdiction where the appeal is being heard. Some jurisdictions have broad doctrines of fundamental error, others have virtually none. The student practicing in New Mexico should learn that certain prosecutorial comments on the accused's silence are subject to reversal on appeal even in the absence of trial objection. See State v. Martin, 680 P.2d 937, 941-42 (N.M. 1984); State v. Ramirez, 648 P.2d 307 (N.M. 1982). Likewise, a student practicing in Texas must be exposed to the rule of Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984) (defining the parameters of fundamental error, particularly jury instructions), in the context of criminal prosecutions. This type of error may also be characterized as "jurisdictional" or "plain" error. See FED. R. EVID. 103(d) (plain error doctrine in matters of admission or exclusion of evidence).

44 See, e.g., Coleman v. Thompson, 111 S. Ct. 2546, 2568 (1991) (holding failure to litigate federal constitutional claims in compliance with state procedures may properly result in bar to federal habeas review once state courts apply state procedural default rules to federal claims).

45 In Murray v. Carrier, 477 U.S. 478, 496 (1986), the Court held that unless the state court defendant could show that his counsel was ineffective under the prevailing standard, counsel's failure to properly preserve and litigate claims in the state court arena would not serve as cause for excusing the failure to exhaust state remedies when the accused sought federal habeas review of the same claims. Id. at 488 (citing Strickland v. Washington, 466 U.S. 668 (1984)).
The appropriate mix of work experience can be achieved, to some extent, through assignment of rehearing motions and petitions for review to students who have handled an initial appeal from the record. Such assignment will assure both breadth of experience and a manageable caseload. Otherwise, acceptance of enough cases to provide students with a direct appeal on the record in more than one case is likely to result in an entirely unmanageable caseload. Once decisions begin to be filed, students must draft post-decision motions and petitions for review, in addition to maintaining work on direct appeals.

Reliance on a heavy concentration of criminal appeals is to some extent necessary where the focus of appellate litigation must be on trials rather than agency determinations. The liberal appellate rules and indigence rules increase the volume of criminal appeals in most jurisdictions. The availability of a clinical law program to assume limited overflow of this caseload makes this a potentially ready, and steady, source of cases. Apart from the more difficult burdens that may be imposed in the review of criminal litigation and the inherent hostility of many appellate judges for many "technical" complaints concerning trial conduct, criminal appeals generally present both the same range of problems and same type of briefing experience as civil appeals.

46 See, e.g., Burns v. Ohio, 360 U.S. 252 (1959) (recognizing rights of indigent appellate litigants to appeal without payment of fees); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (access to the appellate record without payment of costs); Entsminger v. Iowa, 386 U.S. 748 (1967) (effective assistance of counsel); Evitts v. Lucey, 469 U.S. 387 (1985) (same). These cases demonstrate the long-term potential sources of criminal actions and appointments for appellate clinical programs.


48 Consider the heated discussion among the Justices in the recent decision in Teague v. Lane, 489 U.S. 288, 321 (Stevens, J., concurring) ("The plurality wrongly resuscitates Justice Harlan's early view, indicating that the only procedural errors deserving correction on collateral review are those that undermine 'an accurate determination of innocence or guilt. . . .'"), reh'g denied, 490 U.S. 1031 (1989). The Court's embrace of the harmless error doctrine in Chapman v. California, 368 U.S. 18 (1967), has permitted the Supreme Court and state appellate courts to af-
The criminal appeal, like the civil appeal, is focused on issues raised in the record, whereas the criminal trial may often entail significantly different discovery procedures and obligations and result in different factors dominating trial strategy. The result is that the steady flow of criminal appeals affords significant benefits to the clinical program in terms of regulating student workload and experience without significantly creating the impression that criminal appellate practice differs markedly from civil practice, at least in terms of procedure and skills involved in the production of the appellate brief and oral argument.

THE ROLE OF THE DIRECTOR OR SUPERVISING ATTORNEY

The quality of the clinical law experience generally is dependent upon the director or supervising attorney’s skills as both teacher and litigator. Strength of teaching, as reflected in ability to communicate, knowledge of subject matter and concern for student comprehension, is critical for clinical education just as it is critical for high-quality teaching in the traditional curriculum. In addition, and often more significantly, the clinic director or supervising attorney serves as a role model litigator for students who are often without any basis for comparison of the model presented, or whose comparison is predicated only upon clerking experiences that vary widely in quality. To the extent that financial constraints now compel students to support themselves

firm criminal convictions despite the existence of trial error where the evidence was otherwise overwhelmingly sufficient to convict.

49 The Appellate Skills Training Report points out, in discussing the qualifications of individuals teaching appellate advocacy:

The fact that a person has experience at the appellate level does not mean, of course, that the person is competent to teach appellate skills. The person must first and foremost be able to teach. This involves being able to impart knowledge, to guide, to encourage, to extract general principles from individual experiences—in short, to do all of the things a teacher must do.


50 The desirability of significant and successful appellate practice experience as a credential for the director or supervising attorney cannot be underestimated in terms of affording a role model for students in the clinical law program. Regardless of personality differences on the part of students, an established reputation in litigation can hardly be discounted by students in evaluating the merits of critique offered by the director or supervisor. An example of the type of litigation success that would certainly enhance the director’s image is Professor Steven H. Goldblatt’s successful representation of the petitioner in Smith v. Barry, 112 S. Ct. 678 (1992), which dealt with the proper form of notice of appeal in the federal courts. Professor Goldblatt is Director of the Appellate Litigation Clinic at Georgetown University School of Law.
through work or other supplemental resources, the role models who may well impact most on advanced students are not law faculty, but employers whose professional habits are not subject to readily discernible external evaluation. For this reason, the clinic director or supervising attorney, who serves a role model, is extremely valuable in providing training that meets the institution’s standards. This is perhaps one of the few opportunities most law schools will have to counter-balance the diverse images and illusions of practice that students are exposed to during the last two years of the law school program.

The appellate clinic director should, then, possess a number of important qualifications to serve the institution as both teacher and role model.51 First, the director should be an experienced and preferably successful appellate attorney with a range of practice background to fit the caseload that the program may generate.52 Second, the director must have a sufficient understanding of the appellate practice rules to effectively present a specialized course in this aspect of civil and criminal procedure.53 Third, the director must also have a competent understanding of basic sub-

51 See AALS/ABA Guidelines, supra note 2, at 31-32. The AALS/ABA Guidelines suggest the following factors as appropriate in determining suitability of persons for clinical teaching:
   a. prior legal experience in performing the lawyering tasks about which one will be expected to teach;
   b. prior legal experience with the types of cases and problems the client clinic handles;
   c. capacity to relate to students on a one-to-one basis;
   d. capacity to accept criticism from lawyers and students regarding one’s performance as a lawyer;
   e. capacity to evaluate student performance;
   f. intellectual understanding of the theoretical and empirical knowledge related to the issues and problems to be considered in the clinical legal studies curriculum;
   g. interest in doing research related to the educational issues existing in clinical legal studies and the legal problems raised within the clinical legal studies curriculum; and, ability to train and supervise the teaching of other professors, clinical professors, supervising attorneys and cooperating attorneys.

52 Alternatives to experienced litigators might include appellate court judges and staff counsel or attorneys having prior experience as appellate court law clerks. See Appellate Skills Training Report, supra note 16, at 21.

53 Id. As the report notes:
   Instruction in the specialized skills of appellate litigation—including deciding whether to appeal, working with a record, choosing which issues to raise, developing an interesting but accurate statement of facts, and phrasing precisely the issues presented, among others—requires the highest degree of professional skill of a highly specialized
stantive law concepts, local rules or approaches, and an appreciation for potentially developing areas of the law. These skills ensure that students in the appellate clinic program will provide professionally competent representation to their clients. Fourth, it is highly desirable that the director have sufficient contacts with the local bench and bar to obtain case referrals from private or public practitioners and to facilitate the operation of the clinic program in local courts. Typically, this may mean that the supervising attorney should be experienced not only in appellate practice, but also in the appellate courts of the jurisdiction(s) in which the program is located or will be practicing.

In addition, the integration of clinical and traditional educators in a unified faculty requires that the director or supervising attorney be offered either traditional or clinical tenure-track status. The institution must make a commitment to the program and to the individual charged with supervision. This should include integration by offering clinical faculty members an opportunity to teach traditional courses, research support and other benefits and obligations associated with faculty status.

Stable funding for the program and director's position are nature. It demands, consequently, an instructor who has the knowledge and specialized skills of all aspects of appellate litigation.

Id. 54 A.B.A. Standards for Approval of Law Schools, § 405(e) (1986) (purports to encourage law schools to develop tenure track or comparable positions for clinical faculty).

55 An example of the qualifications and program expectations of a supervising attorney in an appellate clinical law program is found in the job description included in Tulane's announcement appearing in the AALS Placement Bulletin, February 14, 1992, at 3:

TULANE UNIVERSITY SCHOOL OF LAW has a clinical teaching position available beginning July 1, 1992. Applications are invited for the position of Assistant or Associate Professor of Clinical Law to teach courses and assist in direction of the Appellate Advocacy Program. The program handles constitutional and civil rights cases in the U.S. Courts of Appeals for the Fifth and Eleventh Circuits, and periodically, in the Supreme Court. Students work as law clerks with faculty, who prepare the briefs and argue the appeals in those courts. Applicants must have three years of legal experience, preferably in federal appellate practice. Applicants with experience in supervision of law clerks, student-attorneys, and lawyers in brief writing are preferred. Applicants must be immediately eligible for admission to the bars of the above-listed federal courts and the Louisiana bar. A successful applicant must be prepared to take the Louisiana bar no later than July of 1992. The appointment will be in the non-tenured clinical faculty track, under an initial three-year contract with eligibility for conversion to a tenure-track position. We specifically encourage applications from women and minorities.
essential because the cases processed by an appellate clinic, as opposed to a trial clinic, tend to be on-going in nature. Consequently, the acceptance of new cases for a given semester carries with it the obligation to continue representation for months or even years following the end of the semester to ensure that available avenues of litigation on direct appeal have been exhausted.\textsuperscript{56} Thus, in contemplating the development of an appellate clinical law program experimentally, the institution must address the issue of how the representation can be continued in clinic cases in the event lack of funds for continuation of the program or faculty dissatisfaction with the program's conduct require its dissolution. Referral of pending cases back to public agencies initially referring the appeals to the program is one way of dealing with this contingency. Alternatively, the institution may simply contract with the supervising attorney or director to personally litigate these cases to conclusion in the event the program is discontinued.

THE ROLE OF NON-CLINIC FACULTY

In contrast to the lack of immediacy that much clinical education brings to the intellectual interests of non-clinical faculty, an appellate clinic can readily involve traditional teachers in the problems that arise in appellate litigation. Not infrequently, students are confronted with fairly novel substantive\textsuperscript{57} or proce-

\textsuperscript{56} The issue of counsel's continuing duty to provide representation through the various steps of the appellate process to indigent litigants is often a difficult one. The Supreme Court, however, in \textit{Pennsylvania v. Finley}, 481 U.S. 551 (1987), has held that an indigent criminal defendant has no right to assistance of appointed counsel in any proceeding following the completion of the direct appeal. The issue has resurfaced concerning representation of death row inmates in \textit{Murray v. Giarratano}, 492 U.S. 1 (1989), with the majority holding that the Constitution does not include a right to representation in post-conviction criminal matters even for inmates facing execution of state court-imposed death sentences.

Clearly, a law school clinical program should contemplate completion of all avenues available on direct appeal or review from the decision on direct appeal simply to avoid a subsequent claim of abandonment or ineffective assistance. \textit{See}, \textit{e.g.}, \textit{Penson v. Ohio}, 488 U.S. 75 (1988) (deprivation of assistance of counsel on direct appeal violates fundamental constitutional guarantees).

\textsuperscript{57} For example, SMU Civil Cases Clinic students lost an appeal challenging an interest rate as usurious when the court of appeals held that a usurious practice could be excused if it resulted from accident or error. \textit{Page v. Cent. Bank & Trust Co.}, 548 S.W.2d 802 (Tex. Civ. App. 1977). Another Civil Cases Clinic appeal, \textit{Sayre v. Mullins}, 681 S.W.2d 25 (Tex. 1984), resulted in recognition of a discharged hospital worker's right to assistance of counsel in a grievance proceeding initiated as a result of her termination.
dural issues that can be developed more efficiently and creatively with input from specialists in the particular area of the law involved. Interaction of students and non-clinical faculty with respect to the approaches to be taken in issue development and argument has three positive results.

First, students benefit from the faculty's expertise in areas relevant to a particular issue generated by the appeal. Not only may the faculty member offer a range of theories that might not be assessed by the student or supervising attorney, but the faculty member often has a national perspective on the issue that may direct the student to developments in other jurisdictions that should be explored in arguing the merits of the client's position. While the supervising attorney is primarily qualified by breadth of experience, exposure to local practice and substantive holdings, the non-clinical faculty member typically brings a more specialized, national approach to the particular issues of interest in the teacher's field. Thus, the student may effectively draw upon a wider range of intellectual resources than may otherwise be available if supervision of the appeal is simply limited to the director or supervising attorney.

Second, the level of representation is improved by having clinical matters discussed by non-clinic faculty. Inevitably, the result of such interaction should either be reasoned critique of the approaches taken by the clinician and clinical students, or simply a greater appreciation for the intellectual content of the clinical law program. To the extent that an appellate clinic focuses on the development of law through the case approach, it provides a practical complement to the traditional case approach of classroom teaching. The interaction of clinical and non-clinical faculty in this respect should significantly enhance both the qual-

58 A number of SMU clinic appeals, for instance, have focused on procedural rights applicable in parental rights termination and juvenile matters. Director, Dallas County Child Welfare Unit v. Thompson, 667 S.W.2d 282 (Tex. Ct. App. 1984) (notarization of affidavit of relinquishment of parental rights not fatal to instrument where notary employed by party having adverse interest in litigation); C.L.B. v. State, 567 S.W.2d 795 (Tex. 1978) (construing State's limited right of appeal in juvenile matters); State v. LJB, 561 S.W.2d 547 (Tex. Ct. App. 1977) (holding summary judgment procedure not available to juvenile challenging sufficiency of delinquency or supervision petition); Hutson v. Haggard, 475 S.W.2d 330 (Tex. Ct. App. 1971) (holding voluntary abandonment of child established by evidence).

59 As an example, Professor Charles J. Morris of the SMU faculty, a nationally recognized scholar and author in the field of labor law, represented a clinic client in the Texas Supreme Court. Professor Morris briefed and argued the case in the Texas Supreme Court, although he is not included as counsel of record on appeal in the published opinion in the Southwestern Reporter. Sayre, 681 S.W.2d at 25.
ity of experience for clinical students and the relationship of clinical education to more traditional approaches. Moreover, to the extent that the overlap focuses on procedural matters or questions of strategy and tactics, the clinical student may draw upon other non-traditional teaching methods also present in the law school curriculum, such as programs in trial advocacy or oral advocacy, for development of skills immediately relevant to the clinic caseload.

Third, not only do clinic students and practitioners benefit from faculty interaction in the evaluation or development of specific issues, but the institution should benefit as well. Interaction of the clinical and non-clinical faculty should theoretically promote the value of clinical education within the total program and reduce clinicians' tendency to be treated as second-class faculty members. It should also afford a practical basis for evaluating the desirability of continuing the clinical program in its current form. Rather than decisions on the direction of clinical education being predicated solely on cost or traditional antipathy toward new educational approaches, these decisions can be based on more direct knowledge of the clinic's operation and its course content by involved non-clinicians.

Non-clinical faculty involvement in cases handled by the SMU Appellate Clinic was not substantial during its existence, but some preliminary indications of interest from certain faculty members were evident. Presumably, with time, more issues deserving the input of traditional faculty would have emerged and afforded students greater reason to inquire about specific points of law, particularly those dealing with Texas procedural and substantive law issues which were likely to interest faculty members with some local orientation. As with any faculty, however, lack of accessibility of certain teachers would have undoubtedly limited the potential for integration of non-clinical faculty into the clinical program. Accessible faculty would have continued to be available for student questions, just as they are in the absence of clinic-based reasons for the inquiries, but the overall institutional contribution to clinic representation is a particularly valuable feature of faculty input in appellate representation.

THE CLASSROOM COMPONENT OF THE COURSE

Effective teaching of oral advocacy should involve a classroom, non-case component. This component may be necessary to persuade faculty to authorize a particular number of credit
hours for an appellate clinic experience, but beyond the political value of the classroom study lies an important role for the student’s education. The non-case component should emphasize at least three distinct features to ensure that students are taught to handle competently appellate matters upon graduation.

First, the classroom component should ideally devote attention to appellate decision-making matters, an aspect of legal development often unaddressed or marginally addressed in the traditional subjects taught by the reading of appellate decisions.60 Rules of appellate decision-making61 and preservation of error62 are uniquely significant in understanding not the rule generated by a case, but the way in which the court made a decision to generate the ruling. When the SMU Appellate Clinic operated, no satisfactory text was available to explore appellate decision-making, as opposed to appellate decisions. About the same time the clinic wound down its operations, Martineau’s casebook on appellate practice and process appeared,63 offering the type of text necessary for an intellectually cohesive approach to the classroom component of the appellate clinic course. This edition may well be challenged by the appearance of other volumes in the coming years,64 but it represents an important breakthrough in recognizing that the decision-making process of the appellate courts themselves deserves scrutiny in the law school curriculum.65 Availability of this type of material will facilitate the deve-

60 See Martineau, supra note 15.
61 See Robert W. Calvert, “No evidence” and “Insufficient evidence” Points of Error, 38 Tex. L. Rev. 361 (1960). This article, one of the most influential articles in Texas jurisprudence, is critical in understanding Texas appellate and supreme court jurisdiction to review evidentiary sufficiency challenges in civil appeals. This insight into appellate decision-making, as opposed to understanding the rules of appellate procedure, requires study beyond the rules and cases interpreting the appellate rules. The problems discussed in this article, perhaps the most cited in Texas decisions, are typically not the type of problems that would be accommodated in an introductory procedure course. They might, however, be discussed in an advanced course in Texas Trial and Appellate Procedure, and easily could be developed thoroughly in a seminar devoted to preservation and presentation of error in Texas practice.
62 See Martineau, supra note 15, at 82 (noting the “key requirement of preserving issues for appeal”).
64 See, e.g., Bentele & Cary, Appellate Advocacy (1990). Professor Bentele is director of the appellate clinical law program at Brooklyn Law School.
65 The Appellate Skills Training Report noted the lack of standard law school classroom materials dealing with appellate process in its 1985 report: “The lack of any casebook designed for use in a course on appellate courts and the law of the appel-
opment of traditionally taught courses on the subject and provide a text for use in teaching a classroom component of an appellate clinic program.

Second, the classroom component should focus on statutes and court rules governing appellate practice in the jurisdiction where the clinic operates. These rules are less likely to be subject to intense instruction during any other course in procedure, if only because they tend to be highly technical and localized in nature. In addition, to the extent that even two-semester courses in basic civil procedure are often insufficient to cover all material deemed necessary to provide an overview of the litigation process, the rules governing appellate matters are simply unaddressed in many cases because of time constraints. Nevertheless, an understanding of the interplay of procedural rules, statutes governing appellate rights and practice, and the court rules generated by individual appellate courts is critical for a practitioner's understanding of the correct way in which to repre-

late process may be one reason why relatively few courses devoted to these topics have been developed. “Appellate Skills Training Report, supra note 16, at 23 n.24.

66 See Martineau, supra note 15, at 82 (“Without a thorough knowledge of the statutes, rules and judicial doctrines that constitute the law of appellate process, lawyers who take or defend an appeal are simply operating outside their area of competence.”) The interplay of rules and statutes may be seen in the Arkansas Rules of Appellate Procedure, which generally govern the procedure by which a case is appealed; the Rules of the Supreme Court and Court of Appeals of the State of Arkansas, which set forth specific requirements for designation and preparation of the record on appeal and preparation and filing of appellate briefs; and Ark. Code Ann. § 5-4-603 (d), (e) (Michie 1988) by which the General Assembly has circumscribed appellate review by the state supreme court in death penalty cases. For an example of appellate doctrine critical to the understanding of appellate process within a particular jurisdiction, see Calvert, supra note 59.

67 For example, an important consideration for practitioners often ignored or barely touched upon in the typical law school course involves the setting and collection of fees. The classroom component of a clinical law course permits exploration of the economic and ethical considerations involved in fee setting and collection. In the context of the classroom component in an appellate clinical program, the focus might be on the problem posed when retained trial counsel seeks to withdraw from representation on appeal and asks the court to appoint counsel for the client who has exhausted his resource in payment of the trial fee. This scenario raises interesting issues of professional responsibility and public policy and is not a problem simply noted in the abstract. See United States v. Lopez-Flores, 701 F. Supp. 597 (S.D. Tex. 1988).

68 In one well-known civil procedure casebook, for example, the materials devoted to “Appeals” begin on page 1213 of a 1253-page casebook. The cases included focus on finality of trial court decisions for purposes of appellate review. See Richard H. Field et al., Materials for a Basic Course in Civil Procedure (5th ed. 1984).
sent a client on appeal in the particular jurisdiction.\textsuperscript{69} Therefore, to the extent that clinical education seeks to prepare students for practice, this would appear a necessary component of the course's classroom portion.

Third, the classroom component should ideally provide some simulation to ensure a uniform experience conceivably unavailable through random case distribution. This simulated experience can focus on drafting a sample point of error, but this exercise is preparatory because any exposure to appellate practice will afford the student an introduction to the process of identifying the issue, finding factual support in the record, stating the point of error on appeal, and arguing the issue on the merits by applying relevant legal principles gleaned from research of applicable statutory and case law. The exercise is designed to assess the student's skill in a mock situation prior to assigning the student responsibility for issue development in an actual case.

Simulated oral argument more likely serves the goal of providing a uniform experience for clinic students. Even in jurisdictions—such as Texas—where oral argument is still retained as a matter of right (at least on direct appeal)\textsuperscript{70} no student is guaran-

\textsuperscript{69} Familiarity with the appellate rules of different jurisdictions will give rise to interesting comparisons in the local particularities to approaching appellate procedure. For example, the only document that need be filed in Texas to give notice of appeal in the typical civil case is the appeal bond or affidavit of inability to pay costs. See Tex. R. App. Proc. 40(a). In criminal cases, the appellant need only give a general notice of appeal in writing following imposition of sentence. See Tex. R. App. Proc. 40(b). In contrast, the notice of appeal invoking the jurisdiction of the Colorado appellate court must also include substantial information involving the nature of the case, ruling below and issues that will be raised on appeal. See Colo. R. App. Proc. 3. The simple notice of appeal, which triggers the appellate process in New Mexico, N.M.S. Ct. R. Ann. 12-202 (1986 Recomp.), must be followed by a timely filing of a docketing statement that details the holding below, evidence presented at trial or on the motion, the issues to be raised on appeal and the authorities supporting the appellant's points of error. N.M.S. Ct. R. Ann. 12-208 (1986 Recomp.). While the docketing statement may be amended within limitations, this instrument serves as the principal vehicle for assignment of cases to the various calendars used by the New Mexico Supreme Court of Appeals, including assignment to the summary calendar for disposition based solely upon the information, issues and supporting authority contained in the docketing statement and any memorandum in opposition filed by the party opposing the disposition announced in the court's calendaring notice.

\textsuperscript{70} For example, Rule 75(1) of the Texas Rules of Appellate Procedure provides: \textit{Right to Argument}. When a case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefore and who has made a timely request for oral argument under (f) hereof may, upon the call of the case for submission, submit an oral argument to the court.
teed an argument in the case they may have briefed because of the delay in processing an appeal, which typically exceeds the single semester dedicated by the course. Students may be afforded the opportunity to argue cases briefed by prior clinic classes, which will provide the chance to appear in court, but this also exposes the student to the very real anxiety of having to argue a position that has been developed by another lawyer, and often not as fully as the lawyer arguing the case might have desired. Of course, this anxiety is often no less significant than that suffered by the attorney required to draft an appellate brief when trial counsel did a poor job of protecting the record. There is some educational value to be gained from exposing future appellate and trial lawyers to this problem.

ENSURING COMPETENT REPRESENTATION

The most critical aspect of the clinic program lies not in the quality of the educational experience, but in the quality of representation afforded by clinic students. Presumably, a program will be evaluated, from the faculty standpoint, by its contribution to the overall institutional program and its goals. If the program is found wanting, it will either be improved or abandoned. During the intervening period between inception and review, however, and thereafter, it is the responsibility of the clinic director or supervising attorney to ensure that the clinic affords its clients quality representation in the appellate courts. Based on the experience at SMU, the director must actively engage in the appellate process in at least four important respects:

1. The director or supervising attorney must review each record on appeal independently of student review to make certain that all colorable issues are identified and that issues which should be raised on appeal in the discretion of the director are properly briefed.71

2. The director or supervising attorney must review each point of error specifically and each brief, generally, to be satis-

71 In Jones v. Barnes, 463 U.S. 745, 751–54 (1983), a majority of the Court held that the decision as to which issues should be raised and argued on appeal, even in the case of court-appointed appellate counsel in criminal appeals, lies in the attorney's sound discretion. Id.
fied that the presentation is theoretically sound and professionally argued.\footnote{One important concern for the supervising attorney is to make certain that student counsel cite adverse authority that might not otherwise be made known to the appellate court, in the brief or oral argument when the authority is from the controlling jurisdiction. \textit{Model Rules of Professional Conduct} Rule 3.3 (1983).} Close contact with the student during the period of research, including discussion of relevant authorities relied upon or distinguished, is essential in protecting against improper reliance on authority or misapprehension of governing principles of law.

3. The director should be present and available at oral argument in the event the student falters or requires assistance in addressing questions. Although failure to respond at oral argument is a threat each appellate lawyer faces, the director's role is not so much to shield the student from the experience, but to protect the client's interests from an error or lapse in responding to the court's inquiry or a point by opposing counsel. In arguing on an appellant's behalf, the director may simply elect to present the rebuttal in any jurisdiction that will permit division of the oral argument between co-counsel to reserve an opportunity to address unresolved points or clarify positions or responses to inquiries by the court.

4. The director must review the appellate decision to assess the client's options following disposition of the appeal, motion for rehearing or petition for review. While the student should be involved in this evaluation, it may prove unnecessarily difficult to assign a student who is unfamiliar with the case the burden of assessing the court's opinion regarding the arguments previously raised. Evaluation of the opinion in light of the authorities relied upon and based on facts related in the opinion itself should not prove unduly burdensome, however, because this is typically what happens in any other law school exercise. Following the decision on how to proceed and after counseling the client, the director may then appropriately assign the next step in the process to another student.

Surprisingly, the same supervisory function over the briefing and argument of appeals is often not provided by private practitioners, who may assign appellate work to inexperienced attorneys or simply hire law students to produce their appellate briefs. While these practices may go undetected, they certainly exist and may well explain in part why the quality of appellate practice is often erratic in many appellate courts. Poor quality does not always result, of course. The actual performance of the attorney who is so disinterested in the prosecution of the appeal might be far more erratic than
the "stabilizing" influence of a young associate or law student who is still fresh from the educational process and eager to enter the fray.

The range of duties required of the clinic director necessarily limits the number of students who can be adequately supervised during the term without additional supervisory personnel. Probably no more than eight students can be adequately supervised during any given semester, assuming the program seeks to have each student involved in work on three cases or three distinct projects. Optimally, with eight students, supervision might be more practical by assigning students to work in pairs and dividing the work within each case or assignment. This approach may appear artificial to students, however, because each case does not typically offer an obvious division of labor—a factor much more likely to be found in the typical moot court problem. More intensive supervision can be provided if enrollment is limited to six students per supervising attorney without restricting the caseload. Such limited enrollment will ensure that students are exposed to the full range of activity involved in litigating appeals generally.

In contrast to the situation presented by private representation in many cases, the representation afforded by clinical law students under competent supervision is probably more likely to have a uniform measure of high quality, to exhibit the product of higher expenditure of energy—particularly in terms of research—and to offer a more creative approach to trial error. To the extent that the brief prepared and argued by clinical students reflects the commitment to quality espoused by the institution, that should surely be the case.

**Conclusion**

The SMU Appellate Clinic did not represent a novel approach to clinical education, even though it was apparently the first such formal foray in student practice in Texas appellate courts. The program offered an opportunity for students to gain practical insight into the heart of legal education—the development of law through appellate decisionmaking. With stable funding, increased faculty support and an additional supervising attorney, the program could have made a more significant impact within the law school curriculum, particularly if it had been taught in conjunction with a traditional course in appellate process and practice.

What seems clear is that the appellate clinic experience is a most satisfactory and professional way in which to approach the
problem of teaching appellate advocacy.\textsuperscript{73} To the extent that law schools should be concerned with the development of competent litigators, this type of program can be an attractive alternative or a supplement to both the traditional programs in moot court and mock advocacy and the core curriculum. Moreover, with time and experience in the appellate courts, the clinical program may prove a valuable force in the development of the substantive law and procedure of the jurisdiction.

\textsuperscript{73} Given fiscal constraints, however, the curriculum advocated by Professor Martineau would appear to provide the most cost-effective approach to educating students in appellate process and practice. See Martineau, supra note 15, at 83-85.