

AFRICAN LAW CLINICIANS' MANUAL

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Preface

The *African Law Clinicians' Manual* was commissioned by the Open Society Foundations to provide a practical resource handbook for University-based and non-governmental community law clinics in Africa. The first draft of this manual was published in November 2007, and this final draft incorporates feedback, experiences and additions which we received and incorporated in the course of teaching, consulting and training in various locations in Africa over the past five years.

The purpose of the book is modest: to provide guidance, checklists and examples that can be adapted to the specific needs of individual African countries. This guide does not pretend to be an exhaustive academic reference book. The actual training materials used during various clinical law training workshops have been included in the manual, as well as extracts and references to selected books, articles and materials to illustrate concepts, procedures and practices.

The manual is divided into five parts: Part One provides a general introduction to clinical legal education; Part Two deals with the establishment and management of law clinics; Part Three covers the development of law clinic curricula and approaches to skills training; Part Four gives an overview of fundraising and reporting procedures for law clinics; and Part Five covers law clinic teacher training and materials development. The text is supported by numerous annexures and examples, together with a basic list of reference materials and a glossary of terms used in the text.

There are a number of items which necessarily had to be omitted to keep the manual within manageable proportions. We were also mindful of the need to provide a fairly generic manual that could be used in all African law clinics. Finally, we appreciated the need to keep the contents of the manual as straight-forward and simple as possible. We would nevertheless appreciate any comments or feedback to ensure that the next edition improves on, and rectifies any short-comings identified in this one.

Kindly send any feedback to the IPLT (Institute for Professional Legal Training) offices (address below).

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April 2013.

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Acknowledgments

- The authors wish to thank the Open Society Foundations (OSF), and in particular, ZAZA NAMORADZE, for their long-standing commitment and support of legal aid clinics and initiatives in Africa.



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- The contribution of all Law Clinicians in Africa, and from around the world is hereby gratefully acknowledged.
- The research, legal and technical contributions of the following IPLT staff members and associates is gratefully acknowledged:

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DEDICATED TO NELSON ROLIHLAHLA MANDELA



Professor David McQuoid-Mason with Nelson Mandela at Howard College, University of Natal, in 1993

“Overcoming poverty is not a gesture of charity; it is an act of justice. Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings. Sometimes it falls on a generation to be great. YOU can be that great generation. Let your greatness blossom.”

— Nelson Mandela

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He has published articles in diverse fields, and has co-authored seven books in the fields of Legal Aid, Reasoning, Writing and Speaking skills; Criminal Law; Trial Advocacy; Evidence; Civil Procedure and International Criminal Justice.

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Outcomes:

At the end of this chapter you will be able to:

1. Explain what is meant by clinical legal education and its mission.
2. Describe the different types of law clinics.
3. Explain the rationale for using clinical legal education teaching methods.
4. Explain the difference between clinical legal education and legal aid and NGO initiatives.

This Chapter will deal with (i) what is clinical legal education; (ii) the mission of clinical legal education; (iii) live client legal advice and assistance law clinics; (iv) street law-type clinics; (v) the rationale for clinical legal education teaching methods; and (vi) the difference between clinical legal education, legal aid and non-governmental organisation (NGO) initiatives.

1.1 What is clinical legal education?

Clinical legal education can be simply defined as experiential learning whereby law students gain practical skills and deliver legal services in a social justice environment. During the process students are confronted with real-life situations and play the role of lawyers to solve legal problems. They do this by interacting with clients or each other to identify and resolve legal issues and are subjected to critical review by their teachers or peers. Clinical legal education enables law students to play an active role in the learning process and to see how the law operates in real-life situations.¹

Clinical legal education provides law students with the tools that lay the foundations for their future careers as lawyers. While traditional legal education tends to focus on the theoretical content of the law and to be knowledge-based, clinical legal education goes further and provides law students with the necessary skills for legal practice. It also inculcates values such as the duty of lawyers to become involved in social justice issues in society, and to display professional responsibility while practising law.

¹ Hugh Brayne, Nigel Duncan and Richard Grimes Clinical Legal Education: Active Learning in the Law School (1998) 1.

1.2 The mission of clinical legal education

In most countries the mission of clinical legal education is to teach law students practical legal skills in a social justice setting.² Social justice refers to the fair distribution of health, housing, welfare, education and legal resources in society.³ Social justice is concerned with satisfying what indigent people need rather than what they want. Clinical legal education programmes play a valuable role in this respect as it provides legal advice and remedies to those that would otherwise not be able to afford it.

Clinical legal education programmes vary greatly but usually involve two broad categories of clinics - live client legal advice and assistance law clinics, and legal literacy or street law-type clinics.

1.3. Live-client legal advice and assistance law clinics

Traditional clinical legal education programmes involving live client legal advice and assistance law clinics usually include both academic and service components – the former requiring classroom attendance and the latter work in a law clinic.

1.3.1 Academic component

In clinical legal education programmes that are fully integrated into the law curriculum law students are given academic credit for their work and assessments like in any other law course. The course can be run over one or two semesters and is usually in the students final year of study. The academic part of these programmes involves students attending lectures or interactive seminars, and practical classes, on the types of topics that are handled by the clinic during the service component in the law clinic. The emphasis is placed on skills training and the students are required to be evaluated according to the academic rules of the faculty. The students may be required to write tests or assignments to ensure they have the requisite knowledge of the topics that have been covered. Students would have to pass all the tests and/or assignments in order to gain the credit points necessary and finish their degrees.

In programmes that are not fully integrated into the law curriculum the faculty may require students to participate in the programme on a 'duly performed' basis. This means that academic credit is not given, but participating students have to satisfactorily complete the programme in order to fulfil the graduation requirements of the faculty. These programmes also usually include mandatory classroom work on skills training so that the students are able effectively to deal with the service component of the clinic. Students could be awarded a certificate of competence before they proceed to deal with clients of the clinic.

Some programmes are entirely voluntary and place much less emphasis on academic work. These programmes tend to provide some training in the skills required in a law clinic but may not have a mandatory classroom component.

2 Cf DJ McQuoid-Mason "Teaching Social Justice to Law Students through Community Service: The South African Experience" in PF Iya, NS Rembe and J Baloro (eds) *Transforming South African Universities: Capacity Building for Historically Black Universities* (2000) 89-203. See also David McQuoid-Mason "Incorporating Justice and Ethical Issues into First Year Undergraduate Law Courses: A South African Experience" (2002) 1 *Journal of Commonwealth Law and Legal Education* 107-125.

3 Cf AM Honore 'Social Justice' in R Summers (ed) *Essays in Legal Philosophy* (1968) 68; PN Bhagwati 'Human Rights as Evolved by the Jurisprudence of the Supreme Court of India' 1987 *Commonwealth Legal Bulletin* 236.

1.3.2 Service component

Traditional clinical legal education programmes, particularly in developing countries, require students to service live clients under supervision in a law clinic. Very often these are general practice clinics that take 'walk in' clients.⁴ The students usually give advice to clients and act as clearing houses for other agencies.⁵ Once a person has qualified for free legal assistance from a law clinic, an appointment for them can be made. They will be requested to bring in all the documents relevant to their matter as well as personal information such as Identity Documents, telephone, address and next of kin details.

If it becomes apparent that the law clinic is not in a position to assist (the matter may require specialised assistance or it may not be in the law clinic's mandate to assist) the law clinic may then refer the client to another organisation or institution that will assist them.

In the more advanced clinics law students may assist qualified lawyers to litigate. In some countries, such as the United States and the Philippines, certain students may even be allowed to appear in court under 'student practice rules'.⁶ In countries with inquisitorial procedural rules that allow people other than lawyers to appear on behalf of litigants in civil cases, it may also be possible for law students to represent clients in court.⁷

1.3.3 Academic v service work

The challenge for traditional clinical legal education programmes is to balance the academic work required of students during their law degree with their duty to provide legal services to poor and marginalised clients in the law clinic.⁸

In the law clinic, students are taught how to deal with clients and their matters. This allows a law clinic to handle more cases than they would usually have the capacity to handle as the students are not paid for their services, but spend time taking detailed instructions and photocopying relevant documents. These matters are all then referred to an attorney in the law clinic – whose duty it is to supervise the students and ensure that each matter is handled in a professional and confidential manner.

1.4 Street law-type clinics

Street law-type clinics are legal literacy programmes, usually aimed at high school children, prisoners and others.⁹ In street law programmes law students are taught to teach about the law, human rights and democracy using interactive learning methods. During the process students are asked to advice about practical aspects of the law.

4 Generally for the types of cases handled by legal aid clinics see DJ McQuoid-Mason Outline of Legal Aid (1982) 139-161.

5 Cf DJ McQuoid-Mason "Legal Aid Clinics as a Social Service" in DJ McQuoid-Mason (ed) Legal Aid and Law Clinics in South Africa (1985) 64.

6 Cf American Bar Association Model Rules for Student Practice (Council for Legal Education and Professional Responsibility State Rules Permitting the Student Practice of Law: Comparisons and Comments 2 ed (1973) 43; Philippines Law Student Practice Rule Rules of Court (1997) Rule 168-A.

7 This was common in Eastern and Central Europe and Indonesia before the bar associations initiated legislation to give a monopoly to legally qualified practitioners.

8 See below

9 See generally David Jan McQuoid-Mason "Reducing Violence in South Africa through Street Law Education of Citizens" in Gerd Ferdinand Kirchoff, Ester Kosovski and Hans Joachim Schneider (eds) International Debates of Victimology (1994) 347-353.

As in the case of live client clinics street law students are subjected to critical review by their teachers and peers. Street law-type clinical programmes also have academic and service components.¹⁰

Street law programmes and law clinics provide an invaluable service to the community and to those that might not be able to afford the advice and assistance that they need. Students in their final year of study could then elect to take part in either a street law programme or assist in a law clinic. These would provide equal credit points for degree purposes. Depending on the institution, students might be afforded an opportunity to participate in both courses.

1.4.1 Academic component

Street law-type programmes that are fully integrated into the law curriculum give law students academic credit for their work like in any other law course. The academic component of street law programmes involves classroom work. In street law students are trained to use different types of interactive learning methods to teach schoolchildren, prisoners or other people about law, human rights and democracy. While the emphasis is placed on how to teach interactively, students are also taught lawyering skills such as preparing a mock trial and thinking on their feet. Where street law is a credit course the students are given grades for their work.

Where street law programmes are not fully integrated into the law curriculum some faculties require students to participate in the programme on a 'duly performed' basis as part of community service projects. This means that although no academic credit is given for such courses, participating students are required satisfactorily to complete the programme in order to graduate. Even though street law is not a credit course students have to learn how to use interactive teaching methods otherwise they would be unable to teach the target groups. Students could be issued with certificates of competence if they successfully complete this programme.

Street law programmes that are entirely voluntary place much less emphasis on academic work. These programmes, however, still require the students to be trained in street law teaching skills, (e.g. in a one-off workshop), but may not have a mandatory regular classroom component.

1.4.2 Service component

The service component in street law programmes requires students to go into high schools, prisons or other organisations and to teach the target audiences about law, human rights and democracy. To do this successfully students have to be taught how to use interactive teaching methods.¹¹

In street law programmes students give limited legal advice. They usually refer more complicated inquiries to a traditional live client law clinic or recommend that the person seeks legal advice from the state legal aid scheme or a private lawyer.

Students are monitored and supervised to ensure that they are providing correct and valuable assistance to the community.

10 Cf DJ McQuoid-Mason "Teaching Social Justice to Law Students through Community Service: The South African Experience" in PF Iya, NS Rembe and J Baloro (eds) *Transforming South African Universities: Capacity Building for Historically Black Universities* (2000) 89-203. See also David McQuoid-Mason "Incorporating Justice and Ethical Issues into First Year Undergraduate Law Courses: A South African Experience" (2002) 1 *Journal of Commonwealth Law and Legal Education* 107-125.

11 See generally David Jan McQuoid-Mason "Reducing Violence in South Africa through Street Law Education of Citizens" in Gerd Ferdinand Kirchoff, Ester Kosovksi and Hans Joachim Schneider (eds) *International Debates of Victimology* (1994) 347-353.

The challenge with street law-type clinics, as with traditional clinics, is to balance the students' service work with their other academic work.¹²

1.5 Rationale for clinical legal education teaching methods

Clinical legal education teaching methods are interactive. They do not rely on the traditional lecture approach. This is because psychological studies have shown that lectures are the least effective way of imparting knowledge. Studies have shown that what is remembered by students depends on the teaching methods used. The rate of memory retention increases as more student-centred interactive teaching methods are used. The following memory retention rates have been measured:

If lectures are used students remember 5%. If students read for themselves they remember 10%. And, if audio-visual methods are used (e.g. an overhead projector or PowerPoint) students remember 20%. If students discuss issues in small groups they will remember 50%. If they are shown a demonstration and then required to practice it they will remember 75%. Where, as happens in street law programmes, law students teach other people, they will remember 90%.

Where these skills are taught the instructors should use interactive, student-centred teaching techniques rather than the passive lecture method. The irony is that in most law schools the lecture method is the most common way of teaching.

On the different interactive teaching methods used in clinical legal education programmes see Chapter 13.

1.6 The difference between clinical legal education, legal aid and NGO institutions

As has been mentioned, clinical legal education has a strong educational focus apart from the service element that occurs in the law clinic or other legal services institution.

Legal aid service organisations and NGOs delivering legal services usually concentrate on delivery rather than on the educational aspects of their programmes. Some programmes may include educational support for their employees and others may be prepared to accommodate law students farmed out to them as interns by law faculties. However in both instances the thrust of the work of the legal aid organisation or the NGO is to provide a service to the people who qualify. Their interest in legal education is often marginal to the main purpose of the programme – except in the case of paralegal programmes which often include a community legal literacy education component.¹³ They may not have the staff or resources available to provide this training to students. This is another reason why the law clinic and street law programmes are so important.

Unlike legal aid institutions and NGOs - except for paralegal programmes - clinical legal education does not only focus on service delivery – it is also intimately linked to legal education. Therefore if law students are farmed out to legal aid agencies or NGOs the host organisations have to be carefully briefed on how to supervise and report on the work done by the students. The fact that campus law clinicians are not directly supervising the students makes farm out programmes more susceptible to

¹² See below para 4.2.6.

¹³ David McQuoid-Mason "Access to Justice in South Africa" (1999) 17 Windsor Yearbook of Access to Justice 230 at 249.

lapses in supervision than in-house law clinics.

1.7 Conclusion

The following conclusions can be drawn regarding clinical legal education:

- (a) The mission of clinical legal education is to provide law students with practical legal skills in a social justice setting.
- (b) Clinical legal education programmes include both academic and service components.
- (c) Clinical legal education programmes usually take the form of live client legal advice and assistance clinics or legal literacy or street law-type clinics.
- (d) The essence of clinical legal education programmes is that interactive teaching methods are used to impart practical skills into students.
- (e) Clinical legal education programmes teach law students professional responsibility and expose them to the social realities of the justice system outside the classroom environment.
- (f) Clinical legal education programmes combine legal education with a service requirement – unlike legal aid services and NGOs that tend to focus on service delivery rather than legal education – except for paralegal programmes.

CHAPTER 2: THE HISTORY OF LIVE-CLIENT CLINICS IN AFRICA

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- 2.1 Introduction
- 2.2 Southern Africa
- 2.3 East Africa
- 2.4 West Africa
- 2.5 Conclusion

Outcomes:

At the end of this chapter you will be able to describe the history of live client clinics in Southern, East and West Africa.

2.1 Introduction

University and law school legal aid clinics can be found throughout the world¹⁴ in Africa,¹⁵ the Americas,¹⁶ Central Asia,¹⁷ South Asia,¹⁸ South East Asia,¹⁹ the Caribbean,²⁰ Western Europe,²¹ Central and Eastern Europe,²² and the South Pacific and Australasia.²³ University legal aid clinics usually supply free legal advice to indigent persons under the supervision of qualified staff members who are legal practitioners. Most university law clinics either require law students to work in a university law clinic or assign the students to an outside partnership organisation where they can provide legal services under supervision.²⁴

The concept of modern independently funded university legal aid clinics developed in the United States in the late 1960s when the Council on Legal Education for Professional Responsibility (CLEPR) was established with financial support from the Ford Foundation.²⁵ Modern forms of law clinics were established in developing countries in Africa during the 1970s, for example, in Ethiopia, Uganda, Tanzania, South Africa, and Zimbabwe. Under traditional African law there is no role for lawyers in chief's and headmen's courts, and law clinics can only assist potential litigants by giving advice.

14 For a general description of how the law clinic concept has spread throughout the world, see Aubrey McCutcheon 'University Legal Aid Clinics: A Growing International Presence with manifold Benefits' in Ford Foundation Many Roads to Justice (2000) 267.

15 For instance, in South Africa, Zimbabwe, Botswana, Namibia, Lesotho, Mozambique, Kenya, Ethiopia, Rwanda, Sierra Leone and Nigeria.

16 For instance, in the United States, Canada, Mexico, Argentina, Chile, Peru, Brazil and Guyana.

17 For instance, in China, Mongolia, Kazakhstan and Kyrgyzstan.

18 For instance, in India, Sri Lanka, Nepal and Bangladesh.

19 For instance, in the Philippines, Indonesia and Cambodia.

20 For instance, in Jamaica, Trinidad and Tobago, Guyana and the Bahamas.

21 For instance, the United Kingdom.

22 For instance, in Poland, Slovakia, the Czech Republic, Hungary and Russia.

23 For instance, Australia and Vanuatu.

24 DJ McQuoid-Mason 'The Organisation, Administration and Funding of Legal Aid Clinics in South Africa' (1986) 1 NULSR 189 193.

25 William Pincus 'Legal Clinics in the Law Schools' in Faculty of Law, University of Natal Legal Aid in South Africa (1974) 123. Earlier models had existed in countries like the United States and Chile during the 1920s and 1930s (cf McCutcheon 'University Legal Aid Clinics' in Many Roads to Justice at 268), but CLEPR gave the impetus to the modern model that fully integrates legal aid work into the law school curriculum.

2.2 Southern Africa

Live client law clinics began operating in Southern African countries such as South Africa and Zimbabwe in the early 1970s, and Botswana in the mid-1980s. More recently law clinics have been established in Lesotho, Namibia, Zambia, Mozambique and Malawi.

2.2.1 South Africa

The first legal aid clinic in South Africa was established by law students at the University of Cape Town in 1972.²⁶ The first law faculty staff-initiated law clinics were established at the Universities of the Witwatersrand and Natal (Durban) in 1973.²⁷ The Ford Foundation funded a legal aid conference in South Africa in 1973 which was the catalyst for the law clinic movement in the region – including Zimbabwe. At the time of the conference the only clinics in the country were at the Universities of Cape Town and the Witwatersrand, but within two years five others had been established.²⁸

In chronological order the following law clinics had been established at South African universities by 1981: Cape Town (1972), the Witwatersrand (1973), Natal (Durban) (1973), Port Elizabeth (1974), Natal (Pietermaritzburg) (1974), Western Cape (1975), Stellenbosch (1975), Durban-Westville (1978), Zululand (1978), Rhodes (1979), the North (1980), Pretoria (1980), South Africa (1981), and Rand Afrikaans University (1981).²⁹

At present nearly all law faculties and law schools at universities in South Africa operate live client law clinics³⁰ independent of the state-funded law clinics that were absorbed into the Legal Aid Board's justice centers.³¹ The university clinics employ directors who are practising attorneys or advocates. If the director is a practising attorney, the clinic will be accredited by the local law society and candidate attorneys may be employed as legal interns doing community service for admission purposes.³² Funding for law clinics is provided by outside donors with contributions from some universities. The Attorneys Fidelity Fund³³ subsidises accredited legal aid clinics by providing funds to enable them to employ a practitioner (attorney or advocate) to manage the clinic.³⁴ The Association of University Legal Aid Institutions (AULAI) set up the AULAI Trust with an endowment from the Ford Foundation to

26 DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1981) 139-140.

27 McQuoid-Mason *Outline of Legal Aid* 148, 153.

28 McQuoid-Mason *Outline of Legal Aid* 139.

29 McQuoid-Mason *Outline of Legal Aid* 139-163.

30 Law clinics exist at the Universities of Cape Town, the Western Cape, Rhodes, University, the Witwatersrand, Johannesburg (formerly Rand Afrikaans University), Pretoria, the North West (formerly the Universities of Potchefstroom and Bophuthatswana), Venda, Limpopo (formerly the North), South Africa, KwaZulu-Natal (formerly Natal and Durban-Westville), Zululand, the Free State, Stellenbosch, Fort Hare and Nelson Mandela Metropolitan (formerly Port Elizabeth) and Walter Sisulu (formerly Transkei) Universities; cf DJ McQuoid-Mason "The Role of Legal Aid Clinics in Assisting Victims of Crime" in WJ Schurink, Ina Snyman, WF Krugel and Laetitia Slabbert (eds) *Victimisation: Nature and Trends* (1992) 569 n 1.

31 DJ McQuoid-Mason "The Role of Legal Aid Clinics in Assisting Victims of Crime" in WJ Schurink, Ina Snyman, WF Krugel and Laetitia Slabbert (eds) *Victimisation: Nature and Trends* (1992) 569 n 1.

32 See above para 2.4.

33 The Attorneys Fidelity Fund is a fund that has accumulated out of the interest paid on monies held in attorneys' trust accounts. It is used to compensate members of the public who have suffered loss as result of fraud by practising attorneys, but also makes money available for legal education. The Fidelity Fund is similar to IOLTA (Interest on Lawyers' Trust Accounts) programme that is in place in Australia, Canada, New Zealand and the United States. However, while IOLTA programmes directly fund legal aid the Fidelity Fund only supports legal education and accredited university legal aid clinics as it believes that legal aid should be funded by the state (cf Rekosh et al 'Access to Justice' in *Access to Justice in Central and Eastern Europe* at 32).

34 DJ McQuoid-Mason 'The Organisation, Administration and Funding of Legal Aid Clinics' (1986) 1 NULSR at 193.

strengthen the funding of the clinics.³⁵ The AULAI Trust has recently been encouraging law faculties and law schools to gradually include the funding of the clinics in their university budgets. Poland and Nigeria have set up organizations based on the South African AULAI model.

Most South African law clinics began as general practice clinics and many still do general practice work. Since 1994, however, the types of poverty law problems that continue to arise, such as housing, the quality of police services, and social security now involve constitutional issues.³⁶ As a result several clinics have begun to challenge the failure of the State to provide basic services as required by the socio-economic provisions of the Constitution.³⁷ At the University of KwaZulu-Natal, Durban, for instance, the law clinic specializes in problems concerning women and children, social justice and HIV/AIDS. The majority of the law clinics still engage in general practice, and fewer restrictions are being imposed on them by the law societies. Candidate attorneys may do their mandatory internships as community service in accredited law clinics instead of as articled clerks with private law firms. The Attorneys Act³⁸ was amended in 1993³⁹ to allow aspiring attorneys to 'perform community service approved by the society concerned' - provided that the person who employs them is a practising attorney. The latter must be 'in the full-time employment of a law clinic, and ... the council of the province in which that law clinic is operated, [must certify] that the law clinic concerned complies with the requirements prescribed by such council for the operation of such clinic'.⁴⁰

The South African law clinics provide free legal services to the needy and use the Legal Aid Board's means test as a flexible guide. Qualified practitioners employed by the clinics represent clients in the lower and high courts in both criminal and civil matters. Approximately 3 000 law graduates are produced annually by South African law schools.⁴¹ It has been calculated that if each final year law student were only to do 10 criminal cases a year in the district courts, mainly during the summer and winter vacations, this could provide criminal defenses for 30 000 accused persons annually.⁴²

The university law clinics are represented on the Legal Aid Board through AULAI and six law clinics in the country have entered into cooperation agreements with the Legal Aid Board⁴³ to service clusters of paralegal advice offices, and to provide services in civil matters where the Board does not have the capacity to do so.

2.2.2 Zimbabwe

The University of Zimbabwe law clinic was established in 1974 and was used as the core component of the final year of the post-graduate LLB degree.⁴⁴ The introduction of the Legal Practitioners Act of 1981 resulted in fusion of the attorneys and advocates professions. After 1985 the University of

35 Stephen Golub "Battling Apartheid, Building a New South Africa" in Ford Foundation Many Roads to Justice at 38.

36 Constitution of the Republic of South Africa Act 108 of 1996 Chapter 2.

37 For instance, breaches of the rights to health care, food, water and social security in terms of s 27 of the Constitution of the Republic of South Africa Act 108 of 1996.

38 Attorneys Act 53 of 1979 s 2 (1A) (b).

39 By s 2 of Act 115 of 1993.

40 Section 3(1)(f); cf McQuoid-Mason 'Lessons from South Africa' (2005) 26 *Obiter* 229 n 165)

41 Cf Nic Swart Entry into the Profession : What about Articles? (1994) 1 (unpublished memorandum for the Law Society of South Africa).

42 Minister of Justice and Department of Justice Enhancing Access to Justice through Legal Aid: Position Paper for National Legal Aid Forum (unpublished) (15-17 January 1998) 25.

43 These are the clinics at the Universities of Pretoria, the Witwatersrand, KwaZulu-Natal, the Free State, the Western Cape and Stellenbosch (Legal Aid Board Annual Report 2005/06 (2006) 26).

44 McQuoid-Mason Outline of Legal Aid 161-163.

Zimbabwe law degree was the only means of admission to the legal profession. This meant that the LLB degree became a practical degree. Articles of clerkship were abolished and the law clinic was required to provide practical training for law graduates before they entered the legal profession.⁴⁵

By 1983 Zimbabwean law students were providing legal advice and assisting with the drafting of pleadings for litigation up to the pre-trial stage. They were also able to attend pre-trial conferences involving clients and lawyers.⁴⁶

In recent years, although students are excluded in first year, they already begin to work on cases in their second and third years. Work in the law clinic is compulsory for third and fourth year law students. By their fourth year, the better law students can take cases in the High Court with the permission of the Attorney General - a possibility not available to South African students. During the summer breaks, Zimbabwe's clinical students are "farmed out" to private law firms, the Attorney General's office and other private sector work such as insurance companies.

As a result of the wide-spread human rights abuses in the country human rights cases have become a very important area of work for the law clinic at the University of Zimbabwe.⁴⁷

2.2.3 Botswana

The University of Botswana introduced the LLB degree in 1984/1985 and the law clinic was established at the same time as 'a legal aid service' institution.⁴⁸ All final year law students were required to do the clinical law course and to spend a period of time either working in the Campus Law Clinic or with some other organization that provided legal services – including NGOs. The students had to write up their experiences in a case book which was then submitted for examination.

In the Campus Clinic students assist with interviewing, giving legal advice, researching legal issues, writing letters of demand, drafting pleadings and other legal documents, participating in negotiations, and referring clients to appropriate governmental or non-governmental legal or social welfare agencies. Students are subjected to a final oral examination.⁴⁹

The University of Botswana law clinic is the one of the main sources of legal aid for indigent people in the country.

2.2.4 Lesotho

The law clinic in Lesotho was established at Roma University together with a clinical law course in 2000.⁵⁰ Students are trained to conduct interviews and give advice, as well as to do legal research. They are also placed in internships where they are monitored.⁵¹

45 F Smith 'The Legal Aid Clinic, University of Zimbabwe, Harare' in DJ McQuoid-Mason (ed) *Legal Aid and Law Clinics in South Africa* (1985) 48-53.

46 Smith in *Legal Aid and Law Clinics* 49.

47 Open Society Justice Initiative Report on First All Africa Colloquium on Clinical Legal Education 23-28 June 2003 (2004) 9.

48 University of Botswana Department of Law Handbook 2000/2001(2000) 3.

49 University of Botswana Law Handbook 22. Cf PF Iya 'Fighting Africa's Poverty and Ignorance through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *International J of Clinical Legal Education* 13, 22.

50 Qhalehang A Letsika *The Future of Clinical Legal Education in Lesotho: A Study of the National University of Lesotho's Legal Education and its Relevance to the Needs of the Administration of Justice in Lesotho* (2002) unpublished LLM Thesis (University of Natal) 2.

51 Open Society Justice Initiative Report on First All Africa Colloquium on Clinical Legal Education 23-28 June 2003 (2004) Annexure I.

2.2.5 Namibia

The law clinic in Namibia was established in 2002, and operates off campus in Katurura, a suburban township. It is a general practice clinic that provides legal advice, counselling and representation before the courts of law. The clinic is staffed by two supervisors and enrolls about 30 students a year. Students are taught skills in interviewing, drafting of documents and advocacy.

Work in the law clinic counts 15% towards the accredited clinical law course. Students spend two hours a week in seminars and two hours a week working in the clinic. The clinic handles about 40 clients a year.⁵²

2.2.6 Zambia

The legal aid clinic at the University of Zambia works closely with the Law Association of Zambia. The clinic trains students in counselling and the giving of advice. The clinic also trains paralegals and conducts legal awareness programmes. Students are placed in government internships.⁵³

2.2.7 Mozambique

The legal aid clinic at the Centre for Practical Legal Studies at the Eduardo Mondlane University in Mozambique was established in March 2002. The clinic is located on the university campus and deals with labour law, civil law and criminal law. The types of services provided are legal advice and counselling and representation before the courts.

The clinic enrolls 16 to 20 students a year who are supervised by four members of staff – one as a general supervisor, and one each for labour law, criminal cases and civil cases. The course is not accredited and there are no formal lectures. However, students are exposed to a variety of lawyering skills in seminars on topics such as professional ethics; the regulations of the legal profession; the work of the court notary's office, registry office and other legal institutions; civil, commercial and pre-trial proceedings; criminal proceedings; labour matters; contracts; administrative law; and land problems. The students are exposed to 72 hours of seminars in the first semester and 128 hours of service in the second semester. The clinic handles about 200 clients a year.⁵⁴

2.2.8 Malawi

In 2004, although the Faculty of Law at the University in Malawi had a Department of Practical Legal Education it was still setting up a clinic. Offices and space had been allocated for the clinic in the old court building about 10 kilometres from the University but it needed to be refurbished. By 2007 the clinic had still not moved into the building. The Department of Practical Legal Studies has three faculty members and plans to mainstream clinical law into the LLB programme.⁵⁵ At present an informal clinic is run by law students.

52 Information provided by Sam K Amoo, Dean and Coordinator of the Legal Aid Clinic, in OSJI Survey of Clinical Programs in Africa Questionnaire (2006).

53 Open Society Justice Initiative Report on First All Africa Colloquium on Clinical Legal Education 23-28 June 2003 (2004) Annexure I.

54 Information provided by Elysa Vieira, Coordinator of the Centre for Practical Legal Studies, in OSJI Survey of Clinical Programs in Africa Questionnaire (2006).

55 Open Society Justice Initiative Report on First All Africa Colloquium on Clinical Legal Education 23-28 June 2003 (2004) Annexure I.

2.3 East Africa

2.3.1 Kenya

Law clinics exist at two universities in Kenya – the University of Nairobi and Moi University

2.3.1.1 University of Nairobi legal aid clinic

The legal aid clinic at the University of Nairobi is run by law students who network with NGOs that deal with children's rights, violence against women and land matters. Students consult with members of the faculty of law and work with live clients in the NGOs. Where necessary the NGOs refer matters to lawyers who do *pro bono* work.

2.3.1.2 Moi University legal aid clinic

The legal aid clinic at Moi University divides its students into law firms. Students are exposed to preparatory clinical components of legal studies in the first three years of the LLB degree, with practice at the clinic reserved for final year students in their fourth year. Students conduct live client interviews in the clinic and are also farmed out to NGOs. The clinic is integrated into the course work but students receive no academic credit for their work in the clinic.⁵⁶

2.3.2 Uganda

Early attempts were made to set up law clinics in Uganda in the 1970s. However, the clinics did not survive some of the political turmoil that affected the country.

2.3.2.1 Law Development Centre legal aid clinic

The law clinic at the Law Development Centre, which provides post-graduate training for aspiring legal practitioners, was established in 1998. The clinic provides legal advice, counselling, legal representation, legal awareness training and development of materials. The clinic is expected to accommodate over 400 students a year and is supervised by five full-time members of staff. Practitioners and other lecturers are employed as part-time supervisors.

All the law school students have to attend a one week clinical course where they are taught interviewing, counselling, legal writing, trial advocacy and research skills. The students then have to be placed for a two or three week period in a legal environment such as the prisons, the courts etc. Students are divided into firms of 20 to 30 each and, because of their numbers, are difficult to manage and monitor. A method needs to be found to deal with large numbers of students without compromising standards. The course lasts 50 hours and is not accredited. However, it is a requirement for graduation from the law school. The clinic serves about 300 clients a year.⁵⁷

2.3.3 Tanzania

Tanzania had a law clinic at the University of Dar-Es-Salaam in the 1970s. The University still has a human rights law clinic which has a four year clinical programme, including internships.⁵⁸

2.3.4 Ethiopia

The University of Addis Ababa had a legal aid clinic in the 1970s which closed down after the overthrow of Emperor Haile Selassie.

56 Open Society Justice Initiative Report on First All Africa Colloquium on Clinical Legal Education 23-28 June 2003 (2004) Annexure I.

57 Information provided by Theodora Webale, Clinic Manager, in OSJI Survey of Clinical Programs in Africa Questionnaire (2006).

58 Open Society Justice Initiative Report on First All Africa Colloquium on Clinical Legal Education 23-28 June 2003 (2004) Annexure I.

In 2002 a law clinic was established at Mekelle University which provides general legal advice as well as advice on women's issues. It also runs a public awareness programme.

2.3.5 Rwanda

There is a legal aid clinic (*clinique juridique*) at the National University of Rwanda that was established in the academic year 2000-2001. The clinic educates the public about its rights, helps them to assert their rights and attempts to provide easy access to justice. The clinic provides legal advice, assistance with court cases, assistance when dealing with administrative bodies, and providing mediation services for family disputes. The clinic operates out of a multipurpose hall in the Southern region where third year students registered for the legal clinic course and fourth year interns provide assistance to the public on Thursday afternoons. However, the clinic operates throughout the year from a permanent office.

During 2005 the clinic dealt with 600 cases, in which it helped people prepare arguments in court, negotiate with insurance companies, institute claims in court etc. These cases included 70 minors who had been raped for whom the clinic provided lawyers to represent their interests in the criminal trials.⁵⁹

2.4 West Africa

2.4.1 Nigeria

Initiatives had been made in the 1980s to establish law clinics in Nigeria but these did not succeed. The latest initiative for clinical legal education had arisen as a result of funding and training initiatives following the Open Society Justice Initiative sponsored First All African Clinical Legal Education Conference at the University of Natal (now KwaZulu-Natal) in Durban in June 2003. A Nigerian Law Clinicians Conference was held in Abuja in February 2004, and the Network of University Legal Aid Institutions (NULAI) was established. The Council of Legal Education has recognized clinical legal education as part of the law curriculum. There are law clinics operating at four universities where students work on a voluntary basis without academic credit.

2.4.1.1 Akungba law clinic, Adekunle Ajasin University

The Akungba law clinic was established in 2004 and is located on the university campus. The clinic focuses on general practice, human rights, public interest law matters, and Street law/community education. About 25 students enroll in the clinic programme which is supervised by three supervisors. The students receive four academic credits for the course and attend for two hours – three times a week. The average number of clients served a year is over 60.⁶⁰

2.4.1.2 Absu law clinic, Abia State University

The Absu law clinic was established in September 2005 and is located on the university campus. The clinic deals with general practice and provides legal advice and counselling, legal representation before administrative bodies, human rights and law awareness education. It also does research. The clinic enrolls 21 students who are placed under the supervision of five clinical law teachers and two volunteer supervisors. The students receive two academic credits for the course and are required

59 Information provided by Aimable Havugiyaremye, Director in Charge of the Clinic, in OSJI Survey of Clinical Programs in Africa Questionnaire (2006).

60 Information provided by Olugbenga Oke-Samuel, Legal Aid Clinic Coordinator/Director, in OSJI Survey of Clinical Programs in Africa Questionnaire (2006).

weekly to attend four hours of instruction and eight hours in the clinic. During its first six months the clinic served 12 clients.⁶¹

2.4.1.3 University of Uyo law clinic

The University of Uyo law clinic was established in November 2005 and is located on the university campus in a faculty of law lecture hall. The clinic does general practice work, and provides legal advice and counselling, legal representation before courts of law, and human rights and law awareness education. The work includes legal drafting, landlord and tenant matters, and criminal cases. The clinic enrolls 50 students a year and is supervised by seven law teachers. The students receive four academic credits for the course and are required to attend three hours a week in seminars and at the clinic.⁶²

2.4.1.4 University of Maiduguri law clinic

The University of Maiduguri law clinic was established in December 2005 on the university campus. The clinic does human rights, Street law, alternative dispute resolution (ADR), labour law matters, and women and children's rights. It trains the students in legal advice and counselling and how to teach human rights awareness. The students are taught such skills as ADR ethics, legal writing, client counselling, trial advocacy, office management, and aspects of civil and criminal proceedings. The course enrolls 20-25 students who are supervised by two clinical law teachers. The students receive three credits for the course and are required to attend seminars and work in the clinic for 48 hours. At the time of writing the clinic had served 20 clients.⁶³

2.4.2 Sierra Leone

The Fourah Bay Law Clinic at the University of Sierra Leone is a student-run operation with premises on the University campus. The clinic runs a number of projects, including legal aid and assistance in the Human Rights Centre; schools education through Human Rights Clubs; a newsletter entitled *Human Rights Watch*; human rights on the campus, through panel discussions, mock trials, symposiums and public lectures; and internship programmes whereby students do a 14 day placement.⁶⁴

2.5 Conclusion

University legal aid clinics in Africa, and in developing countries elsewhere, can play a valuable role in supplementing the work of the national legal aid bodies. National legal aid schemes can enter into partnership agreements with university law clinics to compensate them for providing legal aid services for poor people that cannot be reached by the national body.

Law clinics can also be contracted to provide back-up legal services to clusters of para-legal advice offices, as occurs in South Africa. Such contractual agreements also help to make law clinics more financially viable.

61 Information provided by Sampson Erugo, Clinic Coordinator, in OSJI Survey of Clinical Programs in Africa Questionnaire (2006).

62 Information provided by Uwem Emmanuel Udok, Clinic Coordinator/Supervisor, in OSJI Survey of Clinical Programs in Africa Questionnaire (2006).

63 Information provided by Ibrahim Nguru Labaran, Clinic Coordinator, in OSJI Survey of Clinical Programs in Africa Questionnaire (2006).

64 Open Society Justice Initiative Report on First All Africa Colloquium on Clinical Legal Education 23-28 June 2003 (2004) Annexure I.

More than 25 years ago the role that law clinics can play in Africa was described as follows:

‘The well-supervised use of law students will significantly ease the limitations under which most of the legal aid programmes in Africa now have to work; it is only through student programmes that there is any possibility in the near future for legal services becoming widely available to the poor’.⁶⁵

The above statement applies equally today – not only to Africa - but also to other continents. For instance, as mentioned above, the University of Botswana legal aid clinic has for many years been one of the few agencies providing legal aid services to indigent people requiring lawyers. The same is probably true of law clinics in some other developing African countries.

For a summary of the activities of different African university law clinics see Table in Annexure I which is an analysis by the Open Society Justice Initiative of the state of African clinical law initiatives as at September 2003.⁶⁶

65 F Reyntjens in FA Zemans (ed) *Perspectives on Legal Aid* (1979) 36. The value of using properly supervised law students to deliver legal services has also been recognized as fulfilling the requirement of a constitutional right to counsel by the United States Supreme Court which stated: “Law students can be looked to make a significant contribution, qualitatively and quantitatively, to the representation of the poor in many areas”: *Argersinger v Hamlyn* S Ct 2006 (1979). See generally McQuoid-Mason ‘The Delivery of Civil Legal Aid’ (2000) 24 *Fordham International Law Journal* (Symposium) S 131.

66 Open Society Justice Initiative Report on First All Africa Colloquium on Clinical Legal Education 23-28 June 2003 (2004) Annexure I.

CHAPTER 3: THE HISTORY OF STREET LAW-TYPE CLINICS IN AFRICA

Contents:

- 3.1 Introduction
- 3.2 Southern Africa
- 3.3 East Africa
- 3.4 West Africa
- 3.5 Conclusion

Outcomes:

At the end of this chapter you will be able to describe the history of Street law-type clinics in Africa.

3.1 Introduction

Street law-type clinics and legal literacy programmes exist in a number of countries around the world. They are to be found in South Asia,⁶⁷ South East Asia,⁶⁸ Central Asia,⁶⁹ Western Europe,⁷⁰ Central and Eastern Europe,⁷¹ North America,⁷² Latin America,⁷³ the Caribbean⁷⁴ and Africa.⁷⁵ Street law specific clinics probably exist in their most developed form in the United States of America where they were established in the early 1970s. By the mid-1980s street law programmes based on the American model had been established in South Africa, and after the mid-1990s, in South Asia, Central Asia, Central and Eastern Europe, Latin America, the Caribbean and elsewhere in Africa. Since the millennium they have been established in Western Europe, South East Asia,⁷⁶ and the Middle East. Earlier forms of legal literacy programmes have been in existence in developing countries for many years, for instance, the Philippines.⁷⁷

Unless people are aware of their legal rights they will not know that they have the right to apply for legal aid. Accordingly, legal literacy programmes play a very important role in complementing legal services for the poor.

67 For instance, in India and Bangladesh.

68 For instance, in the Philippines, Cambodia, Malaysia and Indonesia.

69 For instance, in China, Kazakhstan, Kyrgyzstan and Mongolia.

70 For instance, in England and Wales.

71 For instance, in Poland, Hungary, Slovakia, Russia, Moldova and the Czech Republic. A wide variety of street law-type books and materials have been produced in countries such as Belarus, Croatia, the Czech Republic, Estonia, Kazakhstan, Kyrgyzstan, Latvia, Macedonia, Moldova, Mongolia, Russia, Slovakia, Ukraine and Uzbekistan.

72 For instance, in the United States.

73 For instance, in Chile.

74 For instance, in Haiti.

75 For instance, in South Africa, Kenya, Uganda, Nigeria and Ghana.

76 For example, in Cambodia. However, similar programmes have existed in the Philippines for many years.

77 See Stephen Golub 'Non-lawyers as Legal Resources for their Communities' in Ford Foundation Many Roads to Justice (2000) 299 at 303-304

3.2 Southern Africa

The first international Street law programme outside of the United States where the programme originated was established in South Africa in 1986. The second was in Lesotho in 1987. The South African Street law programme has continued. The Lesotho programme ended when King Moshoeshoe II was deposed in 1990.

3.2.1 South Africa

Street law originated at the Georgetown University Law Centre in Washington DC in 1972. Law students were sent out to the inner city schools where many young people in the black ghetto areas felt oppressed by the legal system. It was brought to South Africa in 1985 and a pilot project set up at the University of Natal, Durban for six months during 1986.⁷⁸ The latter was so successful that it was converted into a full-time programme at the University of Natal in 1987. Shortly thereafter similar programmes were established at the Universities of Pretoria and the Witwatersrand.⁷⁹ While donor funding was available the programme spread to 17 of the 21 law schools in South Africa. Subsequently, with a drastic reduction in donor funding, the Street law programme ceased being funded by the national office, and is now separately funded at nine South African universities.⁸⁰

The South African Street law project is a preventive legal education programme that provides people with an understanding of how the legal system works, and how it may be utilized to safeguard the interests of people 'on the street'.⁸¹ Street law students at the universities are taught how to use interactive learning methods when teaching school children, prisoners and ordinary people about the law. The programme has been conducted in hundreds of high schools throughout South Africa and involves a combination of training law students and guidance teachers from the schools to use a street law student text for the pupils and a teacher's manual for teachers. Guidance teachers and law students participating in the programme are trained to use the student's text⁸² and law teacher's manual⁸³ in a classroom situation.⁸⁴

The South African Street law book is user-friendly and deals with a wide variety of subjects, including a general introduction to South African law and the legal system, criminal law and juvenile justice, consumer law, family law, socio-economic rights and labour law.⁸⁵ The book uses student-centred teaching techniques and involves students in a variety of interactive learning methods such as role-playing, opinion polls, critical thinking and mock trials.⁸⁶ As has been mentioned the programme together with its offshoot, Democracy for All, operates at nine universities in South Africa. Democracy for All is intimately linked to the Street law programme and its lessons are captured in a

78 Golub 'Non-lawyers as Legal Resources for their Communities' in *Many Roads to Justice* 299.

79 McQuoid-Mason in *International Debates of Victimology* op cit 349-350.

80 Street law operates at the Nelson Mandela Metropolitan, Rhodes and Walter Sisulu Universities and the Universities of KwaZulu-Natal, the North West, the Witwatersrand, South Africa, Pretoria, and the Free State.

81 DJ McQuoid-Mason "Reducing Violence in South Africa through Street Law Education of Citizens" in Gerd Ferdinand Kirchoff, Ester Kozovski and Hans Joachim Schneider (eds) *International Debates of Victimology* (1994) 347 348.

82 David McQuoid-Mason, Lloyd Lotz, Lindi Coetzee, Usha Jivan, Sibonile Khoza and Tammy Cohen *Street Law: Practical Law for South African Students* 2ed (2004).

83 David McQuoid-Mason, Lloyd Lotz, Lindi Coetzee, Usha Jivan, Sibonile Khoza and Tammy Cohen *Street Law: Practical Law for South African Students: Educator's Manual* 2ed (2005).

84 Ibid.

85 See generally, McQuoid-Mason et al *Street Law: Practical Law for South African Students*.

86 McQuoid-Mason et al *Street Law: Practical Law for South African Students: Educator's Manual* 5-19.

book entitled *Democracy for All*.⁸⁷ The latter is aimed at providing human rights and democracy education for school children and community organisations throughout South Africa. The street law project has also produced a training manual on *HIV/AIDS, the Law and Human Rights*.⁸⁸

3.2.2 Lesotho

The Lesotho Street law programme was established in 1987 with encouragement from the Attorney-General's office and was located at King Moshoeshoe II's palace. The programme trained school teachers how to teach about the law to school children, and the South African Street law programme was involved in some of the training.

A low budget Street law *Student's Manual*⁸⁹ and *Instructor's Manual*⁹⁰ were produced for Lesotho. The *Manuals* covered an introduction to law and the legal system and criminal law and procedure, and consumer law. The Street law programme was housed in an office in the King's Palace and closed down after the King was deposed.

3.3 East Africa

3.3.1 Kenya

The Street law programme was introduced in 1997 and operates out of an NGO.

3.3.2 Uganda

Street law was introduced in 1997 and operated out of a couple of secondary schools. It was based in an NGO. In 2005 the Law Development Centre (LDC) was considering introducing Street law as one of the clinical courses to be done by law graduates as part of their vocational training. The students in the LDC's post-graduate practical training programme do legal awareness education as part of their clinical work (see above para 2.3.2.1).

3.3.3 Tanzania

Street law was introduced in 1997 and was due to be incorporated into the school curriculum as civic education.

3.3.4 Ethiopia

The Faculty of Law at Mekelle University introduced a Street law-type programme in 2000. Law students go into high schools and teach school children about the law (see above para 2.3.4).

3.3.5 Rwanda

Students attached to the law clinic at the National University of Rwanda educate the public about their legal rights (see above para 2.3.5).

87 David McQuoid-Mason, Mandla Mchunu, Karthy Govender, Edward L O'Brien and Mary Curd Larkin *Democracy for All: Education Towards a Democratic Culture* (1994), together with an *Instructor's Manual*.

88 Centre for Socio-Legal Studies *HIV/AIDS, the Law and Human Rights* (2003).

89 See for instance, Margaret E Fisher, Kelebone Maope and Brother Michael Meteka *Street Law A Course in Practical Law for Lesotho: Student Manual* (1987) unpublished and Margaret E Fisher and Likhapo Mbatha *Street Law A Course in Practical Law for Lesotho Consumer Law: Student Manual* (1987) unpublished.

90 For instance, Margaret E Fisher, Kelebone Maope and Brother Michael Meteka *Street Law A Course in Practical Law for Lesotho: Instructor's Manual* (1987) unpublished and Margaret E Fisher and Likhapo Mbatha *Street Law A Course in Practical Law for Lesotho Consumer Law: Teacher's Manual* (1987) unpublished.

3.4 West Africa

3.4.1 Nigeria

The Street law programme runs at five universities where law students are taught to use interactive teaching methods to teach about the law. The university programme was introduced in 2000. An earlier Street law programme was initiated by an NGO, the Legal Research and Resource Development Centre (LRRDC) in 1996. The LRRDC supports Street law in 10 schools in each of 10 states. The schools have formed street law clubs that are run by teachers and school pupils. The LRRDC Nigerian Street law programme has, for example, published texts on law, the Nigerian legal system and human rights.⁹¹

More recently, the new law clinics at Adekunle Ajasin University⁹², Abia State University⁹³, University of Uyo⁹⁴ and the University of Maiduguri⁹⁵ have introduced human rights and Street law-type public awareness programmes.

3.4.2 Sierra Leone

A Street law-type programme was introduced by the Department of Law at Sierra Leone at Fourah Bay Clinic. Law students are trained to give classes to schoolchildren and community-based organizations.⁹⁶

3.5 Conclusion

It is necessary for ordinary people to know their rights before they can enforce them. Street law-type clinics educate people about their rights and also provide practical advice to as to when and how people can enforce their rights. The best time to teach citizens about these rights is while they are still at school. In the United States the Street law programmes have attracted some state-funding because they appear to have assisted in reducing the crime rate amongst juveniles and to encourage young people to become more responsible citizens.

91 Legal Research and Resource Development Centre Book 1: Street Law: Law , the Nigerian Legal System and Human Rights (1996).

92 See above para 2.4.1.1.

93 See above para 2.4.1.2.

94 See above para 2.4.1.3.

95 See above para 2.4.1.4.

96 See above para 2.4.2.

CHAPTER 4: DIFFERENT MODELS OF LAW CLINICS

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Outcomes:

At the end of this chapter you will be able to describe the different types of legal clinics that can be used for clinical legal education.

4.1 Introduction

This chapter will deal with the different models of legal clinics that exist at universities and law schools in the context of their operational strategies, opportunities, challenges and expectations in respect of the provision of legal services and access to justice.

4.2 General and specialist law clinics

The provision of legal services and access to justice is the driving force for the establishment of law clinics in most African countries. Universities in Africa are often surrounded by a sea of poverty and cannot afford the luxury of running purely simulated clinical legal education programmes as is sometimes done in the developed world. In general, law clinics may offer a general service (i.e., dealing with any kind of case, barring specific types of cases excluded as a matter of law clinic policy), or a specialized service (i.e., where the law clinic deals exclusively with specified types of cases, excluding all others). Although a law clinic may be a general clinic dealing with any kind of matter, it may offer only a limited procedural service to clients- For example, the clinic may limit itself to giving

legal advice only, and will not assist the client beyond that (for example, assisting to take the matter to court on behalf of the client). Certain law clinics may specialize in certain procedures only- for example, an appeals clinic will only deal with completed cases that need to be taken on appeal.

Any service- and access to justice-oriented clinical law programme needs to consider how it will operate - depending on its objectives. A variety of models exist, depending on the client target group and the mode of delivery. Client target groups may vary from individuals requiring legal aid to specialized cases, to public interest law matters. Modes of delivery may vary from campus clinics to off-campus clinics, to mobile clinics, to farm-out clinics, to community clinics, to street law-type clinics, to alternative dispute resolution clinics, to legislative drafting clinics, to legal study skills clinics, to mixed clinics, to simulated clinics.

The work done by the clinics varies from simply giving advice and writing letters, to a full legal service that includes litigation, to documenting the problems of communities, to providing legal literacy, to using non-legal means of resolving disputes, to drafting legislation, to final year students acting as instructors for first year students, to purely simulated clinics. The type of work and nature of the clinic will influence the number of students that can be accommodated in the clinic.

Many African universities have campus and off-campus clinic offices. However, these are not the only categories. Other models that are less common in Africa and exist in other developing countries are worth discussing in the African context.

This section will deal with the following types of law clinics: (a) campus clinics; (b) off-campus clinics; (c) mobile clinics; (d) farm-out clinics; (e) community clinics; (f) street law-type clinics; (g) alternative dispute resolution clinics; (h) legislative drafting clinics; (i) teaching legal study skills clinics; (j) mixed law clinics; and (k) simulated clinics. Given the importance of clinical legal education in the context of law clinic practice, in respect of each clinic model it is necessary to consider the following: (i) the operational strategies; (ii) the opportunities; (iii) the challenges; (iv) the expectations, and (v) the impact of service-oriented clinical law programmes. These factors in respect to student numbers will also be discussed.

4.2.1 Campus law clinics

Campus law clinics operate on university campuses in premises closely linked to a law school or elsewhere on the campus. As a result they are much more accessible to law students and staff than off-campus clinics. The client target groups in campus law clinics may be individual clients attending a general practice clinic, clients with problems requiring special expertise or clients who wish to bring actions in the public interest.

4.2.1.1 Operational strategies for campus law clinics

4.2.1.1.1 Types of clients in campus law clinics

Operational strategies for campus clinics may vary from general practice clinics to specialist and public interest law clinics, but it is probably true to say that most law clinics in Africa provide legal aid on an individual basis to people who qualify in terms of a “means test” or some other indication that a person cannot afford a lawyer. Clients usually attend on a “walk-in” basis. General practice clinics tend to give law students exposure to the wide variety of poverty law problems that affect a particular community. These clinics require law students to be trained in dealing with a broad spectrum of poverty law problems, that may include labour matters such as wrongful dismissals, unemployment insurance and workmen’s compensation for injuries; consumer law problems such as credit

agreements (hire-purchase), defective products, loan sharks and unscrupulous debt collection practices; housing problems such as fraudulent contracts, non-delivery and poor workmanship; customary law matters such as emancipation of women and succession rights; maintenance; and, criminal cases.⁹⁷

Some university law clinics specialize in particular types of problems such as criminal law, labour law, women and children's rights, refugees, environmental law etc. These clinics require the students to be trained in the particular speciality in which the clinic specializes.⁹⁸

Law clinics that specialize in public interest matters only accept cases that impact on the lives of large numbers of people. The categories are similar to those in the specialist clinics and include such matters as those affecting constitutional issues, the administration of justice, prisoners' rights, refugees' rights, consumer law, environmental law, housing and land rights, women and children's rights, legal aspects of HIV/AIDS, administrative justice etc. Public interest law clinics focus on issues that impact on large numbers of people. This approach has been adopted by some South African clinics. As in the case of specialist clinics students have to be trained in the particular area of law in which the public interest matters arise.

Campus clinics are usually the best-resourced clinics, and the most beneficial for legal aid staff and students, because of easy access to library and faculty administration facilities. They also have access to academic staff who may be able to assist with cases in their respective areas of expertise. However, campus clinics will only benefit the communities they serve if they are easily accessible to clients by public transport. Their success will often depend upon the geographical location of the university or law faculty.

4.2.1.1.2 Types of work in campus law clinics

The work done by campus clinics may vary from primary legal advice to litigation. Primary legal advice is the most common activity of legal aid clinics in Africa and elsewhere. In these clinics properly supervised students provide preliminary legal advice, write letters and refer clients elsewhere. Here the clinics play the role of clearing houses for the legal profession, government offices and other bodies.⁹⁹

Where clinics engage in litigation they rely on their professional staff to supervise and sign pleadings and appear in court. Generally student practice rules¹⁰⁰ are not found in African countries – with the exception of Uganda where post-graduate students attending the vocational training institute and the Centre for Law and Development may appear in court before they qualify as practitioners. In most African countries students are limited to assisting the professional staff with supervised preliminary

97 Generally for the types of cases handled by legal aid clinics see DJ McQuoid-Mason *Outline of Legal Aid* (1982) 139-161.

98 For instance, at the campus law clinic at the University of KwaZulu-Natal where the clinic specializes in social justice, gender discrimination and juvenile justice and HIV AIDS law.

99 Cf DJ McQuoid-Mason "Legal Aid Clinics as a Social Service" in DJ McQuoid-Mason (ed) *Legal Aid and Law Clinics in South Africa* (1985) 64.

100 The present writer drafted Student Practice Rules for South Africa based on the American Bar Association Model Rules for Student Practice (Council for Legal Education and Professional Responsibility State Rules Permitting the Student Practice of Law: Comparisons and Comments 2 ed (1973) 43) and submitted them to the Association of Law Societies of South Africa in April 1985 for onward transmission to the then Minister of Justice. Although the rules were approved by all branches of the practising profession and the law schools in the late 1980s they appear to have been blocked by bureaucrats in the Department of Justice. The first Minister of Justice under a democratic government in South Africa, who took office in 1994, undertook to have the rules implemented but this never happened (see McQuoid-Mason (2000) 24 *Fordham International Law Journal* (Symposium) S 129 n 82).

work such as interviewing, statement taking, letter writing and legal research.

4.2.1.2 Opportunities in campus law clinics

4.2.1.2.1 Opportunities dependent on types of clients

Clinics that operate a general practice provide an opportunity for law students to experience a wide variety of problems that affect the poor.¹⁰¹ Students are given a window into the real world of practice. General practice clinics also allow students to appreciate just how varied legal practice can be. It gives them an opportunity to put into practice different areas of the substantive law learned by them. In some cases they will have to learn about new areas of the law.

4.2.1.2.2 Opportunities dependent on types of work

Clinics that specialize in a particular area of the law rather than in general practice provide students with an opportunity of building up expertise in a particular area. If the work in the clinic falls under an area of specialty covered by the law curriculum students obtain an in-depth understanding of the particular field of law. If it is not covered in the curriculum students have to be taught not only the practical but also the substantive aspects of the law.

Clinics that specialize in public interest law also provide students with an opportunity to become experts in a particular area of the law. Unlike in the case of subject specific clinics students, students in public interest law clinics may experience a wider variety of cases. They will also gain experience in how to litigate public interest law cases.

Where law clinics provide basic legal advice and write letters students are given an opportunity to learn interviewing and letter-writing skills. They also need to learn how to counsel clients and how to act with professional responsibility. Clinics that engage in litigation provide law students with an opportunity to observe at all the stages in a legal dispute, from the initial interview and statement taking, to legal research, letter writing, pleadings, and, in some cases, trial.

4.2.1.2.3 Opportunities to work with other faculty members

As has been mentioned campus clinics have the advantage of being located close to the University and law faculty and this provides access to university resources. Campus clinics provide an opportunity for interested faculty members to become involved in the clinic's activities as counsel. They may also provide faculty members with a window into practical aspects of the law taught by them. Students also have an opportunity to consult with experts who are close at hand.

4.2.1.3 Challenges regarding campus law clinics

4.2.1.3.1 Challenge of dealing with large numbers of clients and their needs

The greatest challenge with general practice clinics is how to limit the numbers of clients so that the clinics do not become overrun. If the number of clients exceeds the capacity of a clinic both the clients and the clinic will suffer. The clients will suffer because they will not receive proper advice and service. The clinic will suffer because its reputation will be harmed and its staff and students demoralized. Intakes need to be limited and clients referred to other agencies once the clinic reaches its capacity.

101 DJ McQuoid-Mason "Teaching Social Justice to Law Students through Community Service: The South African Experience" in PF Iya, NS Rembe and J Baloro (eds) *Transforming South African Universities: Capacity Building for Historically Black Universities* (2000) 89-203.

The challenge to clinics serving clients who require special expertise is to ensure that both students and staff develop the necessary expertise. This is particularly difficult if the speciality offered by the clinic is not offered as part of the law curriculum. In such cases it may be necessary to mount supplementary classes covering the relevant area of the law.

The challenges facing public interest law clinics are similar to those that affect specialist law clinics – for instance, the area of law that is being litigated may not be covered in the curriculum. Matters are complicated further, however, if the variety of public interest law claims handled by the clinic is not limited. Whereas a specialist law clinic may specialize in one area of the law, a public interest law firm may litigate in a number of different fields of law. The challenge is to limit the number of special fields the clinic can handle without undermining its objectives.

The challenge for campus law clinics is also to ensure that they are accessible to the public from off the campus (e.g. by bus or taxi). It should not be a challenge to locate the clinic, so it is important to ensure the clinic is situated in a user-friendly part of the campus so that it is easily found by the public once they reach the university campus. Another challenge is to keep the law clinic operational during university vacations and examination periods. A final challenge is to ensure that law students keep up to date with their files and that there is a proper system in place to monitor their work.

4.2.1.3.2 Challenges regarding the types of work

In law clinics where students provide basic legal advice and write letters the challenge is to train students to enable them to conduct competent interviews, take proper statements, carry out legal research and write accurate letters. They must also be imbued with professional responsibility and an understanding of the importance of consulting properly with their supervisors before engaging in any activities that may affect the interests of their clients.

The challenges for clinics that engage in litigation are similar to those for clinics providing primary legal advice. Students assisting with litigation also require interviewing, statement taking, letter-writing and research skills. In addition they need to acquire skills in drafting pleadings and preparing for trial – even if in the end the pleadings will be signed and the trial conducted by a professional staff member.

4.2.1.4 Expectations of clients, students and staff in campus law clinics

The expectations of the students and clinical staff are that the members of the community will cooperate with them by keeping appointments and publicizing their activities.

Clients of campus law clinics that specialize in particular areas of the law expect that they will succeed in their claims. Clinicians undertaking specialist litigation expect that the community will bring relevant cases to their attention.

Where the campus law clinic undertakes public interest litigation the expectations of the community are that their cases will be won and that systemic changes will occur in the areas of dispute. Clinicians undertaking public interest litigation, as in the case of specialist clinics, expect that members of the community will cooperate by bringing relevant public interest cases to their attention.

4.2.1.4.1 Expectations of clients regarding students and staff

The expectations of clients in the general practice clinics, specialist law clinics and public interest campus law clinics are that they will receive a proper service from the professional staff and student advisors. Clients will also expect that their cases will be dealt with timeously by their designated legal aid advisors, and that they will not be unnecessarily referred to other people or institutions for assistance. They will also expect that students and staff make sure that they are available for pre-arranged consultations on the dates in question.

The expectations of the clients are also that law students, who provide basic legal advice and write letters, are able to conduct competent interviews, take proper statements, carry out legal research and write accurate letters. The expectations of the community are that the campus law clinic will serve their needs by giving them the necessary advice and, where necessary, legal representation. The same applies in respect of students in clinics that litigate.

4.2.1.4.2 Expectations of students regarding clinic staff and clients

The expectations of students in general practice, specialist or public interest clinics are that they will receive exposure to a variety of practical problems and learn the necessary skills to enable them to interview clients, take statements, write letters and conduct legal research on practical aspects of the relevant law. Students also expect that professional staff will be available to advise them and supervise their work.

The expectations of students regarding clients are that the latter will keep their appointments and comply with any requests that are necessary in order for the students and staff to assist them effectively.

4.2.1.4.3 Expectations of law clinic staff regarding students

The expectations of legal aid clinic professional staff are that the students will do their work properly, will keep up to date with their files, and will subject themselves to regular supervision. They also expect that the students will demonstrate professional responsibility – not only when interacting with clients, but also in their relationship with staff members and other students in the clinic.

4.2.1.5 Impact of campus law clinics

Campus law clinics can only impact on the community to the extent that they are consulted by members of the community. If a clinic is not accessible because of its location, or is not well-known because of lack of publicity or information or networking with other organisations, it may not be consulted by many clients from the community. This is often the case when clinics are set up for the first time – particularly if they are located on a university campus rather than in the community. Where clinics only specialize in particular cases or in public interest law they need to inform the community properly so that poor people do not make unnecessary, and to them, expensive trips to the campus. Care should be taken to ensure that poor people are not sent from pillar to post when seeking legal aid.

4.2.1.5.1 Impact of general practice campus law clinics

The impact of the legal aid work in the community will depend upon whether the campus clinic functions effectively irrespective of the nature of its work. Where a campus clinic undertakes general practice it will assist individual members of the community to obtain justice. It will not necessarily - unless it sets an important precedent that affects the public at large - deal with systemic issues that may change the system to benefit the community as a whole. Where a campus clinic operates as a

general practice it has the opportunity to monitor a wide range of poverty law problems that affect a particular community and to determine patterns of abuse. Even though it only helps people on an individual basis it may be able to refer appropriate cases that require systemic change through specialist or public interest litigation to suitable bodies.

4.2.1.5.2 Impact of specialist campus law clinics

A specialist campus law clinic – unless it undertakes public interest law work - may only benefit individuals whose cases fall within its special field. Poor members of the community whose cases fall outside the clinic's work will be left remediless unless the clinic sets up a referral mechanism to ensure that people are not turned away without further assistance. Campus clinics that operate as specialist law firms have an opportunity to build up a body of expertise in a particular area. This places them in a unique position to document abuses in their particular field and where appropriate to lobby and advocate for changes that can bring about access to justice for the people concerned.

4.2.1.5.3 Impact of public interest law campus clinics

A campus law clinic that undertakes public interest law work is likely to have a significant impact on the community that it serves. This is because public interest law cases are specifically chosen to ensure that systemic changes occur in order to achieve social justice for large numbers of people. Campus clinics that act as public interest law firms are in a similar position to specialist law clinics except that they only take on individual cases that will affect large numbers of other people. Like specialist law firms they will be able to document abuses and lobby and advocate for change.

4.2.2 Off-campus law clinics

Off-campus clinics operate away from the university campus and the law school. They are usually much less accessible to students and staff than campus clinics. However, depending on their location, they tend to be more accessible to clients than campus clinics.

4.2.2.1 Operational strategies in off-campus law clinics

Off-campus clinics may have the same operational strategies as campus clinics regarding their clientele. They may operate as general practice, specialist or public interest law clinics. Off-campus clinics have the advantage of being located in places convenient to the clients such as in busy areas of the city where there is easy access to public transport or in suburbs or communities where the target clients live. There also has to be easy access for the law students who assist at the clinic.

The work done by off-campus clinics is often the same as that done by campus clinics.

4.2.2.2 Opportunities in off-campus law clinics

The opportunities available to students in off-campus clinics are the same as those for students in campus clinics. In addition off-campus clinics provide an opportunity for students to work in a city or neighbourhood environment away from the sanitized safety of a campus law clinic. This gives them a more realistic idea of the outside world. Getting to and from off-campus clinics provides students with the opportunity to learn time-management skills in respect of balancing their academic and practical work.

4.2.2.3 Challenges in off-campus law clinics

The challenges for off-campus law clinics are the same as for campus law clinics concerning accessibility for clients by public transport and the location of the building. The other challenge is to ensure that the clinic is easily accessible to law students so that they can comfortably balance their

clinic service with their lecture requirements. The challenges regarding the work done are the same as for the campus clinics.

4.2.2.4 Expectations of clients, students and staff in off-campus law clinics

The expectations of clients, students and staff in the off-campus clinics are the same as those for the campus clinics.

4.2.2.5 Impact of off-campus law clinics

As in the case of campus law clinics, the impact of the legal aid work in the community will depend upon whether the clinic undertakes general practice, specialist or public interest litigation. A major advantage off-campus clinics have over campus clinics is that they are often located in the communities they serve and this makes them able to have a greater impact by attracting more clients.

While general practice off-campus law clinics serve the community at large and can have a widespread impact across the community on an individual basis, specialist and public interest law firms are much more restrictive in their clientele. To make a worthwhile impact, off-campus clinics, like campus clinics, need to ensure that there is a proper referral system for poor people who require legal aid outside of the work of the clinic.

The impact of an off-campus law clinic on the community is likely to be the same as that of a campus law clinic which provides similar services.

4.2.3 Mobile law clinics

Mobile law clinics are clinics that move away from the campus or off-campus clinics and visit the communities they serve. They often work on a circuit basis in that they may visit a particular community or neighbourhood on a regular day of the month (e.g. the first Saturday of each month).

4.2.3.1 Operational strategies in mobile law clinics

Mobile law clinics may also have the same operational strategies as campus and off-campus clinics regarding their clientele. As has been mentioned mobile clinics travel to convenient meeting places in the communities they serve. Usually mobile filing cabinets are used. The filing cabinets and files are taken to the site of the clinic on the day. Master files and a control diary are kept at the main clinic. Supervised students deal with existing files and new matters at the venue of the mobile clinic. All files are followed up and monitored on a regular basis at the main clinic.

The work done by mobile law clinics is often the same as that done by campus and off-campus clinics.

4.2.3.2 Opportunities regarding mobile law clinics

Students who work in mobile law clinics have the same opportunities as students in campus and off-campus clinics. In addition mobile law clinics provide students with opportunities to reach out into communities and to explore places that they would not normally visit. As in the case of the off-campus clinics mobile law clinics enable students to learn time-management skills in respect of balancing their academic and practical work.

4.2.3.3 Challenges in respect of mobile law clinics

The biggest challenge facing mobile law clinics is to ensure that files are properly monitored and a master filing system exists at the main clinic to prevent files being lost. An effective diary system is required so that all files can be tracked from the moment they leave the main clinic for use in the

mobile clinic until their return to the main clinic. Students have to be taught to be particularly scrupulous in this regard.

The other challenges facing mobile law clinics are the same as those affecting campus and off-campus clinics depending on the type of work of the clinic.

4.2.3.4 Expectations of clients, students and clinic staff of mobile law clinics

The expectations of clients, students and staff in mobile law clinics are the same as those for campus and off-campus clinics. In addition the clinic staff expect students to be particularly diligent in ensuring that client files do not go missing between the main clinic and the mobile clinic.

4.2.3.5 Impact of mobile law clinics

The impact of legal aid work in the community will depend upon whether the mobile law clinic undertakes general practice, specialist or public interest litigation. An advantage that mobile law clinics have over off-campus and campus clinics is that they visit the communities they serve. This places them in direct contact with the community at grassroots level.

While general practice mobile law clinics, like campus and off-campus clinics, serve the community at large, specialist and public interest law firms are much more restrictive in whom they accept as clients. In such situations, as in the case of campus and off-campus clinics, mobile law clinics need to ensure that there is a proper referral system for poor people who require legal aid not provided by the clinic.

4.2.4 Farm-out law clinics

Farm-out law clinics are based on cooperation or partnership agreements between law schools and outside bodies such as NGOs, other private bodies or government departments.¹⁰² They differ from campus clinics, off-campus clinics or mobile clinics in that administrative control of the clinic vests in the host organization.

4.2.4.1 Operational strategies regarding farm-out law clinics

Farm-out law clinics usually involve students working in a legal or paralegal NGO or government office involved with the administration of justice or correctional services. Students are required to serve a certain number of sessions with the institution concerned under the supervision of the management of the organization. They are supervised by the personnel of the host organization and usually have to produce a written report on their work and experiences regarding the administration of justice or correctional services.

4.2.4.2 Opportunities in farm-out law clinics

Farm-out law clinics provide law students and faculty members with an opportunity to build meaningful relationships with NGOs and publicly funded bodies that are involved in the administration of justice and correctional services. Students also obtain a unique insight into how these bodies operate in practice. Farm-out law clinics also remove the load of daily supervision from the shoulders of the regular law clinic staff.

¹⁰² A farm out approach is used by the University of Botswana legal aid programme – only a handful of students are able to work in the campus clinic.

4.2.4.3 Challenges with farm-out law clinics

The main challenge with farm-out law clinics is to make sure that the law students who are farmed out to NGOs and publicly funded bodies involved in the administration of justice and correctional services are properly supervised. Farm-out law clinic programmes may lift the load of daily supervision from the shoulders of the staff at the main clinic – depending on how well the students are supervised by the host organisation. Supervision by outside bodies needs to be carefully monitored to ensure that students receive the type of practical experience and community service that is required by the programme.

4.2.4.4 Expectations of clients, students and staff in farm-out law clinics

The expectations of clients of farm out law clinics, as in the case of the other clinics, are that their cases will be dealt with timeously by their legal aid advisors, and that they will not be unnecessarily referred to other people or institutions for assistance. They will also expect the students to be available for consultations on the pre-arranged dates.

As in the case of the other clinics, the expectations of students in farm-out law clinics are that clients will keep their appointments. In addition students will expect that professional staff from the host NGO or public institution concerned with the administration of justice or correctional services will be available to supervise their work.

The expectations of legal aid clinic professional staff are that the students will do their work properly, and that the professional staff at the host institution will supervise the students adequately and submit a report on each student's work.

4.2.4.5 Impact of farm-out law clinics

The impact that a farm-out clinic makes on the community depends upon the nature of the work done by the host organization to which the law students are attached. If the organization provides general legal advice and assistance its impact will be the same as that of a general practice clinic. If its work involves advice and legal representation in specialist or public interest law cases the impact will be the same as for specialist or public interest law clinics.

In order to maintain the credibility of the community, where the farm-out clinic offers a restricted specialist or public interest law service it should ensure that there is a proper referral system for poor people who require legal aid not provided by it.

4.2.5 Community law clinics

Community law clinics involve law students living in a community, (usually during a vacation period), in order to identify and record the types of legal problems encountered by the community. They are then required to research the problems and provide appropriate solutions.

4.2.5.1 Operational strategies regarding community law clinics

The operational strategies adopted when running community law clinic programmes will depend upon whether the students have to work in communities during their vacations or on week-ends. In addition a decision has to be made whether the students are required to identify systemic rather than individual problems in the community. The types of problems identified will determine whether the solutions will be individual-based or systemic. Students in community law clinic programmes are required to write up their experiences and solutions. They also have to follow-up with action from the main law clinic or other role-players who can assist. Community-based law clinics in which law

students are required to live in communities during their vacations to assist in problem solving have been used very successfully in India,¹⁰³ Bangladesh¹⁰⁴ and the Philippines.¹⁰⁵

4.2.5.2 Opportunities regarding community law clinics

Community law clinics provide law students with an opportunity to live in a community and to assist its members in achieving access to justice. Students experience at first hand the trials and tribulations of the community and are placed in a position where they may be able to bring about meaningful changes to alleviate the plight of the local people.

Community-based law clinic students are able to apply their research and problem solving skills to real life cases involving whole communities. Sometimes, as in Bangladesh, the students have an opportunity to publish their research where it contributes to knowledge about how to solve certain community problems.¹⁰⁶ They may also experience the satisfaction of having helped large numbers of people to secure justice.

4.2.5.3 Challenges regarding community law clinics

Community law clinics, like farm-out clinics, need careful monitoring. They may also give rise to logistical challenges such as how to fund travel, accommodation and subsistence for the students. One method of overcoming these challenges is for students to carry out their work in their home community in which case no additional costs will be incurred except for expenses directly related to the research (e.g. the cost of questionnaires).

The challenge for community-based law clinics is to train students in how to conduct empirical research, (e.g. how to draft and use questionnaires), and to provide the students with the necessary tools to develop practical solutions to the problems encountered by them. They also need to be taught how to use their research and solutions for lobbying purposes, and how to present them for publication.

4.2.5.4 Expectations of clients, students and staff involved in community law clinics

4.2.5.4.1 Expectations of community law clinic clients regarding students

The expectations of clients living in the community where the students are based are that the students will help them to identify their problems and find practical solutions for them. They will also expect the students to consult with them on regular basis when identifying issues and proposing solutions.

4.2.5.4.2 Expectations of community law clinic students

The expectations of the students in community-based clinics are that they will be welcomed, supported and trusted by the community. Students would also expect to receive adequate support from the main clinic to enable them to successfully complete the project to the benefit of the community. The students would hope that they succeed in changing the lives of the community for the better. The students might also expect to use their research and solutions for lobbying purposes,

103 For instance, at the National Law School in Bangalore.

104 See for instance, Mizanur Rahman (ed) *Combating the Khosi Uprooting: Humanity Cries* (2004).

105 See Ateneo Human Rights Centre Ateneo Human Rights Centre (2006) 6-7.

106 See for instance, Mizanur Rahman (ed) *Combating the Khosi Uprooting: Humanity Cries* (2004).

and to present them for publication.

4.2.5.4.3 Expectations of community law clinic staff

The expectations of the law clinic staff are that the students will submit a well-researched report on their work that not only identifies the problems but also provides follow-up guidelines and practical solutions. The other expectations of the clinical staff are likely to be the same as those of the students.

4.2.5.5 Impact of community law clinics

The impact that a community law clinic makes on the community depends upon the success of the law students in identifying the problems and developing solutions. This can only be achieved if the community trusts the students. The students must be given the necessary tools to work closely with the community so that they attain such trust. The main clinic at which the students are based must introduce the students to the community and put mechanisms in place to build trust between the students and the community.

The opportunities for community-based law clinics to make an impact on the community are great because the law students live, and identify problems, in the community. Provided students are given the proper research, problem-solving and lobbying tools, and the necessary follow-up support by the main clinic when they leave the community, they can make a major impact by bringing about changes to the lives of the community.

Community-based clinics need to ensure that the main clinic and the law students maintain credibility with the community by working closely with them. The clinic and the students must consult with the community in respect of each phase of the issue identification and problem-solving stages of the project. The community law clinic must also retain the confidence of the community by engaging in effective follow-up procedures so that the community can see meaningful changes to their lives on the ground.

The community law clinic will only make a worthwhile impact if after the students have left the community is supported with back-up from the main clinic until its problems have been solved. This will ensure that the students in community-based clinics are welcomed and trusted by the communities they serve. Students also require adequate support from the main clinic to enable them to successfully complete the project to the benefit of the community.

4.2.6 Street law-type clinics

Street law-type clinics are clinics that train law students to teach people legal literacy using interactive teaching methods.

4.2.6.1 Operational strategies for street law programmes

Depending on the objectives of the clinic, street law-type clinics train law students to teach schoolchildren, prisoners and members of the public about law, human rights and democracy. Law students are usually required to teach a certain number of lessons in high schools or prisons using pupil-centered learning techniques. During the lessons the students frequently have to deal with questions about the law. Some street law programmes may also incorporate an advice-giving component by the students themselves or in conjunction with the campus or off-campus legal aid clinic.

Law students are often required to teach a series of interactive lessons on areas of the law such as an introduction to law and the legal system, criminal law and juvenile justice, consumer law, family law, socio-economic rights, family law, human rights, democracy and HIV/AIDS and the law, at high schools and prisons.¹⁰⁷ They also have to be able to answer questions on relevant areas of the law.

4.2.6.2 Opportunities in street law-type clinics

Street law-type clinics provide students with an opportunity to learn a number of lawyering skills such as preparing arguments, thinking on their feet, explaining the law in simple terms, trial preparation and public speaking. They obtain first-hand knowledge about social justice issues in the schools and communities where they work.

Law students have the opportunity to learn a variety of pupil-centred teaching activities such as role-plays, simulations, games, small group discussions, opinion polls, mock trials, debates and field trips.¹⁰⁸ Law students are trained to draw on the real life experiences of the school children and communities they teach when discussing the law. Street law-type clinical programmes enable law schools to expose large numbers of law students to clinical work without requiring the small staff-student ratios associated with more traditional clinical programmes.

4.2.6.3 Challenges in street law-type clinics

Street law-type clinics involve challenges similar to those experienced by farm-out programmes. This is particularly true in respect of programmes where students are required to teach in schools or prisons. Here the clinic organizers often have to rely on supervision and monitoring by the outside bodies serviced by the street law programme. For instance, in the case of high schools and prisons it may not be possible for the street law course instructors and administrators to visit all the schools or prisons involved. They may have to rely on reports from schoolteachers and prison administrators.

Another challenge for street law-type clinics is to train students in how to teach schoolchildren and prisoners about law, human rights and democracy using interactive teaching methods rather than lectures. The challenge is made difficult by the fact that law students are confronted on a daily basis by law faculty staff using lecture methods. It is necessary to get the students to make a clean break from lectures, and to have the confidence to embrace experiential learning using interactive methods.¹⁰⁹ Students also need to be taught how to think and answer questions on their feet.¹¹⁰

4.2.6.4 Expectations of recipients, students and staff in street law programmes

4.2.6.4.1 Expectations of recipients of street law programmes

The expectations of schoolchildren and prisoners in the street law programmes are that they will gain knowledge about how the law and the legal system works; how they can use the law and alternative dispute methods to solve problems; and how to obtain the services of a lawyer when they need one.

4.2.6.4.2 Expectations of law students in street law programme

The expectations of the law students in street law programmes are that they will learn lawyering skills

107 See generally David McQuoid-Mason, Lloyd Lotz, Lindi Coetzee, Usha Jivan, Sibonile Khoza and Tammy Cohen *Street Law South Africa: Practical Law for South African Students* 2ed (2004).

108 See generally David Jan McQuoid-Mason "Reducing Violence in South Africa through Street Law Education of Citizens" in Gerd Ferdinand Kirchoff, Ester Kosovski and Hans Joachim Schneider (eds) *International Debates of Victimology* (1994) 347-353.

109 See below Chapter 10

110 See Chapter 10

such as thinking on their feet, presenting arguments, preparing for trial and speaking in public. They also expect to make a contribution to legal literacy amongst schoolchildren and prisoners. Another expectation of law students is that they will get adequate training and logistical support from the staff and administrators in the street law programme.

4.2.6.4.3 Expectations of staff and hosts working with street law programmes

Street law staff will expect that the students prepare properly for their lessons and ensure that they arrive at venues on time. They also expect that the students get their reports signed by the host organizations and prepare proper lesson plans where these are required to be handed in for academic credit.

The host organizations will expect that the street law students arrive at classes on time and teach the target participants in an effective manner.

4.2.6.5 Impact of street law-type clinics

The impact that a street law-type clinic makes on the community depends the type of community it serves and the methods used to train law students to teach about law, human rights and democracy. If the street law programme is aimed at secondary schoolchildren or prisoners it should be designed to empower the pupils or prisoners to be aware of their legal rights and responsibilities, to understand how law and the legal process works, and to know what to do should they require legal advice or assistance.

If the street law programme is incorporated into the formal high school curriculum it is likely make a greater impact on schoolchildren than if it is merely a non-formal optional course. Similarly, if street law is included as a formal part of prisoner rehabilitation in the prisons it is likely to have a greater impact than if it is simply offered to prisoners on an ad hoc basis. Whether street law is offered as a formal or non-formal course to schoolchildren and/or prisoners the law students must be trained to use interactive teaching methods to ensure that the learning is effective.

For maximum impact the street law programme should also be made available in disadvantaged and rural schools that do not have many resources, and in prisons that are away from the larger urban areas. Street law-type clinics can meet this challenge by allowing law students to teach street law in such environments during the university or law school vacations.

In street law-type clinics law students may give preliminary legal advice and then refer the pupils or prisoners to the university's live client clinic or a local legal aid agency that can assist with their problems.

4.2.7 Alternative dispute resolution clinics

Alternative dispute resolution clinics train students in how to use non-legal methods to resolve disputes. In order to achieve this students have to be taught how to use negotiation and mediation skills when dealing with clients in the clinic.

4.2.7.1 Operational strategies for alternative dispute resolution clinics

In India law clinic students have been used in a highly structured alternative dispute resolution programme. The law students are involved in the *lok adalats* or "people's courts" where they assist with the functioning of such courts on week-ends or public holidays. The *lok adalats* try to

settle disputes referred to them by the courts for resolution by negotiation, arbitration or conciliation. The law students do all the preparatory work of interviewing the parties in order to obtain a negotiated settlement. If this does not work the parties attend the *lok adalat* presided over by a panel consisting of a district court judge or magistrate, a lawyer and a social worker. The proceedings are conducted informally and the parties, (and their lawyers if they are represented), appear before the panel in an attempt to reach a solution.¹¹¹ In some states the *lok adalats* are organized by the state legal aid bodies, while in others the coordination is done by paralegal organizations or even the courts.¹¹²

4.2.7.2 Opportunities in alternative dispute resolution clinics

Alternative dispute resolution clinics such as the *lok adalats* allow students the opportunity to work outside the court system in conjunction with lawyers and social workers. Thus they work together with district court judges, legal practitioners and social workers, to assist parties to come to settlements. As a result they gain valuable experience by working with both live clients and professionals in different fields.

In alternative dispute resolution clinics law students learn the theory and practice of negotiation and mediation skills. Once they have learned how to negotiate and mediate they have an opportunity to apply the different techniques in practice. This may be done in a clinic setting or under a system akin to the Indian *lok adalat* programme where the law students assist the parties in a formal conciliation process.

4.2.7.3 Challenges for alternative dispute resolution clinics

The challenge for alternative dispute resolution clinics is to train law students to change their behaviour from the traditional adversarial approach usually adopted by lawyers to an alternative dispute resolution model that encourages consensus. This is not always easy because the adversarial approach is reinforced on a daily basis by teachers at law schools and it requires techniques in behaviour-modification to train law students in negotiation and mediation skills. For instance, one of the most difficult things for law students, (and lawyers), to appreciate in the mediation process is that they must not give legal advice!

4.2.7.4 Expectations of clients, students and staff alternative dispute resolution clinics

The expectations of clients in alternative dispute resolution clinics are that the law students will be suitably trained to conduct successful negotiations and mediations. The expectations of the students and the law clinic staff are the same as those of the clients.

4.2.7.5 Impact of alternative dispute resolution clinics

The impact of alternative dispute resolution clinics will depend upon how they operate. If the clinic deals with individual cases (e.g. domestic violence cases) the impact will be on the individuals involved. If the clinic is involved in an Indian *lok adalat* type programme it may impact on numerous people who have been trying to settle their disputes through the law. If the alternative dispute resolution clinic deals with community disputes it may impact on large numbers of people as whole communities will be involved.

111 Nomita Aggarwal Handbook on Lok Adalat in India (1991) 1.

112 Aggarwal Handbook on Lok Adalat 3-7. See also S Muralidhar Law, Poverty and Legal Aid: Access to Criminal Justice (2004) 121-122.

4.2.8 Legislative drafting clinics

Legislative drafting clinics train law students in how to draft legislation in important areas of the law. The draft legislation is then sent to the relevant government department or legal research body. Often such clinics work very closely with government departments, law commissions or NGOs. For example, in South Africa students attached to the Independent Medico-Legal Unit (IMLU), University of Natal, Durban, helped to draft a Bill to rationalize forensic medicine services. A clinical programme to revise aspects of mental health law was undertaken by the University of Greenwich in London, England.

4.2.8.1 Operational strategies for legislative drafting clinics

In legislative drafting clinics law students research the need for amendments to relevant legislation and then analyse the existing legislation in the context of the needs. The students are required to research how the defects in the legislation can be remedied. They do this by examining other national and comparative legislation in countries dealing with similar problems. Having laid a theoretical base of guiding principles the students then prepare draft legislation which is presented to the appropriate government or NGO body that is proposing the legislative changes.

Legislative drafting clinics usually involve small numbers of students who focus as a team on particular changes to legislation. If students are to be involved in drafting a completely new statute, and not simply in amending existing legislation, it may be possible to accommodate many more students by allocating different aspects of the legislation to separate teams of students.

4.2.8.2 Opportunities in legislative drafting clinics

Legislative drafting clinics give law students the opportunity to make a major contribution to social change. It also enables them to work with policy makers and lawyers with legislative drafting experience. As a result they gain valuable experience in how laws are drafted and the process that follows from the time that a policy has been determined until it is implemented as legislation.

4.2.8.3 Challenges for legislative drafting clinics

The first challenge for legislative drafting clinics is to train law students in suitable research skills to be able to assess the needs of communities and societies and to relate them to omissions in existing legislation. The second challenge is to train students how to draft legislation. The final challenge is to give them sufficient confidence to effectively present their prospective legislation together with its underlying principles to relevant government officials and NGOs in public forums.

4.2.8.4 Expectations of students and staff in legislative drafting clinics

The expectations of students and staff in legislative drafting clinics is that the law students will be suitably trained to conduct needs assessments and relate their findings to the legislative changes that are required. Students and clinic staff will also expect that the students have the necessary skills to undertake legislative drafting.

4.2.8.5 Impact of legislative drafting clinics

The impact of legislative drafting clinics will depend upon how closely the clinic works with the authorities that have the power to implement the recommended changes. The impact will be greatest where the clinic has the credibility to engage with the relevant government authority

that has the power to put in place the mechanisms necessary to bring about the changes. However, the same result may be achieved if the clinic works with an NGO that has credibility with the relevant government authorities that can take the process forward.

4.2.9 Teaching legal skills clinics

Teaching legal skills clinics have been used in South Africa to train senior law students how to teach first year law students about the law using interactive teaching methods. For example, the teaching legal skills course that operates at the University of KwaZulu-Natal, Durban (UKZN) involves senior law students being trained in how to use student-centred teaching methods to teach first year law students in the weekly interactive classes on introduction to law and foundations of law.¹¹³ The senior students are trained like street law-type clinic students and their teaching is subjected to critical review by the students and the course coordinator.

4.2.9.1 Operational strategies for teaching legal skills clinics

Teaching legal skills clinics require a limited number of senior law students who can be trained as junior law teachers. They need to be carefully prepared for the first year classes they will be teaching. The UKZN model requires the 20 teaching legal skills clinic students to meet once a week with the course coordinator for the first year courses that they teach. At each meeting students are taken through the interactive lesson that they will be teaching and given a step-by-step account of how to teach each lesson. The clinic students then present the lesson to small groups of first year students – usually not more than 15 in a class. Under this system 20 teaching legal skills clinic students can teach up to 300 first year students in small groups.

4.2.9.2 Opportunities in teaching legal skills clinics

The teaching legal skills clinic programme allows students who might be attracted to academic life an opportunity to experience what teaching is like in a supportive environment. The intense supervision and preparation for classes gives them an opportunity to build their self-confidence as prospective law teachers.

4.2.9.3 Challenges for teaching legal skills clinics

The challenge for teaching legal skills clinics is to train law students to use interactive teaching methods. This is not always easy because if they use other lecturers in the law school as their role models they will find that most of the law teachers tend to use the lecture method of instruction. The challenge is to give the teaching legal skills clinic students sufficient confidence to use interactive teaching methods so that they do not fall back into the habit of simply delivering lectures.

4.2.9.4 Expectations of first year students, student teachers and staff in teaching legal skills clinics

The expectations of first year students are that the teaching legal skills clinic students will be properly trained to provide interesting and effective interactive lessons. The expectations of the student teachers will be that they have the necessary training and confidence to teach the first year students competently. The expectations of the teaching legal skills clinic staff will be the same as those of the first year students and student teachers.

4.2.9.5 Impact of teaching legal skills clinics

113 For how these courses are taught see generally, David McQuoid-Mason "Incorporating Justice and Ethical Issues into First Year Undergraduate Law Courses: A South African Experience" (2002) 1 J of Commonwealth Law and Legal Education 107-125.

The impact of a teaching legal skills clinic is twofold: Firstly, if the clinic is effectively organized and the clinic student teachers are well trained, it will ensure that the first year law students receive a thorough understanding of the foundations of law and the legal system. Secondly, it will impact on the final year law students in the programme. Not only will they gain considerable self-confidence regarding their communication skills, but they will also be influenced into deciding whether or not they wish to choose law teaching as a career.

4.2.10 Mixed law clinics

Mixed law clinics may operate on or off-campus or as mobile clinics. They may combine general practice with specialist clinic work or even public interest litigation. Depending on their location, they operate in the same manner as campus, off-campus or mobile clinics.

4.2.10.1 Operational strategies in mixed law clinics

Mixed law clinics have the same operational strategies as campus, off-campus and mobile law clinics regarding their clientele. The difference is that they may operate as a combination of general practice, specialist or public interest law clinics. Mixed clinics have the same advantages as campus, off-campus and mobile clinics. The work done by mixed clinics is often the same as that done by campus, off-campus and mobile clinics.

4.2.10.2 Opportunities in mixed law clinics

The opportunities available to students in mixed law clinics are the same as those for students in campus, off-campus and mobile clinics. Mixed law clinics that incorporate a general practice component provide opportunities for broader exposure to practical legal problems than the narrower focus associated with specialist or public interest law clinics.

4.2.10.3 Challenges in mixed law clinics

The challenges for mixed law clinics are the same as for campus, off-campus and mobile law clinics concerning the number of clients that can be handled, accessibility for clients by public transport and the location of the building. Likewise the clinic needs to be easily accessible to law students so that they can balance their clinic service with their lecture requirements. The challenges regarding the work done are the same as for campus, off-campus and mobile clinics.

4.2.10.4 Expectations of clients, students and staff in off-campus law clinics

The expectations of clients, students and staff in mixed law clinics are the same as those for the campus, off-campus and mobile clinics.

4.2.10.5 Impact of mixed law clinics

As in the case of campus, off-campus or mobile law clinics, the impact of the legal aid work in the community depends upon how much general practice, specialist or public interest litigation the clinic undertakes.

While mixed law clinics may serve the community at large by incorporating a general practice component, the specialist and public interest components are likely to be much more restrictive in their clientele. The impact of a mixed law clinic on the community will depend upon the proportion of its work that is general, specialist or of a public interest nature.

4.2.11 Simulated law clinics

As has been mentioned, most African and developing countries cannot afford the luxury of simulated law clinics. However, they are a useful model for developing legal skills in the classroom. Simulated law clinics have little direct impact on the community unless they are linked to a live client clinic or students are farmed out to legal aid agencies, or some other government or non-governmental organizations that provide access to justice.

4.3 Student numbers

The number of students that are required to go through a clinical law programme, together with the staff-student ratio of supervisors to students, may have a significant effect on how a clinic can function without comprising service standards.

4.3.1 Student numbers impacting on operational strategies

Whatever mode of delivery is used to provide legal services the law clinic needs to decide how many students it can accommodate, and on the ratio of students to law clinic supervising staff. In developed countries the ideal ratio is said to be about 10 law students to one supervising staff member. However, for developing countries such a ratio is too expensive. It is unlikely that many African law clinics can afford to operate on a ratio of less than 20 students to one staff member. In some countries such as Uganda the law clinic staff are expected to accommodate over 400 students in clinical programmes over a two-week period. Generally street law-type clinics can accommodate much larger numbers of students than traditional live client law clinics.

4.3.2 Opportunities arising from student numbers

The number of students targeted by a clinic may provide an opportunity to increase the staff required to teach them – provided the law school has an equitable policy regarding staff-student ratios. If not, a law clinic should not lose sight of the fact that its primary goals are clinical legal education and properly supervised client service. Therefore if additional students are imposed on the clinic, without a commensurate increase in staff, the clinic should refuse to enroll the increased student numbers. This is because both the educational and service functions of the clinic will be compromised.

Increased student numbers may however also provide valuable opportunities for universities and law schools to build links with the practising legal profession by inviting practitioners to assist with supervision in the law clinic. This is likely to be particularly successful if the practitioners themselves went through the clinical programme as law students.

4.3.3 Challenges arising from student numbers

The biggest challenge to most clinical law programmes is how to limit the number of law students who can be accepted. Different methods can be adopted for selecting students into the programme. These include: (a) academic merit; (b) demonstrated commitment to social justice; (c) an appropriate test; and (d) selection based on background and socio-economic status (e.g. from a previously disadvantaged community). If large numbers of students are required to be put through a clinical law programme the street law method is the most cost-effective method as it does not require the degree of intensive individual supervision that is used in live client clinics.

4.3.4 Expectations of clients, students and clinic staff regarding student numbers

The expectations of clients, students and law clinic staff are that there are not so many students in the

clinical law programme that service delivery is compromised because it is impossible for the law clinic staff to train and supervise the students properly.

4.3.5 Impact of student numbers on law clinics

In case where law clinics are required to accept large numbers of students without a corresponding increase in the number of staff to maintain staff-student ratios at no more than 1-20 it is likely that the students will not be properly supervised. If students are not properly supervised the standard of service to clients will decline and the clinic will lose its credibility. There may also be legal consequences for the law clinic and its professional staff if as a result of increased student numbers supervision is compromised and legal claims become prescribed as a result of a statute of limitations. A poorly supervised clinic will also impact on the clinic students who will become frustrated in the handling of their cases and at being unable to reap the full benefits of a functioning clinical legal education programme.

4.4 Conclusions

In the light of the above the following conclusions can be drawn:

1. The operational strategies, opportunities, challenges, expectations and impact of clinical legal education programmes with service components will depend upon the target clientele selected and mode of delivery used.
2. The mode of delivery may take the form of general practice, specialist or public interest campus, off-campus, mobile or farm out clinics; community clinics; street law-type clinics; alternative dispute resolution clinics; legislative drafting clinics; teaching legal skills clinics, mixed clinics and simulated clinics – but the list is not closed.

Clinical programmes focused on public interest law, community-based, street law-type, and legislative drafting clinics are likely to impact on larger numbers of people than those that involve general practice, specialization, alternative dispute resolution or teaching legal skills.

PART II: ESTABLISHING AND MANAGING LEGAL CLINICS AT LAW SCHOOLS

CHAPTER 5: OVERVIEW OF STEPS TO SET UP A LAW CLINIC

Contents:

- 5.1 Introduction
- 5.2 The Steering Committee
- 5.3 Objectives, policy statement and name of the clinic
- 5.4 The clinic model, constitution and financing of the law clinic
- 5.5 Management structure of the law clinic
- 5.6 Staffing and administration of the law clinic
- 5.7 Case study: Report on Eduard Mondlane law clinic

Outcomes:

At the end of this chapter you will be able to:

Understand the steps to take to set up a new law clinic, and know the basic information and resources required to carry out this task.

5.1 Introduction

When planning to set up a new law clinic, there are a number of planning steps that have to be considered. These are, in sequence, forming an informal steering committee to drive the establishment of the clinic; deciding on the main and subsidiary objectives of the clinic; the choice of the clinic model that will be best suited to carry out these objectives; the management structure and other human resources required; the set-up budget; the physical situation and administration systems; the staffing of the clinic; and putting systems into place to deal with the academic and administrative requirements of the students who will man the clinic.

The clinic set-up steps discussed below are illustrated in the case study on the setting up of a law clinic at the Eduardo Mondlane University in Maputo, Mozambique, 2003..

5.2 The Steering Committee

The initiator of the law clinic must form an informal steering committee to take the planning process leading to the setup of the clinic forward. It is important that this steering committee include all members who have a direct interest in the clinic, or will be affected by the clinic. To ensure speed of action, however, it is important that the informal steering committee not be too big, usually not more than three people. Depending on the circumstances, the informal steering committee can be formed by invitation of the initiator, or they can be appointed or elected by a formal meeting. Once the informal steering committee has prepared a draft plan of action for the implementation of the law clinic, a formal steering committee must be appointed following a meeting by the relevant stakeholders to take the implementation process forward. All the steps described below, will be steps taken by a properly mandated steering committee.

5.3 Objectives, policy statement and name of the clinic

5.3.1 Objectives

The first step that must be taken by the steering committee is to list the main and any subsidiary objectives of the clinic. This will be done after full discussion with all the stakeholders, and after obtaining a mandate from relevant stakeholders. For example, the steering committee will have to decide whether the main objective of the clinic will be training of law students in lawyering skills with a subsidiary objective being the provision of basic legal services to indigent members of the public, or whether these two objectives should have equal weight.

5.3.2 Policy Statement

Once the main and subsidiary objectives have been decided on and written down, the next step would be to draft a policy statement for the law clinic. The policy statement is an extremely important document, as this statement provides the parameters for the drafting of a constitution for the law clinic. On completion of a draft policy statement, it must be taken to the Board from which the steering committee derived its mandate for discussion, debate and approval.

5.3.3 Naming the clinic

Only after the objectives and policy statement have been finalized, should a final name be chosen for the clinic. This is to ensure that the name chosen correctly reflects the main objective and scope of the clinic.

5.4 The clinic model, constitution, and financing of the law clinic

5.4.1 The law clinic model

At this point the law clinic model must be decided upon, taking into account the agreed objectives and policy statement. (See the discussion on the various clinic models in Chapter 4 above.) The law clinic model chosen may also be a hybrid model, combining features of more than one of the models described. Also, depending on the short, medium and long-term objectives of the clinic, it may be decided to start with a certain model, progressing with time towards a different kind of model.

5.4.2 The law clinic constitution¹¹⁴

Depending on the legal entity chosen to operate the clinic, the constitution may be very formal (prescribed by law), or very informal. Even if the law clinic forms part of the law faculty of a university, a basic constitution should be agreed upon to provide a framework for the management and governance of the clinic¹¹⁵.

5.4.3 Financing of the law clinic

The financial planning of the law clinic consists of two parts: financing the initial setting up of the clinic, and the ongoing financing of the clinic once the setting up has been complete. To estimate the required finances (whether the money is raised internally or through external fundraising) requires that a detailed budget be drawn up. The methodology of preparing a simple budget is set out in Annexure P. The spending on the amounts budgeted for must be monitored by the management on a monthly basis.

¹¹⁴ See attached the constitution of the then University of Natal 1999 as Annexure DD.

¹¹⁵ The essential components of a law clinic constitution are set out in Annexure O.

5.5 Management structure of the clinic

5.5.1 Management team

Management team manages the clinic on a day-to-day basis. The team is usually small, about two to three people, and must consist of at least the head of the clinic, and office bearer in charge of finances. The management team is accountable to the board of control of the law clinic.

5.5.2 Board of control

The board of control is the body ultimately responsible for the clinic's operation and for its financial wellbeing. In a university setting the board of control usually consists of the head of the clinic and staff members of the law faculty designated by the law faculty board.

5.5.3 The advisory board

It is advisable for every clinic to have an advisory board consisting of selected people who have expertise in all aspects of law clinic management and policy. An advisory board will typically be appointed by invitations extended by the board of control and will usually meet not more than once or twice a year. Advisory boards are also useful in aspects such as fundraising.

5.6 Staffing and administration of the clinic

5.6.1 Staffing of the clinic

Each member of staff must be provided with an employment contract, containing a detailed job description which must be drawn up in consultation with the head of the clinic. The general information that must be provided in terms of the relevant labour laws, like leave allowances, bonus payments, and grievance procedures, must also be provided to the staff member in writing.

Administration of the clinic: the three main aspects of law clinic administration are financial control, equipment management, and student and file administration.

- (a) *Financial control:* a book-keeping system must be implemented to keep on-going expenses of the law clinic to keep control of the income and expenses of the law clinic. A designated member of staff who must form part of the management team must be given financial control as a primary task. This is one of the most important functions in the law clinic as the financial control record-keeping will provide the basis of the annual audited statements of the clinic, and will also be the source of the monthly financial information which will determine whether there has been over- or under-spending in terms of the budget. An example of the basic law clinic accounting records that should be kept by the financial controller is attached as Annexure N. The annual financial statements, which form part of the annual report of the clinic, are derived from these records. Note that these records may be kept in a computerized format or handwritten books.
- (b) *Equipment management:* Every clinic should maintain an equipment register in which all items of equipment are listed together with their identifying asset numbers. Equipment that is used by staff members or students must be carefully signed in or out of a separate control book. This book must be monitored on a regularly
- (c) *Student and file administration:* In clinics with a large student component, a system must be developed for the efficient administration of the students and their involvement in the law clinic.

This would usually require students to be divided into separate groups or 'firms' (usually no more than four to six members per 'firm'), and the drawing up of a detailed daily and weekly timetable regulating the attendance of students at live-client clinics, firm meetings, staff consultations, and follow-up meetings. An example of a student timetable used at the University of Natal Howard College Campus Law Clinic in 1994 is attached as Annexure Q. Client files may be kept either in paper (hard copy) or electronic format. It is suggested that a hard copy paper file be opened for each client, and that any electronic copy be kept as a backup for the electronic copy. The usual format of a client file, a cardboard cover folded in three parts, is as follows:

- (1) *Outside front cover*: The outside front cover will contain the client name, the student firm, the name and number of the student responsible for the file, the name of the staff member supervising the student, a column for diarised dates, and a block in which the prescription or statute of limitation deadline for legal action of the file is entered. This latter block should also be large enough to accommodate any other legislative deadlines, like the deadlines for statutory letters of demand or other notices.
- (2) *Inside front cover (Part A of the file)*: the inside front cover is where all statements taken from the client and possible witnesses are kept. All formal reports obtained are also pinned to the inside front cover of the file. All statements and reports kept here must be marked from A1 (first statement) to A...in sequential order.
- (3) *Middle part of file (Part B of the file)*: The middle portion of the file is where all correspondence is pinned. This is correspondence written by the student or supervisor, or received from the client or any other person. This correspondence must be B1 to B... in date order of receipt.
- (4) *Inside back cover (Part C of the file)*: The inside back cover of the file is a diary, which contains sheets of paper divided into columns indicating date, author, comment. Every time anybody does anything relating to the file, this action must be noted in detail in the diary. This is to ensure that anybody who picks the file up can immediately see what stage the matter has reached, and what has to be done next.

5.7. Case Study: Report on the establishment of a law clinic at Eduardo Mondlane University, Maputo

Below is a report on behalf of the OSI by Professor Robin Palmer, who acted as a consultant in the establishment of a law clinic at Eduardo Mondlane University Law faculty, Maputo, Mozambique: 14 February to 3 March 2003:

FROM: Professor RW Palmer
University of Natal, Durban
(Consultant)

TO: The Justice Initiative
OSI Europe

Report on the feasibility of establishing a Clinical Legal Education (CLE) Programme at Eduardo Mondlane University Law Faculty, Maputo, Mozambique: 14 February to 3 March 2003.

1. Mandate of Consultant

The Consultant spent from 14 February to 3 March 2003 in Maputo, mandated to perform the following duties:

To conduct needs assessment and feasibility study of establishing a Clinical Legal Education (CLE) programme at the Eduardo Mondlane University Law Faculty in Maputo, Mozambique;

To advise the leadership of the Law Faculty on the objectives, scope, structure of a CLE programme;

To identify the faculty members who could play an active role in running the CLE programme;

To develop an initial model for the CLE programme: mandate, areas of focus, management structure, legal aid component, etc.;

To provide "Justice Initiative", a report on the visit, outlining recommendations for the implementation fleshing out the CLE programme in the future.

2. Background and Planning

Mandate: This mandate was widely interpreted to consider the feasibility of establishing both a CLE programme, and a functioning Law Clinic at Eduardo Mondlane University (UEM).

Planning Workshop: On Tuesday morning 18 February, a planning workshop was held with the Deputy-Director (Research) of the Law School, Luis Bitone; the Director of the Centre for Practical Legal Studies (CPLS), Tomás Timbane; the staff member in charge of practical legal training courses, Filipe Sitoi; and the staff member in charge of the proposed law clinic section of the CPLS, Elysa Vieira.

Programme of Action: Following this planning session, a programme of action was agreed upon. The programme, which was forwarded to OSI, is outlined in paragraph 2.7 below.

Faculty Workshop: In addition, a workshop over two afternoons was held on Thursday 20 February and Friday 21 February 2003 at UEM. The workshop was attended by fifteen UEM staff members, and covered the following topics:

- (1) The definition of a "Law Clinic";
- (2) Various Law Clinic models;
- (3) The objects of a Law Clinic;
- (4) Interaction between the Law Clinic and the Law Faculty;
- (5) Developing a Law Clinic programme and curriculum;
- (6) Funding and administration of Law Clinics.

History of Law Clinic Proposals: At the time of the visit, the UEM did not have a functioning Law Clinic or CLE programme. Various visiting academics (particularly Dyle Compallo, a visiting professor from Sao Paulo University), had over the years, proposed the setting-up of a Law Clinic, but no real action to implement these proposals was taken by UEM. As a first step, the Consultant decided to establish the level of commitment and support for the implementation of a Law Clinic and CLE programme from the Law Faculty and the University. After meeting with the Director of the Law Faculty, Lucia Ribeiro, and the Deputy-Director (Research), Luis Bitone, it was clear that the Law Clinic project had the full support of the Faculty and the University.

Implementation date: Given the level of commitment, It was agreed to commence the

implementation of the Law Clinic and CLE programme on Monday 10 March 2003. All planning actions and decisions were made with this date in mind.

Planning Workshops and Meetings: Planning workshops and meetings covering the following six topics were held:

- (1) Structure of, and implementation plan for, the Law Clinic;
- (2) Relationship between the Law Clinic and the Law Faculty;
- (3) Law Clinic linkages;
- (4) The CLE programme and course curricula;
- (5) Infrastructure, manual and administrative requirements;
- (6) Public relations, marketing, training and funding.

Attendance: Planning workshops and meetings were attended by Elysa Vieira, Tomás Timbane, Filipe Sitoi and Maria da Conceicao Faria, with other staff members also attending from time to time.

3. Structure of, and implementation plan for, the Law Clinic

3.1 Name of Law Clinic: Various possible names for the Law Clinic were considered. It was felt that the word 'Clinic' had medical connotations, and a more appropriate name should be found. Many English language suggestions (such as 'Legal Helping Hand') did not translate well into Portuguese, and it was eventually decided to defer the decision on a permanent name to a later date.

3.2 Focus of the Law Clinic: It was agreed that the Law Clinic would have a dual focus: the training of senior law students with live clients, combined with the provision of basic legal services to indigent members of the public.

3.3 Policy statement for the Law Clinic: It was agreed to draft a proposed policy statement for the Law Clinic in Portuguese, which would encapsulate the following principles:

- (1) That the Law Clinic would be an independent, non-profit making public interest law firm affiliated to Eduardo Mondlane University;
- (2) That the Law Clinic is apolitical, and does not have links with, nor support any political party or grouping;
- (3) That the Law Clinic will have the dual, equally important, objectives of:
 - (a) providing legal services to indigent members of the public who would otherwise be unable to enforce their legal rights; and
 - (b) to train law students of UEM in the practical aspects of dealing with clients.
- (4) To research and publicise public interest law issues.

3.4 Law Clinic model: It was decided to start the Law Clinic as a legal advice office initially, and to gradually develop into a fully fledged public interest law firm. The emphasis in the first year of operation would be to open files on selected cases, as agreed with the Bar Association (see para 5.5 below), and to take these cases to the end of the pre-litigation stage. There would also be a strong emphasis on the referral of clients to other assistance-agencies.

3.5 Commencement date of Law Clinic & timetable:

- (1) *Start date:* Monday 10 March 2003;
- (2) *Timetable:*
 - (a) *Monday 3 March – Monday 10 March 2003:* Selection of ten student firm managers.
 - (b) *Monday 10 March – Monday 7 April 2003:* Training programme for ten student firm managers and final-year law students (See 3.8 below);
 - (c) *Friday 11 April 2003 [11am-4pm]:* First live-client clinic
 - (d) *November 2003:* Review of first year's operation.

3.6 Structure of the Law Clinic: The Law Clinic will form part of the Centre for Practical Legal Studies (CPLS) (Director: Mr Tomás Timbane). The staff member in the CPLS responsible for practical legal skills training is Mr Filipe Sitoi, and the staff member with special responsibility for the new Law Clinic section of the CPLS is Elysa Vieira. In addition to these three staff members, Ms Maria da Conceicao Faria and Ms Amina Abdala have volunteered to provide substantial assistance to the Law Clinic.

3.7 Staffing of the Law Clinic: The forty final-year law students in the Faculty would be divided into ten firms of four student each, of which ten students would be interviewed by a panel of Law Clinic staff members to be firm managers responsible for file maintenance, client follow-up, etc.). Each of the five Law Faculty staff members (Timbane, Sitoi, Vieira, Faria and Abdala), will supervise two student law-firm managers.

3.8 Training: The basic training of law students to take place from 10 March – 7 April 2003 will be done as follows (special training sessions in the afternoons in addition to the normal law courses):

- (1) *Timbane:* Filing systems and administrative procedures;
- (2) *Sitoi:* Interviewing and counselling skills and ethics;
- (3) *Abdala:* List and database of referral agencies;
- (4) *Vieira:* Basic letter-writing and file memoranda;
- (5) *Faria:* Rules of prescription (limitation)

3.9 Staff training: Proposals for the training of Law Clinic staff members are contained in paragraph 9.4 below.

3.10 Interim funding: The expenses for the pilot Law Clinic project, which will run from 10 March 2003 to November 2003, will be carried by the UEM Law Faculty.

4. The relationship between the UEM Law Faculty and the Law Clinic

4.1 Faculty commitment: As stated in para 2.5 above, the Law Faculty is fully committed to the implementation and development of a Law Clinic as an integral part of the Law Faculty.

4.2 Reporting structure: The Law Clinic Director, Mr Tomás Timbane, will report to the Deputy Director (Research), Mr Luis Bitone, who in turn will report to the Director of the Law Faculty,

Ms Lucia Ribeiro (see also, 'Structure of the Law Clinic' at para 3.6 above).

- 4.3 Staffing commitment:** The Faculty has agreed to ensure that the Law Clinic is adequately staffed with both academic and administrative staff in the long term. Both supervisory and teaching duties in the Law Clinic will be recognised as part of the normal Faculty academic workload. In the short term, the Faculty will provide part-time administrative assistance to the Clinic.
- 4.4 Staff volunteers:** Several members of the academic staff have indicated their willingness to assist the Law Clinic on a voluntary basis when needed. In particular, Maria Faria and Amina Abdala have agreed to help with training, and supervise two student law-clinic firms each. (See paras 3.7 and 3.8 above).
- 4.5 Liability and insurance:** The general UEM student insurance must be investigated to establish to what extent the University would be liable for errors or negligence by students or staff of the Law Clinic. When meeting with the Bar Association (O.A.M- see para 5.5 below), this issue must also be canvassed.
- 5. Law Clinic Linkages: NGOs, Government Departments, the Bar Association and other educational institutions**
Under the direction of the Director of the Law Faculty, Ms Lucia Ribeiro, and the Deputy Director (Research), Mr Luis Bitone, linkages between the UEM Law Clinic and the following will be established during the period March to May 2003:
- 5.1 The Mozambiquan Human Rights League:** The Director of this NGO is also an academic member of the UEM Law Faculty. He has undertaken to refer suitable cases from this NGO to the new UEM Law Clinic, and, in return, will accept test cases from the Clinic to create legal precedent in cases of human rights abuses.
- 5.2 The Ministry of Justice:** A meeting will be arranged with the Minister of Justice or his representative to explain the objects and policy of the UEM Law Clinic (see paras 3.2 and 3.3. above). One of the aims of this meeting will be to prevent any Government suspicion of subversive agendas.
- 5.3 The Attorney-General:** This will be a follow-up meeting to the meeting with the Minister of Justice to brief the Attorney-General or his designated representative, and to ensure the cooperation of the prosecutors under his control with staff and students of the UEM Law Clinic.
- 5.4 I.P.A.J. (Instituto de Patrocinio e Assistencia Juridica):** This is the Government-funded legal aid assistance Board, which provides limited legal assistance, based on set criteria, to members of the public who cannot afford private lawyers. The purpose of this meeting will be to inform the Board of the existence and objects of the UEM Law Clinic; to discuss avenues of cooperation and mutual referral policies; and finally, to set up a schedule of regular information exchange meetings.

- 5.5 O.A.M. (Ordem de Advogados de Mocambique):** The OAM is the Mozambiquan Bar Association, which controls the activities of all private legal practitioners. This is a crucial meeting in order to ensure the cooperation and support of the OAM for the UEM Law Clinic. Follow-up meetings will also have to be held to ensure that the UEM Law Clinic, as a public interest law firm, complies with the necessary laws and regulations. An initial meeting will be arranged by Ms Ribeiro with the CEO of the OAM, Dr Cauio.
- 5.6 I.S.P.U. (Instituto Superior Politecnico e Universitario):** ISPU is a polytechnic (technical university) in Maputo which has approached the UEM Law Faculty for assistance in setting up its own student Law Clinic. The Director and staff of the UEM Law Clinic will meet with ISPU to help it develop a functioning clinic along the lines of the one at UEM, and to agree on avenues of cooperation.
- 5.7 AULAI (Association of University Legal Aid Institutions):** AULAI is the umbrella body for all Southern African University-based law clinics. Arrangements will be made for UEM to join AULAI as a member, and attempts will be made for selected UEM staff to attend the African Clinical Law Conference from 23 – 27 June 2003 (under the auspices of AULAI and the Open Society Institute), and perhaps also to send a UEM representative to the Society of Southern African Law Teachers' Congress in Windhoek, Namibia, from 30 June – 2 July 2003.
- 5.8 The Campus Law Clinic (CLC), Howard College School of Law, University of Natal, Durban:** Formal linkages as a precursor to mutual exchange visits with the CLC and the UEM Law Clinic will be set into motion. Additional linkages with other Southern African universities could follow (especially University-based law clinics relatively close to Maputo, such as the clinic at the University of the Witwatersrand).
- 6. Course curricula, Staff Training and Law Clinic Manual:**
- 6.1 Course Curricula:** The juridical practice course under the control of the Director of Practical Legal Training, Mr Filipe Sitoi, will be amended to incorporate training modules for law clinic work. These amendments will come into effect in the 2004 academic year once the required staff training has been done and the necessary materials obtained. Currently the juridical practice course is done over the last two years of the law curriculum, and is fairly intensive as there is no formalised postgraduate practical legal training for Mozambiquan law graduates prior to their commencing practice. The final content of the juridical practice course will be determined after the completion of a course review process currently under way with the aim of reducing the length of the current law degree by one year. A Committee comprising Professor Joao Caires (from Portugal), Maria Faria, and the Deputy Director (Academic), Paolo Comoane, is coordinating this process. Given the reduction of the length of the law degree by one year, it appears that the only viable option is to incorporate law clinic training courses in the juridical practice courses, as it is not feasible to accommodate an additional specialised law clinic course in the reduced curriculum. The amended juridical practice course curriculum should also incorporate practical assessments of law students' performances in the Clinic, and models for doing so have been discussed.(See para 9.3 below).
- 6.2 Staff Training:** Staff members involved in the UEM Law Clinic will require specialised training, especially in Alternative Dispute Resolution (ADR: arbitration, mediation and negotiation); Client interviewing and counselling skills; inter-agency cooperation; and Law Clinic filing and

administrative procedures. Staff members will also require training in basic management systems, financial control and fundraising techniques. The interim training for the pilot project already in progress (see para 3.8 above), will be undertaken relying on local resources.

6.3 Law Clinic Manual: A Law Clinic manual, for use by both staff and students, will be developed in the course of 2003 under the direction of Mr Sitoi and Ms Vieira. The manual will include the Law Clinic's policy statement and objectives; Clinic procedures and guidelines; the client indemnity form (see para 4.5 above too); detailed daily and weekly timetables; a list of referral agencies and useful addresses; examples of consultation sheets, referral forms and client detail forms; relevant Bar association (OAM); rules; the IPAJ instruction guide; course syllabi and requirements; and selected extracts of relevant statutes. A copy of the Professional Training manual of the CLC (University of Natal, Durban) has been fully discussed with Law Clinic staff, and given to Mr Sitoi as a model to be adapted for the UEM Law Clinic.

7. Law Clinic infrastructure and administration:

7.1 Law Clinic office and equipment: The UEM Law Clinic is housed in one big office in the Law Faculty building. The office equipment comprises two desks, two computers, two filing cabinets and assorted loose items of furniture. Other offices in the building are available for temporary use during new-client clinics on Fridays (due to start in April- see para 3.5 above).

7.2 Administrative staff: Currently there are no administrative staff dedicated to the Law Clinic, and most administrative tasks will have to be done by staff and students. The director of the Law Faculty, Ms Ribeiro, has agreed to consider a job-sharing arrangement, whereby existing administrative staff could be tasked with taking messages for Law Clinic staff and students on a dedicated telephone line.

7.3 Stationery: All stationery is currently provided by the Law Faculty. As budgets are already badly stretched, only essential, basic materials are provided.

7.4 Job descriptions: The Law Clinic staff, under the direction of Mr Timbane, are in the process of compiling detailed job descriptions for the Law Clinic staff, staff assistant volunteers and firm managers, to ensure proper functioning and accountability.

8. Marketing and Fundraising:

8.1 Marketing: The initial marketing of the Law Clinic will be low-key, relying on referrals from the Mozambiquan Human Rights League, and word-of-mouth, to inform members of the public of the new service. During the pilot programme (April to November 2003), a more comprehensive marketing plan can be developed for implementation in 2004. The plan will include public information seminars, regular articles in widely-read newspapers (e.g. *Noticias*), and single-page pamphlets on topics on which the public need legal guidance (these pamphlets can be adapted from papers prepared by Law Clinic students for course credits- a model successfully used at the Howard College School of Law).

8.2 Fundraising: During the period of the pilot project, targeted fundraising should commence to ensure the long-term sustainability of the Law Clinic. In this regard, the assistance of AULAI will be very helpful.

9. Recommendations:

- 9.1 Pilot project:** That the UEM Law Clinic should run as a pilot project from March to November 2003, and that Law Clinic activities should be limited to giving advice; referrals; and doing letters, representations and negotiations on behalf of clients (i.e., no court work or processes in this period), and that the expansion of activities be considered after November 2003, taking into account factors such as finance, capacity, etc;
- 9.2 Conferences:** That at least two members of the UEM Law Clinic staff be assisted to attend the African Clinical Law Conference (23-27 June 2003), and the Society of University Teachers' congress (which includes the AULAI general meeting and Clinical Law programmes)- 30 June- 2 July 2003;
- 9.3 Exchanges:** That during the period July 2003 to February 2004, exchanges be arranged (perhaps through AULAI) between selected members of UEM Law Clinic and experienced South African Clinical lawyers. In addition to Law Clinic exchanges, a study tour by Mr Sitoi to the School for Legal Practice in Durban would be very valuable, given the absence of formal vocational legal training in Mozambique;
- 9.4 Training:** That UEM Law Clinic staff be assisted to acquire the training outlined in para 6.2 below, and, in particular, that specialised training in fundraising methodology be made available to selected staff members;
- 9.5 AULAI membership:** That the UEM Law Clinic become members of the Association of University Legal Aid Institutions as soon as possible; and
- 9.6 Programme of Action:** That the UEM Law Faculty and Law Clinic arrange a workshop early in 2004 to agree on a five-year plan of action for the UEM Law Clinic.

10. Concluding comments:

The enthusiasm and commitment of the UEM Law Faculty and staff to implement and make a success of their fledgling law clinic, in the face of severe budgetary constraints, is laudable, and should be given every encouragement.

The establishment and expansion of law clinics in Mozambique in the wake of UEM's pioneering work could play a major role in establishing a caring, human rights-based culture among Mozambiquan law students and lawyers.

Professor Robin Palmer
22 March 2003.

CHAPTER 6: GOVERNANCE AND MANAGEMENT OF THE LAW CLINIC

Contents:

- 6.1 Relationship with Law Faculty and/or Other Bodies
- 6.2 Legal Status of the Clinic
- 6.3 Governance
- 6.4 Legal Agreements
- 6.5 Compliance with Legislation
- 6.6 Risk Management
- 6.7 Internal Controls and Checks
- 6.8 Value for Money

Outcomes:

By the end of this chapter you will be able to structure and direct the governance and management of a law clinic.

6.1 Relationship with law faculty and/or other bodies

The law clinic may operate as an independent entity, with its own constitution, budget and legal status. On the other hand, the law clinic may be a sub-division or department of another body, for example, a university law clinic that forms a constituent part of that university's law faculty. In between these two extremes, there are various hybrid models of association, for example, the law clinic may operate as an independent body with its own constitution, and yet be in a contractual association with another entity. (This association is known as an "affiliation" – e.g., the law clinics letterhead will indicate "affiliated to University X").

The nature of the law clinics relationship to other bodies will often determine its choice of legal status and structure.

6.2 Legal Status of the Clinic

Depending on the laws of the country in which the law clinic is situated; there are various legal structures that may be considered for adoption by the law clinic concerned. The legal structure decided upon will often be influenced by the law clinic's desire for independence; exposure to taxation; the requirements of outside funders and donors, the function and strategic objectives of the law clinic (for example, if the law clinic offers a full legal services, the bar association or law society of the country concerned may require a specified legal structure).

For example, In South Africa most university law clinics operate as constituent parts of the law faculties of their respective universities. Many other law clinics and paralegal organizations operate as independent legal entities, usually as non-profit organizations (NPOs)¹¹⁶, non-profit companies¹¹⁷,

¹¹⁶ In terms of the South Africa's Nonprofit Organisations Act 71 of 1997

voluntary associations or a non-profit trust.¹¹⁸

6.3 Governance

6.3.1 Governance is the process of decision-making and the implementing of decisions. Thus, governance focuses on those persons involved in making and implementing these decisions, as well as the adequacy and effectiveness of the clinic's structures used for implementing these decisions.

6.3.2 The term "good governance" is used to describe governance which meets levels that approach, or correspond to "best" standards and practices.

6.3.3 Good governance, as it applies to law clinics, has the following eight characteristics or ideals:

- (1) Participatory: Participation should be inclusive and may be either direct or through intermediate institutions or representatives.
- (2) Rule of Law: Compliance with applicable legislation and the values enshrined in the National Constitution such as the protection of human rights.
- (3) Transparency: Information used for decision making should be directly accessible to those who will be affected by such decisions and their outcomes. Furthermore, information on decisions taken and their results should be made available in easily understandable form.
- (4) Responsiveness: The clinic, through its processes, should serve all its stakeholders within reasonable timeframes.
- (5) Consensus Oriented: The clinic should mediate the different interests in society to achieve a broad consensus on what is in the best interests of the community as a whole.
- (6) Equity and Inclusiveness: All groups in society, particularly the most vulnerable should be included or considered in the clinic's objectives and operations.
- (7) Effectiveness and Efficiency: The clinic's processes should produce results that meet the needs of society while making the best use of the resources at its disposal.
- (8) Accountability: The clinic must be accountable to all those affected by its decisions and actions. Generally, those affected will comprise the clinic's stakeholders, but they may also include other clinics and even the general public.

6.3.4 Every clinic must have its own Constitution setting out its objectives and providing details of its various governance and management structures, their roles, responsibilities, membership and meeting frequencies.

6.3.5 Every aspect of a clinic's structure and processes are, to a greater or lesser extent, a factor in determining the standards to which the clinic subscribes and achieves good governance.

117 In terms of Schedule 1 of the Companies Act 71 of 2008

118 See Hoosen Agjee (2012) A Guide to the New Companies Act and Non-profit Organisations. Durban: Turning Point Consultants.

6.3.7 The following checklist should be completed as a tool to assess the clinic’s compliance with governance.

	<u>GOVERNANCE: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic have a constitution which is relevant to its needs?				
2	Is the clinic’s constitution familiar to the members of its governance structures, its management and staff?				
3	Is the clinic compliant with all the articles in its constitution?				
4	Are the members of the clinic's governance forums:				
4.1	Sufficiently independent of the clinic's operations, suppliers and service recipients?				
4.2	Contributors of unique skills (e.g. Legal, financial, human resources, information technology) which enables the forums of which they are members to adequately perform their roles?				
4.3	Adequately trained for their roles and responsibilities as members of their forums?				
4.4	Does the clinic subscribe to/ conform to the following eight characteristics or ideals of good governance?				
	- Participatory.				
	- Rule of Law.				
	- Transparency.				
	- Responsiveness.				
	- Consensus orientated.				
	- Equity and inclusiveness.				
	- Effectiveness and efficiency.				
	- Accountability.				

6.4 Entering into Legal Agreements

- 6.4.1 Legal agreements are contracts drawn up for a wide range of purposes which legally bind the clinic to another party. These parties may be employees, stakeholders, funders or another person or organization.
- 6.4.2 As agreements give rights to and impose obligations on a clinic they should only be entered into after being fully discussed and negotiated, and after having been approved by the clinic's management and Board of Control as being in the best interests of the clinic.
- 6.4.3 Signatories authorised to sign agreements should be mandated by the clinic's Board of Control. These signatories will often be the same signatories who have been mandated to authorise payments on behalf of the clinic.
- 6.4.4 It is important that in any planning process the possible effects of the clinic's existing agreements, such as property leases, should be taken into account.
- 6.4.5 The following checklist should be completed as a tool to assess the clinic's compliance in respect of legal agreements:

	<u>ENTERING INTO LEGAL AGREEMENTS: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Are draft legal agreements subject to discussion and negotiation processes prior to being signed?				
2	Are draft legal agreements subject to the approval of management and/ or the Board of Control prior to being signed?				
3	Are all agreements signed by signatories who have been mandated by the Board of Control?				
4	Are existing agreements taken into account during the clinic's planning processes?				

6.5 Compliance with legislation

- 6.5.1 Compliance with applicable legislation requires the application of significant administrative resources and in most cases the onus is on the clinic itself to research these requirements and ensure such compliance. Failure to comply could result in penalties being incurred or, in certain cases, suspension of the clinic's activities.
- 6.5.2 The legislation which is applicable to the clinic will generally be determined by the clinic's legal status, the region or country in which it operates and its size.
- 6.5.3 Legislation which will generally apply to the clinic could include the following:

Labour

- Basic Conditions of Employment
- Staff Pension and Medical Aid Schemes
- Unemployment Insurance
- Workman’s Compensation
- Training and Service Levies
- Employment Diversity

Taxation

- PAYE
- Tax on the clinic’s profits (Unless the clinic has tax exempt status)
- Value Added Tax

Vehicles

- Licences
- Roadworthy requirements

Environmental

- Property usage
- Hazardous waste disposal

6.5.4 The complexities of certain legislative requirements may be overcome by engaging the services of specialist consultants or service providers. These services will lower the risks of any non-compliance and also allow the clinic to focus on its core activities.

6.5.5 The following checklist should be completed as a tool to assess the clinic’s compliance with relevant legislation:

	<u>COMPLIANCE WITH LEGISLATION: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Has the clinic identified all legislation that it is required to comply with?				
2	Has the clinic developed processes (e.g. the completion and submission of monthly returns together with the requisite payment for PAYE tax) and rosters to ensure its ongoing and timeous compliance with relevant legislation?				
3	Does the clinic have any outstanding issues, returns or payments in respect of its compliance with relevant legislation? If so, is the clinic taking steps to regularise these outstanding issues, returns or payments?				

6.6 Risk management and insurance

6.6.1 Risk may be defined as the likelihood of occurrence of an event or events which would adversely affect the normal functions and operations of a clinic.

6.6.2 Risks may be ranked as having either a high or low probability of occurrence as well as having either a high or low impact on the clinic should they occur. The following table illustrates this concept:

<u>Probability of Occurrence</u>	<u>Impact</u>
(1) High	High
(2) Low	High
(3) High	Low
(4) Low	Low

Those risks ranked under numbers 1 and 2 require the main attention in respect of their need to be “managed” by the clinic.

6.6.3 Risks may be classified as being either general or specific. Examples of each type are as follows:

General Risks

- A drop in funding income
- Cash flow interruptions or shortages
- A loss of key staff
- Reputational damage to the clinic

Specific Risks

- Loss or damage to vehicles
- A substantial legal claim against the clinic
- A loss of important information or records

6.6.4 General risks are normally managed by a clinic through its operational processes and procedures and the adoption of good clinical practices. For example:

- (1) The effect of a fall in income could be reduced by broadening the clinic’s funding base or by developing the clinic’s income generation capacity.
- (2) The effect of cash flow interruptions or shortages could be addressed by persuading funders to commit more funds at the commencement of a project.
- (3) The effect of a loss of key staff could be reduced by introducing a staff succession plan and providing appropriate training to enable staff to multitask.
- (4) Reputational damage to a clinic could result from a multitude of reasons or events. Generally, the likelihood of reputational damage to a well-structured and run clinic with good controls will be lower than for a clinic which is deficient in these areas.

6.6.5 Specific risks to a clinic are generally managed through the purchase of appropriate insurance cover, the intention of which is to fully compensate the clinic for any loss or damage suffered should an event insured against, occur.

6.6.6 Insurance cover is available for most specific risks and the clinic will need to decide on the type and extent of cover it requires. This is best done by engaging with an experienced insurance broker or a representative of a reputable insurance company.

6.6.7 Care should be taken not to over-insure (resulting in “fruitless” expenditure) or under-insure (resulting in the claimed amounts being “averaged” and reduced).

6.6.8 Assets which are insured should correspond to those assets recorded in the clinic’s assets register.

6.6.9 It is recommended that clinics should undertake regular formal risk assessment processes during which risks are identified and strategies for their management developed. This is normally done during “brainstorming sessions” involving senior management and members of the Board of Control. These sessions should be minuted and their findings and decisions recorded in a “risk register”.

6.6.10 The following checklist should be completed as a tool to assess the adequacy of the clinic’s risk management and insurance:

	<u>RISK MANAGEMENT AND INSURANCE: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic have a formal risk assessment and risk management process?				
2	Are the findings and recommendations of this process recorded in a risk register?				
3	Has responsibility for the risk management process been assigned to a senior clinic employee?				
4	Does the clinic record the relevant details of its insurance cover in an insurance register?				
5	Does the clinic regularly review its insurance cover for changed needs or circumstances?				

6.7 Internal Controls and Checks

6.7.1 Internal controls are processes and procedures designed and implemented by a clinic to reduce the risk of occurrence of fraud, errors and oversights which could cause loss or adversely affect the clinic’s operations and activities.

6.7.2 Checks are an important component of the internal control process in terms of which all transactions and contractual agreements of the clinic are subject to a checking or oversight process by a duly appointed staff member or third party.

6.7.3 The size of the clinic and its resources will determine its approach to the internal control procedures it implements. For example, in a small clinic having only three staff it may not be possible to separate duties by, for example, having different staff responsible for the ordering, receiving and approving of payments for goods and services. In such a case the clinic’s Board of Control could implement a compensatory control by appointing one of their members to be a second signatory for all payments. This would satisfy the need that there be independent oversight and approval for all payments.

6.7.4 For larger clinics there are a number of possible options for implementing and monitoring internal controls and checks. These are as follows:

- (1) The clinic may introduce an internal audit function whose role will be the evaluation of the adequacy or otherwise of the clinic's internal controls and checking processes and, most importantly, the making of recommendations to rectify deficiencies and strengthen any weaknesses. The internal audit function may be done in-house or by a qualified consultant on a periodic basis. The advantage of appointing a consultant is that he/ she would have greater independence and objectivity than persons who are directly employed by the clinic.
- (2) The appointed external auditors of the clinic are required, as part of their process of certifying the clinic's financial statements, to review internal controls. This is normally done during "interim audits" which lead up to a "final audit" of the financial statements. The clinic, through its Board of Control, could approach its external auditors and request that the frequency of interim audits be increased and that specified areas of the clinic's operations be focused on a rotational basis.

6.7.5 Although internal controls and checking processes are applicable to all operations of the clinic they need to be designed and implemented according to the importance and risk profile of specific operations.

6.7.6 The Board of Control should take ultimate responsibility for the adequacy and implementation of the clinic's internal controls and checking processes.

6.7.7 The following checklist should be completed as a tool to assess the adequacy or otherwise of the clinic's internal controls and checks:

	<u>INTERNAL CONTROLS AND CHECKS: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic's Board of Control play an active role in, and take responsibility for, internal control and checking processes?				
2	Does the organisation regularly evaluate and monitor the adequacy or otherwise of its internal control and checking processes?				
3	If so, which of the following means does it use:				
	- Oversight by the Board of Control?				
	- An in-house Internal Audit Function?				
	- An Internal Audit Consultant?				
	- The appointed External Auditor?				

6.8 Value for Money

- 6.8.1 Clinics are being increasingly challenged by their funders and other interested parties to demonstrate that they have achieved “value for money” from their spending.
- 6.8.2 The concept of value for money is the determination whether the expenditure in question resulted in the achievement of its intended result or objective, that the result or objective of the expenditure was relevant and beneficial to the clinic in the first place and that the best possible price was achieved.
- 6.8.3 The standard approach to assessing value for money is to ask the questions as to whether efficiency, effectiveness and economy have been achieved. The following criteria should be considered in this assessment process:
- (1) Efficient: Was the expenditure made in respect of specific goods or services which, from the choices available, best met the need or objective of the relevant expenditure decision?
 - (2) Effective: Did the choice of goods or services adequately meet the purpose for which they were acquired?
 - (3) Economical: Was the best available price for the goods or services obtained?
- 6.8.4 Although value for money is primarily focused on goods and services the concept may be extended to other areas such as salaries and wages, rental of premises and document delivery services. The following are examples of criteria which may be considered in respect of each of the aforementioned:
- (1) Salaries and wages: Is the clinic’s staff complement fully utilised? If not, there may be excess staff or inadequacies in the allocation of tasks.
 - (2) Rental of premises: Are the premises being rented in the right location and are they fully utilised?
 - (3) Document delivery: Are courier services being used when the Post Office mail service, costing far less, would be adequate to meet the clinic’s needs? Are there other suitable options available at a lower cost?
- 6.8.5 Clinics are encouraged to consider whether they will receive “value for money” in the making of all expenditure decisions, particularly those involving large amounts of money.
- 6.8.6 The following checklist should be completed as a tool to assess the clinic’s awareness of the concept of value for money:

	<u>VALUE FOR MONEY: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic undertake a “value for money” conceptual review prior to, and during, the procurement process for goods and services?				
2	Is the clinic’s staffing complement appropriate to its service delivery needs?				
3	Is there surplus staffing capacity on account of the non-utilisation or under-utilisation of staff?				
4	Would the clinic’s senior staff benefit from receiving further training and information in the concept of “value for money”?				

CHAPTER 7: OPERATION AND ADMINISTRATION OF THE CLINIC

Contents:

- 7.1. Human Resources
- 7.2. Budgeting
- 7.3. Accounting
- 7.4. Cash Flow Management
- 7.5. Fixed Assets
- 7.6. Payment Procedures
- 7.7. Procurement of Goods and Services
- 7.8. Petty Cash
- 7.9. Income Generation
- 7.10. Computer Systems

Outcomes:

By the end of this chapter you will be able to administer the day-to-day operations of a clinic and future planning for a clinic.

7.1 Human Resources

- 7.1.1 Staff salaries and associated staff benefits will generally comprise between 60% and 80% of the total expenditure of a typical clinic. As the clinic's human resources function is responsible for administering key aspects of the clinic's contractual and working relationship with its staff, its professionalism, efficiency, and effectiveness is critical to the overall success of the clinic.
- 7.1.2 Key criteria in the operation of a human resources function are the following:
 - (1) There should be an operational organogram based on the clinic's staff establishment.
 - (2) There should be job descriptions for all posts, including contract and temporary posts on the staff establishment.
 - (3) Prior to commencing a staff recruitment process, detailed job descriptions for all new posts to be filled should be prepared and approved. This will require the identification and recording of tasks the incumbents will have to perform.
 - (4) The process to attract applicants to fill vacancies or newly created posts should be carefully planned in order to target the best and most suitable candidates. This process should decide on whether to use press advertisements, employment agencies or the internet, with consideration being given of the costs to the clinic of each of these mediums.
 - (5) The staff selection process should include the following:
 - The completion of a comprehensive application form by all applicants.

- An interview by a selection committee whose membership is appropriate to the grade and skills of the post to be filled.
 - The calling for, and follow up of, prior work experience and character references.
 - The verification of qualifications and professional body memberships.
- (6) All staff, including contract and temporary employees should be issued with a letter of appointment setting out their contractual relationship with the clinic and detailing specifics of the rights and obligations of both parties. These should be in accordance with, and generally be aligned to, the labour laws of the country in which the clinic operates. The following is a list of the most important of these rights and obligations:
- Rights of the employer/ obligations of the employee:
- Working hours
 - Duties
 - Termination of employment
 - Probation period
 - Disciplinary code
 - Performance evaluation
- Rights of the employee/ obligations of the employer:
- Salary
 - Benefits such as pension and medical aid
 - Leave
 - Performance evaluation
 - Termination of employment

7.1.3 The following operational organogram should be completed to document the clinic’s staff establishment and reporting lines:

OPERATIONAL ORGANOGRAM (TO BE COMPLETED WITH REFERENCE TO THE ORGANISATION’S STAFF

ESTABLISHMENT)

CHIEF EXECUTIVE OFFICER/ MANAGING DIRECTOR

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7.1.4 The following checklist should be completed as a tool to assess the clinic's compliance with good human resources practices.

	<u>HUMAN RESOURCES: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic have an organisational organogram based on its staff establishment?				
2	Does the clinic have job descriptions for all permanent, contract and temporary posts on its staff establishment?				
3	Are job descriptions prepared and approved for all new posts prior to them being advertised and filled?				
4	Does the organisation have a process to target and recruit candidates best suited to fill new posts and vacancies?				
5	Does the clinic's selection process include the following?				
	- The completion of a comprehensive application form by all applicants.				
	- The interview by a selection committee whose membership is appropriate to the grade and skills of the post to be filled.				
	- The calling for, and follow up of prior work experience and character references.				
	- The verification of qualifications and professional body memberships.				
6	Are all staff issued with a letter of appointment setting out their contractual relationship with the organisation and detailing specifics of the rights and obligations of both employer and employee.				
7	Does the organisation have a staff performance evaluation process with an appropriate acknowledgement or reward system for recognising exceptional performances?				

7.2 Budgeting

- 7.2.1 Budgeting is a process used by clinics to plan their activities taking account of their current and anticipated future resources. These resources comprise their staff complement, funds and fixed assets. It is important to appreciate that the budgeting process is more than a mechanism only used to constrain expenditure.
- 7.2.2 In the case of clinics the budgeting process is an important tool which may be used to achieve the following:
- (1) The planning and costing of future activities.
 - (2) Determining the resources required for operational and project purposes.
 - (3) Providing details of funds and other resources required for inclusion in fundraising proposals.
 - (4) Monitoring and controlling the clinic's operational and project expenditure.
- 7.2.3 The budgeting process is normally driven by the clinic's Board of Control who make, as part of the clinic's strategic planning, decisions on new projects.
- 7.2.4 The first stage of the budgeting process will be the preparation, usually by the clinic's management, of costing templates for the clinic's operations and its existing and proposed projects.
- 7.2.5 The second stage of the budgeting process will be to align the clinic's resource requirements to its available resources. Shortfalls in resources will generally form the basis of a fundraising proposal or proposals. As fundraising proposals often take considerable time to be processed and awarded by funders the budgeting process should cover at least three years.
- 7.2.6 Budgets should be revised and adapted for changing circumstances or the occurrence of certain events such as the unexpected withdrawal of a funder. Failure to do so could result in the clinic encountering operational difficulties or projects being jeopardised.
- 7.2.7 A clinic's budget should be approved by its Board of Control.
- 7.2.8 Regular reports comparing actual income and expenditure to budgeted income and expenditure should be prepared and tabled at management meetings. Timeous action should be taken to investigate and rectify problems that may be identified in these reports.
- 7.2.9 This checklist should be completed as a tool to assess the adequacy of the clinic's budgeting process:

	<u>BUDGETING: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic have a budgeting process which is:				
1.1	Prepared for at least the next three years?				
1.2	Flexible and is revised to take account of changed circumstances and significant				

	events?				
2	Does the clinic's Board of Control and other stakeholders participate in the budgeting process?				
3	Are the final budgets approved by the clinic's Board of Control?				
4	Are reports comparing actual to budgeted expenditure prepared on a regular basis?				
5	Are the aforementioned reports tabled at meetings of the clinic's senior management and Board of Control?				
6	Is timeous and appropriate action taken to address significant over or under expenditure identified by the aforementioned reports?				

7.3 Accounting

7.3.1 Accounting is the process by which all the financial transactions of the clinic are recorded, validated, summarised and reported. These transactions will be in respect of the clinic's income received or owing, expenditure for the acquisition of goods, services and assets, and the payment of salaries, wages and other operating expenses.

7.3.2 An appropriate accounting system is key to the clinic being able to plan its operations and deliver effectively in its core business areas. Most importantly, comprehensive and accurate financial records are essential to compete for scarce resources when fundraising.

7.3.3 Many clinics will have developed their own Accounting Policies and Procedures document. Generally, such a document will provide guidelines and compliance requirements in respect of the following accounting processes:

- Code of Accounts
- Budgeting
- Procurement of Goods and Services
- Reconciliations
- Payroll Procedures
- Payment Procedures
- Cash Receipts and Disbursements
- Investments
- Petty Cash Fund
- Fixed Assets
- Staff Travel and Subsistences
- Reporting Internally and Externally

7.3.4 It is important that the clinic has developed methodologies which dictate and guide how the above functions should be transacted and controlled. This will reduce the possibility of ad hoc

decisions that may be detrimental to the clinic being made.

7.3.5 The following are the most important features of an accounting system:

- (1) The accounting system should be under the responsibility and guidance of a person who has appropriate accounting training and expertise.
- (2) The clinic should use an accounting package or system which is suitable for its specific needs and which should be capable of preparing the following:
 - Interim income and expenditure statements to meet the needs of management.
 - Reports which compare actual income and expenditure to budget and detail variances.
 - Income and expenditure reports which separate funds and grants in accordance with funders' requirements.
 - Recording and controlling orders placed with suppliers.
 - Recording debtors and creditors as applicable.
- (3) Current bank and investment accounts should be reconciled on a monthly basis.
- (4) Should credit or value cards (e.g. credit, debit and petrol cards) be used, the values of their usage should be brought to account at least monthly.
- (5) Dependent on the clinic's fixed asset policy, the system should include providing for the replacement of fixed assets.

7.3.6 The following checklist should be completed in order to assess the adequacy of the clinic's accounting policies and processes:

	<u>ACCOUNTING: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Is the clinic's accounting system controlled and staffed by persons who have appropriate training and experience?				
2	Does the clinic have its own Accounting Policies and Procedures document which provides guidelines and direction to its accounting systems?				
3	Is all expenditure appropriately authorised and supported by the necessary documentation?				
4	Does the system meet the accounting needs of the clinic, specifically:				
4.1	Are periodic interim income and expenditure statements prepared as required?				
4.2	Are reports which detail variances from the budget prepared?				
4.3	Are reports meeting the requirements of individual funders prepared as required?				

4.4	Are orders placed with suppliers adequately recorded and monitored?				
4.5	Are debtors and creditors adequately recorded and monitored?				
5	Are all bank and investment accounts reconciled on a monthly basis and are these reconciliations scrutinised and signed off by a person other than the preparer?				
6	Are credit and value card usages summarised and brought to account as expenditure at least monthly?				
7	Are appropriate provisions made to ensure available funding for the replacement of fixed assets?				
8	Is the clinic's monthly payroll compliant with the following:				
8.1	Are all salary payments to staff supported by duly authorised letters of appointment?				
8.2	Are all additional payments to staff (e.g. bonuses, overtime, travel and subsistence) supported by written authorisations?				
8.3	Are time sheets/ work schedules appropriately authorised and filed? (Clinics should have a method in place to ensure that staff being paid have satisfactorily performed their assigned tasks.)				
8.4	Does the clinic maintain leave records for all staff and, when applicable, make the necessary payroll adjustments for unpaid leave taken or leave converted to cash?				

7.4 Cash Flow Management

7.4.1 Cash flow management is the process of ensuring that the clinic has sufficient funds to meet its short and medium-term operational and project needs.

7.4.2 To effectively manage cash flow, careful forward planning involving the alignment of fundraising and income flows to budgeted project and operational expenditure needs is required.

7.4.3 Cash flow projections may be prepared for a specific project or for the clinic as a whole. They may be for the term of a project or for a set period of normally twelve months.

7.4.4 It is essential that cash flows be reviewed and, if necessary, amended on a regular basis or on the occurrence of an unforeseen event having a significant effect on projected income or expenditure. For example, a new vehicle having to be acquired to replace one that has unexpectedly become irreparable.

7.4.5 Cash flow management also includes the utilisation of surplus funds, usually by investment in a registered bank at the best interest rate available to the clinic.

7.4.6 The following table, using hypothetical figures, illustrates a cash flow projection:

<u>Date</u>	<u>Details</u>	<u>Bank Account</u>	<u>Investment Account</u>
		USD	USD
1 Jan 2012	Balances	2 000	10 000
Jan 2012	Projected income	20 000	-
Jan 2012	Budgeted Expenditure	<u>(8 000)</u>	<u>-</u>
		14 000	10 000
1 Feb 2012	Transfer to investment account	(12 000)	12 000
Feb 2012	Projected income	30 000	-
Feb 2012	Budgeted Expenditure	(35 000)	-
Feb 2012	Transfer from investment account	<u>5 000</u>	<u>(5 000)</u>
1 March 2012	Balances	<u>2 000</u>	<u>17 000</u>

It is important to understand that a clinic's cash flow is largely determined by its fundraising and other income streams together with planned expenditure in terms of its budget. If either of these processes is deficient, the clinic may run into serious difficulties due to a shortage of cash.

7.4.7 The following checklist should be completed to assess the adequacy of the clinic's cash flow management:

	<u>CASH FLOW MANAGEMENT: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	When preparing fundraising proposals does the clinic undertake a study of its cash flow needs during the terms of its projects and request that the respective funders release funds in accordance with these requirements?				
2	Does the clinic take account of its present and anticipated future cash flow when preparing its budget (this will be important if the clinic receives fixed long-term funding or is unable to influence the flow of its funding receipts.)?				
3	Does the clinic review its cash flow projections on a regular basis?				

4	Does the clinic hold sufficient funds in reserve in the event of an emergency?				
5	Does the clinic invest surplus funds in an appropriate interest earning account?				

7.5 Fixed Assets

7.5.1 Fixed assets generally comprise vehicles and various items of equipment necessarily acquired by a clinic in order for it to function and deliver its services.

7.5.2 Fixed assets will comprise items costing in excess of a predetermined amount (e.g. USD1 000) and they will generally have a useful life ranging from one to five years.

7.5.3 On account of their value to the clinic it is important that fixed assets are adequately safeguarded and maintained to ensure that they are fully functional during their useful lives.

7.5.4 It is essential that the clinic maintains an assets register or database in which the description and serial number, asset tag number allocated by the clinic, acquisition date, cost, and funding source of individual assets is recorded.

7.5.5 The acquisition of fixed assets should be compliant with the clinic's Procurement of Goods and Services process.

7.5.6 On account of the risk of abuse or misuse of certain categories of assets the clinic should have in place appropriate controls such as the pre-authorisation of vehicle usage, vehicle log books, and computer user passwords.

7.5.7 The clinic should have a formal process for the disposal of fixed assets. This process should ensure that the optimum price is realised to the benefit of the clinic.

7.5.8 The following checklist should be completed to assess the adequacy of the clinic's recording and control of its fixed assets:

	<u>FIXED ASSETS: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic maintain a fixed asset register or database which records the following details for each fixed asset?				
1.1	Acquisition date of the asset.				
1.2	Description of asset and manufacturer's serial number.				
1.3	Organisation's asset tag number.				
1.4	Cost of the asset.				

1.5	Funding used to purchase the asset.				
2	Does the clinic follow an asset procurement process which requires that a needs analysis be performed and that the asset is acquired at its best available price?				
3	Are assets, particularly those categories most vulnerable to misuse, subject to appropriate access and user controls?				
4	Does the clinic maintain its assets, particularly vehicles, according to manufacturers' specifications?				
5	Is there a formalised procedure to control the disposal of surplus and redundant assets?				

7.6 Payment Procedures

7.6.1 Payment procedures comprise all actions leading to an outflow of funds from the clinic's bank accounts or cash resources.

7.6.2 Payment methods include the following:

- Cheques
- Electronic bank transfers
- Cash

7.6.3 Procedures to be complied with for all the above payment methods include the following:

- (1) All payments should be supported by relevant documentation which details the goods or services being paid for. These documents normally take the form of original invoices, till slips, payroll reports or letters on which contact details and, where applicable, the VAT registration numbers of the providers of the goods or services are indicated.
- (2) All payment documentation should be subject to a pre-authorisation verification and checking process and should be signed off by staff performing these functions.
- (3) Where applicable, payment documentation should be endorsed by the responsible staff member confirming that the goods or services were received and that they conformed to expected standards.
- (4) On payment the supporting documentation should be endorsed "paid" together with the date and details (e.g. cheque no.) of such payment. This will reduce the possibility of accidental or deliberate duplicate payments being made.

7.6.4 The most important aspect of a payment process is that payments may only be made on the authority of duly authorised and mandated staff of the clinic who may be held responsible for their actions. The process should conform to the following:

- (1) Staff assigned to authorise payments should be formally mandated to do so by the clinic's

Board of Control. Changes to these mandates should also be authorised by the Board of Control and minuted.

- (2) The authorisation mandate should require that at least two persons are required to authorise all payments.
- (3) Cheques and payment vouchers should be authorised for payment by being signed by two of the authorised signatories.
- (4) Electronic fund transfers may be made by any person having the clinic's bank account details and transaction password. Consequently, additional controls are provided by banks to safeguard their clients from unauthorised access to their bank accounts. An example of one such control is that the bank will SMS a unique password to the authorised staff member's cellphone and require that this password be entered before a payment is made to a third party.
- (5) Payments to be made by electronic fund transfers should be scheduled and the schedule duly authorised prior to being processed. The clinic's authorising signatories should, on a routine basis, check that all payments actually made from the clinic's bank account have been duly authorised.
- (6) The clinic should hold on file copies of signatory mandates given to, and acknowledged by, their bankers.

7.6.5 The following checklist should be completed to assess the adequacy of the clinic's payment procedures:

	<u>PAYMENT PROCEDURES: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic effect payments by means of the following:				
1.1	Cheques?				
1.2	Electronic bank transfers?				
1.3	Cash?				
2	Are documents supporting payments subject to pre-authorisation verification and checking and are they signed off by the staff performing these tasks?				
3	Is payment documentation endorsed to the effect that the relevant goods or services were received and conformed to expected standards?				
4	Is payment documentation endorsed "paid" and with the date and details of such payment?				
5	Does the clinic's Board of Control formally mandate staff to authorise payments?				

6	Are copies of signatory mandates, acknowledged by the clinic's bankers, held on file?				
7	Does the payment process require that all payments be authorised by at least two staff members?				
8	Does the clinic have adequate controls over its electronic fund payments and transfers?				

7.7 Procurement of Goods and Services

7.7.1 Clinics will, on an on-going basis, need to acquire goods and services to function and undertake their project work. These needs may be for routine consumables such as stationery, for fixed assets such as vehicles and equipment, for premises to rent or for professional services.

7.7.2 The decisions regarding what should be procured by the clinic as well as the choice of goods or services should be driven by what will be in the best interests of the clinic. The process should be transparent, and require approval by the appropriate management or governance levels of the clinic.

7.7.3 The aforementioned process should also take into account the following:

- (1) A needs analysis should be carried out to ascertain the purpose and specifications of high value goods and services.
- (2) The acquisition should be in terms of the clinic's budget unless there are extenuating circumstances such as in the case of an emergency.
- (3) The clinic should have available or committed funding for the acquisition.
- (4) The acquisition should represent value for money to the clinic
- (5) The clinic should have a system of quotations, tenders etc. linked to the value and type of goods or services to be acquired. For example, for acquisitions between USD500 and USD5,000 three written quotes from different suppliers should be obtained, and for acquisitions exceeding USD5,000 tenders should be called for. This system will need to be flexible according to the availability or otherwise of multiple suppliers and historic factors such as the standardisation of vehicle models.
- (6) Manufacturers' warranties together with any terms and conditions in the case of services should be taken note of and, if necessary, negotiated prior to any acquisition being committed to.
- (7) Original invoices or signed written agreements should be obtained and filed for all procurements.
- (8) Payment procedures should be complied with as part of the procurement process.

7.7.4 The clinic's office bearers, staff and other stakeholders should be required to declare any interest they may have in any of its suppliers of goods or services and such declarations should be taken into account in making acquisition decisions.

7.7.5 The following checklist should be completed to assess the adequacy of the clinic's processes for its procurement of goods and services.

	<u>PROCUREMENT OF GOODS AND SERVICES: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic have its own procurement policy?				
2	Does the clinic carry out a needs analysis in respect of high value goods and services?				
3	Are all acquisitions in terms of the clinic's budget?				
4	Does the clinic ensure that there is available or committed funding for its procurements?				
5	Does the clinic ensure that its procurements offer value for money?				
6	Does the clinic follow a transparent process to ensure that best value is achieved in the sourcing of goods and services?				
7	Are manufacturers' warranties or terms and conditions taken note of and, if necessary, negotiated prior to any procurement being committed to?				
8	Are original invoices or signed written agreements held on file for all procurements?				
9	Are the clinic's payment procedures complied with?				
10	Are the clinic's office bearers, staff and other stakeholders required to declare any interests they may have in the clinic's supplies, and are such declarations taken into account in the making of acquisition decisions?				

7.8 Petty Cash

7.8.1 The benefits of operating a petty cash fund are to facilitate the immediate purchase and payment for low value goods and services, and also to save on the cost and inconvenience of issuing orders and cheques to make these purchases.

7.8.2 The following procedures are important in the operation of a petty cash fund:

- (1) The fund should be operated and accounted for on an imprest system. This involves the reimbursement of a petty cash float and accounting for the reimbursement according to categories of actual expenditure e.g. stationery, postage, teas and cleaning etc.
- (2) The size of the petty cash float should be sufficient to require reimbursement approximately once a month.
- (3) Custody of the petty cash float should be assigned to an appropriate staff member.
- (4) The petty cash float should be securely stored.
- (5) All petty cash expenditure should be supported by vouchers which should be authorised by the

petty cash custodian and an independent staff member.

- (6) The petty cash float should be periodically checked on a surprise basis by a staff member other than its custodian.
- (7) No staff loans from petty cash should be permitted.
- (8) Cash advances to staff to make purchases should be recorded and controlled.

7.8.3 The following checklist should be completed to assess the adequacy of the clinic’s petty cash procedures:

	<u>PETTY CASH: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic operate a petty cash fund?				
2	Is the petty cash fund operated on an imprest basis?				
3	Is the control of the petty cash fund designated to a single custodian?				
4	Is the petty cash securely stored with restricted access?				
5	Are all petty cash payments supported by vouchers which are independently authorised?				
6	Is the petty cash float periodically checked on a surprise basis by an independent staff member?				
7	Are staff loans from petty cash prohibited?				
8	Are petty cash advances recorded and controlled?				

7.9 Income Generation

7.9.1 Although unlikely to become a core activity, income generation provides a number of benefits and advantages to a clinic. The most important of these are the following:

- (1) It will enhance the credibility of the clinic in the eyes of its funders and stakeholders as it will be an indication that the clinic is innovative and proactive.
- (2) It will provide the clinic with an additional income stream, the funds from which may be utilised by the clinic at its own discretion.
- (3) It may provide an opportunity for staff of the clinic to earn limited additional income.

7.9.2 Clinics should consider investigating income generating opportunities which could be in the following areas:

- Training
- Publications
- Consulting
- Knowledge and skills transfers

7.9.3 Income generation initiatives should comply with the following criteria:

- (1) They should not negatively affect the core operations of the clinic.
- (2) All work or consultancies negotiated with third parties should be in terms of written contracts.
- (3) A reward system for staff engaged in income generation activities outside their normal working hours should be fair to all staff, operate within strict parameters and be formalised in a clinic policy document.

7.9.4 All income generation initiatives should be properly costed to ensure that they are profitable. Such costing should include direct and indirect costs such as office overheads.

7.9.5 Income generation activities may be subject to income tax and/or could affect the tax status of the clinic. These implications will need to be researched according to the applicable legislation of the country in which the clinic is based or operates.

For example, in South Africa a clinic whose turnover exceeds ZAR 1,000,000 in a twelve month period will be obligated to register for value added tax. Consequently, 14% (the current South African rate of value added tax) would have to be added to all fees billed by the clinic and be paid to the South African taxation authorities as value added tax.

7.9.6 The following checklist should be completed to assess and evaluate controls over the clinic's income generation activities:

	<u>INCOME GENERATION: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Does the clinic engage in income generation activities?				
2	Are income generation activities conducted in terms of a clinic policy document?				
3	Are staff permitted to earn additional income from income generation activities in which they participate?				
4	Is the billing process for income generation activities adequately managed and controlled?				
5	Does the clinic periodically investigate new opportunities for income generation?				

7.10 Computer Systems

7.10.1 There is an increasing reliance on computer systems to administer communications, finances, research, data and reporting. Due to this reliance, it is vital that there are sound procedures in place to ensure that the integrity of data is safeguarded and there are means to recover data and information which may be corrupted or lost in the event of a system or equipment failure.

7.10.2 The following considerations are important to ensure that computer systems adequately meet the needs of the clinic:

- (1) Computer terminals should be password protected and shut down when not attended or actively used.
- (2) Access to programs and systems should be restricted to those staff members who require it to perform their duties.
- (3) After capture, data should be reconciled or verified to source documents.
- (4) Appropriate anti-virus and firewall software should be installed.
- (5) Computer hardware specifications should be appropriate to run the clinic's systems software.
- (6) New software program options should be fully investigated and tested to ensure that the program which best suits the needs of the clinic is acquired.

7.10.3 The following requirements to prevent or recover lost or corrupt data are important:

- (1) The installation of an Uninterruptable Power Supply for each computer or server to prevent damage or corruption of data due to an unexpected power outage.
- (2) All computers should be backed-up on a regular basis and the backed up information should be stored off-site in a secure location.

7.10.4 The following checklist should be completed to assess the adequacy of controls over the clinic's computer systems:

	<u>COMPUTER SYSTEMS: CHECKLIST</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>NOTES</u>
1	Are computers, their programs and data password protected?				
2	Is access to specific programs and data restricted?				
3	Is data reconciled or verified to its source documentation after capture?				
4	Has appropriate anti-virus protection software been installed?				
5	Is the clinic's computer hardware suitable for running its programs and storing its data?				
6	Is new program software investigated and tested for suitability prior to it being purchased?				
7	Has the clinic installed uninterruptable power supply systems for all its personal computers and servers?				
8	Are all computers backed up on a regular basis and is the backed up information stored off-site in a secure location?				

PART III: DEVELOPING A LAW CLINIC CURRICULUM & SKILLS TRAINING

CHAPTER 8: DEVELOPING A LAW CLINIC CURRICULUM

Contents:

- 8.1 Choosing the curriculum
- 8.2 Integrating the law clinic curriculum into the academic programme
- 8.3 Assessing skills and practical work in law clinics
- 8.4 Annual course and skills audits
- 8.5 Conclusion

Outcomes:

At the end of this chapter you will be able to:

1. Decide on the type of law clinic curriculum appropriate for your clinic.
2. Explain how law clinics can be integrated into the law curriculum.
3. Understand how to assess the mastering of skills and practical work.

8.1 Choosing the curriculum

The clinical legal education curriculum at most law schools include selected areas of public interest law (like old-age and social pensions; unemployment insurance; occupational injuries insurance; access to medical treatment; children's rights; etc), and also focus on training in the essential skills required for student clinicians to function effectively in a law clinic. Communication is the life-blood of legal practice. Law students need to be trained in both oral and written communication skills. These include how to use words, thinking and logical reasoning, speaking skills, reading skills and writing skills.¹¹⁹ This may include the PRES formula .¹²⁰

The following skills are regarded as necessary for student clinicians:

- Client interviewing.
- Client counselling.
- Trial Advocacy.
- Negotiation.
- Critical thinking.
- Problem-solving.
- Drafting.

8.1.1 Client interviewing

Client interviewing and the taking of instructions are very important as they are the first point of

119 Robin Palmer and Angela Crocker *Becoming a Lawyer: Fundamental Skills for Law Students* (2ed-2007) 3-84.

120 See para 10.17.

contact between lawyers and clients. Students have to be taught how to put clients at ease and how to build trust between themselves and their clients. This must be done so that clients feel free to tell their lawyers everything that is relevant. Client-centred interviewing techniques should be used to ensure that the lawyer has a clear understanding of the client's needs and requirements.¹²¹

8.1.2 Client counselling

Client counselling involves the lawyer advising the client once he or she has helped the client to identify what the issues are. Students need to be trained so that they take a client-centred approach to counselling. Clients should be given choices regarding the alternative procedures that could be followed and encouraged to make an informed decision on the path they would like to follow.¹²²

8.1.3 Trial advocacy

Trial advocacy skills for law clinics require law students to be trained in case analysis and trial preparation. Students also need to get practice in the oral and written skills necessary to prepare for, and conduct, preliminary hearings in court.¹²³

8.1.4 Negotiation

Negotiation is a skill that all lawyers require as most cases dealt with by them involve attempting to reach an agreement about something. Students need to know that litigation is not the only way to settle disputes. They also need to understand the importance of principled negotiation.¹²⁴ Law students in clinic situations spend a great deal of time negotiating and need to understand the dynamics involved.¹²⁵ In specialist ADR clinics students may also need to be trained in mediation techniques, including how to listen, the steps in the mediation process, and how to draw up a mediation agreement.¹²⁶

8.1.5 Critical thinking

Critical thinking requires students not simply to accept what the law is, or what the courts or text books say the law is. Students should be encouraged to question the legal principle and solutions offered and to think creatively about how they can assist clients to solve their problems using both legal and other remedies.¹²⁷

8.1.6 Problem-solving

Problem-solving is the essence of legal practice. When problem-solving students should be able to identify the issues, generate alternative solutions to the issues raised, and develop a plan of action. They should learn to be open to new information and ideas and be flexible in their approach while dealing with problems.¹²⁸

Students may be trained to use the so-called FIRAC formula to solve legal problems.¹²⁹

121 H Twist *Effective Interviewing* (1992) 20; J Alexander *Client Care* (1997) 12. See below para 17.1.

122 J Chapman *Interviewing and Counselling* (1993) 25. See below para 17.2.

123 See generally, R Palmer and DJ McQuoid-Mason *Basic Trial Advocacy Skills* (2000) 32. See below paras 19.1-19.3.

124 See generally Roger Fisher and William Ury *Getting to Yes: Negotiating Agreement without Giving In* (1981).

125 See for instance, S Lee and M Fox *Learning Legal Skills* 2 ed (1994) 150-151. See below para 20.2.

126 See below Chapter 20.

127 See generally Chapter 13. And see R Palmer and A Crocker *Becoming a Lawyer: Fundamental Skills for Law Students* (2ed- 2007), Durban:LexisNexis.

128 PF Iya 'Strategies for Skills Development: The Fort Hare Experience in Curriculum Design for the New LLB' in PF Iya, NS Rembe and J Baloro (eds) *Transforming South African Universities* (2000) 62, 67.

129 See below para 10.18.

8.1.7 Drafting

Students in law clinics may be required to write letters and draft documents such as pleadings, contracts, wills, leases and other legal documents. They need to be taught these skills before they attempt to undertake writing and drafting tasks on behalf of clients. The clinics need to imbue law students with a commitment to accurate and good drafting techniques.¹³⁰

8.2 Integrating the law clinic curriculum into the academic programme

Academic training and justice education involving clinical legal education can occur at both the formal and informal level. Clinical law is recognized at the formal level when it is integrated into the law school curriculum as a credit-bearing course.¹³¹ At the informal level clinical law is regarded as a voluntary course for which no academic credit is given. The ideal situation is where the clinical course is fully integrated into the academic programme.

The nature of an institution's academic programme will determine the kind of academic training and justice education that can take place. The status of the clinical law course as either a credit-bearing or non-credit-bearing course will impact on the (a) operational strategies; (b) opportunities; (c) challenges; and (d) expectations, involving the course.

8.2.1 Clinical law as a credit-bearing course

8.2.1.1 Operational strategies for credit-bearing clinical law courses

Where clinical law is a credit-bearing course it will be governed by the law school curriculum. Its content, delivery and assessment will have to conform to the requirements of the law degree structure.

The content of the course should be designed to meet the objectives of the course and may be influenced, for example, by whether the clinical work will be done in a general practice, specialist or public interest campus, off-campus, mobile or farm-out law clinic, a community clinic, a street law clinic, an alternative dispute resolution clinic, a legislative drafting clinic, a teaching study skills clinic, a mixed clinic, a simulated clinic or some other clinic. Apart from the necessary practical skills that students need to learn, the course should also contain elements of justice education to make students socially aware of the problems faced by poor people in society and how these can be addressed.¹³²

The delivery of the course should involve interactive teaching methods in the clinical legal education tradition and not simply be lecture-based. Students should be exposed to experiential learning whereby skills are taught, demonstrated and practiced. This should be done through the use of a variety of interactive teaching methods¹³³ and, wherever possible, exposure to live clients. The programme should consist of a mix of interactive lessons, tutorials, practical exercises, exposure to live clients and consultations with supervisors.

130 D Barnheizer 'The University Ideal and Clinical Legal Education' (1990) 35 New York Law School LR 87. See Chapter 18.

131 For instance, as occurs at the University of KwaZulu-Natal.

132 DJ McQuoid-Mason "Teaching Social Justice to Law Students through Community Service: The South African Experience" in PF Iya, NS Rembe and J Baloro (eds) *Transforming South African Universities: Capacity Building for Historically Black Universities* (2000) 89-203. See also David McQuoid-Mason "Incorporating Justice and Ethical Issues into First Year Undergraduate Law Courses: A South African Experience" (2002) 1 *Journal of Commonwealth Law and Legal Education* 107-125.

133 See Chapter 10.

Although the assessment of the course will have to comply with the faculty rules for examinations, appropriate arrangements should be made to assess practical skills and student performance in the clinic. Depending on the nature of the faculty rules it may for instance be possible to allocate 50% of the grade marks to practical work and 50% to a written examination,¹³⁴ or to allow 100% of the marks to flow from continuous assessment and assignments.¹³⁵

8.2.1.2 Opportunities in credit-bearing clinical law courses

Where the clinical law course is credit-bearing the clinicians can place specific demands on the students regarding attendance and participation. Failure to meet these demands can be sanctioned by the withdrawal of a duly performed certificate (or its equivalent) that enables students to write the examination or qualify for the course. Where the credit-bearing course is optional or only available to a limited number of students the clinic can devise a selection process whereby only those students who are really committed to social justice and prepared to work long hours are accepted into the programme.

8.2.1.3 Challenges in credit-bearing clinical law courses

Clinical law courses are time-consuming, labour intensive, and usually demand many more contact hours than regular credit-bearing courses. They require students to spend considerable time outside of the classroom conducting research and following up on their files. Depending on the type of clinic students may also have to staff clinics on week-ends or visit off-campus venues; meet with clients and other persons or officials away from the campus; live in communities away from home during their vacations; or, as street law students do, visit schools or prisons. These activities all need to be balanced with other academic work.

A further challenge is that students who under-perform can only be excluded from the course if they are in breach of the faculty rules regarding duly performed certificates or their equivalents. Specific requirements will have to be drawn up by the clinic to conform to these. Where all the students in a degree or diploma programme are required to participate in a clinical course the greatest challenges are to keep all the students motivated and to ensure that the learning process is not compromised by unrealistic staff-student teaching ratios.¹³⁶

8.2.1.4 Expectations of students and staff in credit-bearing clinical law courses

The expectations of students in credit-bearing clinical law courses, depending on the nature of the clinic, are that they will learn the appropriate lawyering skills and be exposed to practical aspects of justice education. By the end of the course they expect to be sufficiently empowered to enter the next stage of their legal and professional education. They expect to do this with self-confidence and a better understanding of the challenges involved in delivering social justice. They also want to have a proper understanding of the practical aspects of legal practice. The expectations of law clinicians are that apart from learning practical skills some of the students will have become sufficiently imbued with the notions of justice education and professional responsibility that in their future legal careers they can make a positive impact in the struggle for social justice.

134 As happens in the Street Law course at the University of KwaZulu-Natal.

135 As is the case with the Clinical Law course at the University of KwaZulu-Natal.

136 See above para 4.10.

8.2.2 Clinical law as a non-credit-bearing course

8.2.2.1 Operational strategies for non-credit-bearing clinical law courses

Where the clinical law course is a non-credit-bearing course the instructors have much greater flexibility in determining the content, delivery and assessment of the course. Ideally the content and delivery of the course should conform to the criteria mentioned above in respect of credit-bearing courses. The difference will be in respect of the assessment because, given the pressures of a law curriculum, students will be reluctant to submit themselves to formal methods of grading and examination if they will not result in academic credit.

8.2.2.2 Opportunities in non-credit-bearing clinical law courses

Where the clinical law course is voluntary and non-credit-bearing, the clinic can devise a selection process, as in the case of optional credit-bearing courses, whereby only those students who are committed to justice education and who undertake to work long hours are accepted into the programme. The clinic has the flexibility to determine its own exclusion criteria for removing students who do not perform from the programme – without having to conform to the faculty rules regarding exclusion from credit-bearing courses. The clinic should, however, make sure that all students are fully informed about what is expected of them by drawing up specific criteria in respect of attendance and participation in, and exclusion from, the course.

8.2.2.3 Challenges for non-credit-bearing clinical law courses

The main challenge for clinicians teaching non-credit-bearing courses is to keep students sufficiently motivated to ensure that they do their work properly and do not withdraw from the programme. Clinicians in such courses do not have the weapon of duly performed certificates or their equivalents to secure compliance and are solely dependent on their ability to maintain the interest of the students. To this end the content and delivery of the programme must be interesting, informative and action-oriented. Students must feel that the skills they are learning and the education they are receiving more than compensate for the lack of academic credit. Clinicians also need to imbue students with a sense of professional responsibility so that they are not tempted to abandon their clients when things become difficult or they feel under pressure.

8.2.2.4 Expectations of students and law clinicians in non-credit-bearing clinical law courses

The expectations of the students and law clinicians teaching in a non-credit-bearing clinical law course are the same as those involved in a credit-bearing course.

8.3 Assessing skills and practical work in law clinics

8.3.1 Skills assessments

The skills-training component of the curriculum requires an on-going, rigorous assessment of the students' mastery of the relevant skills. An mark sheet must be developed for each skill, with an explanatory memorandum, to ensure consistency in practical assessment. Also, the number of assessors should be limited as much as possible to ensure marking consistency. For example, the mark sheet for the assessment of the interview of a clinic client by a student could look as follows:

[The assessor sits and observes the entire interview and makes entries on the mark sheet]

LIVE-CLIENT INTERVIEW: MARK SHEET

<i>Topic</i>	<i>Mark</i>	<i>Comments</i>
1. Preparation for interview:	.../20	
2. The interview:		
2.1 Opening and chronology:	.../10	
2.2 Issue identification:	.../20	
3. Counselling:		
3.1 Identification of options:	... /10	
3.2 Explanation of options:	.../10	
3.3 Advice & client's choice:	.../10	
4. Closing interview:	.../10	
5. General impression:	<u>.../10</u>	
Total:	... /100	

ASSESSOR: DATE:

8.3.2 The seven-step skills training process: TOS-PCR-A

The skills training programmes in the curriculum that precede the assessment should comply with the following training sequence (over a number of training sessions):

First: Explain the title (what do we mean by 'Negotiation?');

Second: Discuss the required outcome (the level of competence expected at the end of the training in negotiation);

Third: Identify and name the subsidiary skills (ss) required to reach the outcome (e.g., ss1: preparation for negotiation; ss2: starting the negotiation, etc);

Fourth: Demonstrate and practice each subsidiary skill separately (e.g., a whole training session just on the various ways of starting a negotiation);

Fifth: Using a case study, make students combine all their learnt subsidiary skills;

Sixth: Give feedback, and do remedial training on subsidiary skills not up to standard;

Seventh: Using a fresh case study, assess the student's mastery of the skill (i.e., against the defined outcome).

8.3.3 Assessing case management

The fairest and most effective way to assess each student's case management is to base the assessment on file handling. The recommended method is to develop a file-handling mark sheet based on the following criteria (all the relevant student's files being assessed at the end of each semester, and the marks under the categories below averaged to get an overall mark):

1. Completion of cover details:	[10]
2. Content of client's and supporting statements:	[40]
3. Appropriate research and actions:	[20]
4. Satisfactory completion of diary:	[10]
5. Timeous follow-up and client communication:	[20]
Total:	[100]

8.4 Annual course and skills audits

The public-interest law course content of the curriculum (i.e., Social pensions, children's rights, etc) must be reassessed on an annual basis with reference to the case statistics of that year. For example, if the statistics show that in the course of the year, refugee cases constituted 20% of all cases handled by the clinic, a module in Refugee law will have to be developed and added to the curriculum for the next academic year. This will mean that some existing modules may (depending on their statistical frequency) have to be reduced in scope or removed from the curriculum entirely.

In the same way, changing circumstances may require new skills training programmes to be included in the curriculum: for example, a new computerized file-management programme may have been installed requiring training in its use.

8.5 Conclusion

The operational strategies, opportunities, challenges and expectations regarding the academic training and justice education aspects of clinical legal education programmes will depend upon whether the courses are credit-bearing or non-credit-bearing.

Credit-bearing courses have to comply with the assessment criteria required by the law faculty or law school offering the course. Students involved in credit-bearing courses are exposed to the academic sanctions applied to all law students enrolled in credit-bearing courses.¹³⁷

Non-credit-bearing courses can be more flexible as they are not confined by the usual academic rules regarding assessment. However, it is more difficult to deal with students who do not conform to the course requirements as they may not be bound by the academic sanctions associated with credit-bearing courses.

Given the heavy workload faced by students in clinical programmes it is recommended that all clinical courses should be integrated into the academic programme as credit-bearing courses.

¹³⁷ This is required by the Council for Legal Education in Nigeria, and as a condition for the funding law clinics in South Africa by the Attorneys Fidelity Guarantee Fund.

CHAPTER 9: DEVELOPING LESSON PLANS

Contents:

- 9.1 Knowledge, skills and values
- 9.2 Effective learning
- 9.3 The general lesson plan

Outcomes:

At the end of this chapter you will be able to:

1. Explain the difference between knowledge, skills and values.
2. Design a general lesson plan.

This chapter defines lesson outcomes. It then describes the requirement for an effective lesson and suggests two types of lesson plans that can be used to assist clinical teachers to prepare for their classes: (a) a general lesson plan or (b) a grid lesson plan for skills training. Either may be used. The grid plan gives a more detailed breakdown of the lesson.

9.1 Knowledge, skills and values

Outcomes are what the students should know by the end of the clinical law lesson. When developing a lesson plan law clinicians should bear in mind that the ideal lesson should include three kinds of outcomes, being knowledge, skills and values.

Knowledge outcomes refer to what the students will know by the end of the lesson about the relevant substantive or procedural law principles, skills or values being taught (e.g. “At the end of the lesson students will be able to explain ...”).

Skills outcomes refer to what the students will be able to do by the end of the lesson (e.g. “At the end of this lesson students will be able to conduct ...”). To ensure that skills outcomes are achieved, see the discussion in Chapter 11.3 above.

Values outcomes refer to what the students will appreciate by the end of the lesson (e.g. “At the end of this lesson students will appreciate the importance of ...”).

The outcomes regarding knowledge, skills and values should be explained to the students at the beginning of each lesson so they know what to expect. The inclusion of the outcomes in the law clinician’s lesson plans ensures that he or she has the necessary guidelines as to what he or she is trying to achieve in the lesson. The outcomes also enable the instructor to check whether or not he or she has achieved to objective of the lesson.

9.2 Effective learning

Clinical law teachers do not rely on the traditional lecture approach to teaching because it is the least effective method of imparting knowledge to students.¹³⁸

138 See below para 10.1.

In order to use interactive teaching methods it is necessary to consider the elements of an effective lesson and what should be included in a lesson plan that uses interactive strategies.

As has been pointed out an effective lesson is not merely a lecture. An effective lesson goes beyond using the lecture technique in order to stimulate cognitive learning by law students. It is recommended that for an effective lesson the following elements should be included:

1. The substance of the actual topic (e.g. law, human rights, legal ethics, procedure or practice).
2. The policy considerations affecting the topic (e.g. why the law was introduced, how it works in practice etc).
3. Conflicting values – a lesson will be more lively and motivating if students are exposed to different competing values (e.g. the need for the police to combat crime weighed against the right of accused persons to a fair trial).
4. An interactive teaching strategy.¹³⁹
5. When possible, practical advice – students need to know what can be done in practice about relevant aspects of the law.

9.3 A general lesson plan

9.3.1 Outline of a general lesson plan

Unlike in the case of lectures, where time management is relatively easy, interactive learning methods require very careful time management.

The following outline for lesson plans involving interactive learning methods can be used:

Step 1: Set out the topic of the lesson.

Step 2: Set out the outcomes for the lesson - state what students will be able to do at the end of the lesson in respect of knowledge, skills and values.

Step 3: Set out the content of the lesson in respect of the areas that have to be covered in respect of knowledge, skills and values (i.e. what has to be taught in respect of each).

Step 4: Set out the interactive strategies that will be used together with their time frames in respect of each outcome, e.g.:

4.1 Focuser: brainstorm (5 minutes).

4.2 Divide students into small groups and allocate questions (5 minutes).

4.3 Small group discussions of questions (10 minutes).

4.4 Report back from small groups (20 minutes).

4.5 General discussion and checking questions (10 minutes)

Total: 50 minutes

Step 5: Set out the resources needed for the lesson (e.g. case study handouts, flip chart, overhead projector, PowerPoint projector etc).

Step 6: Make a list of questions for the concluding session to check that the outcomes for the lesson have been achieved.

139 See below Chapter 13.

9.3.2 Example of a general lesson plan

The following is an example a case study and general lesson plan for how to conduct the lesson.

Case study: The second-hand clothes arrest

A man in plain clothes stops Mr. Soni while he is walking down the street with a box full of second-hand clothes that had been given to him by his employer. The man says he is a policeman and asks Mr. Soni to give him his full name and address. He also asks Mr. Soni where he obtained the clothes. Unless the policeman identifies himself, Mr. Soni refuses to give his name and address. The policeman gets angry with Mr. Soni and takes him to the police station for questioning.

1. Role-play the incident between the policeman and Mr. Soni in the street, and at the police station.
2. Is Mr. Soni required by law to answer any questions? Why might he decide to answer questions? Give reasons for your answer.
3. If you were Mr. Soni what would you have done?
4. Should people have the right to refuse to answer questions by the police? Why or why not? If people have the right to keep quiet should the police tell them about it? Why or why not?

Lesson plan: The second-hand clothes arrest

1. Topic: Rights on arrest
2. Outcomes: At the end of this lesson you will be able to:
 - 2.1 Explain the powers of the police when arresting a person.
 - 2.2 Explain the rights of people who have been arrested.
 - 2.3 Appreciate what to do if you are arrested.
3. Procedure:
 - 3.1 Focuser: Ask students who of them has been arrested (5 minutes).
 - 3.2 Ask students to prepare for second-hand clothes arrest roleplay (5 minutes).
 - 3.3 Conduct second-hand clothes arrest roleplay (5 minutes).
 - 3.4 Debrief roleplay (10 minutes).
 - 3.5 Divide students into small groups of not more than 5 each (2 minutes)
 - 3.6 Allocate one of questions 2-4 to each group for discussion (8 minutes)
 - 3.6 Reports back (10 minutes)
 - 3.7 General discussion and checking questions (10 minutes).Total time: 60 minutes
4. Resources: Hand-out on second-hand clothes arrest scenario.
5. Checking questions: Question and answer on rights of people on arrest, e.g.:
 - 5.1 What are the powers of the police to arrest?
 - 5.2 What are the rights of people who are arrested?
 - 5.3 What should you do if you are arrested?

CHAPTER 10: INTERACTIVE TEACHING METHODS

Contents:

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- 10.26. Conclusion

Outcomes:

At the end of this chapter you will be able to explain how to use a variety of interactive teaching methods.

This chapter will deal with the following interactive teaching methods: (i) brainstorming, (ii) ranking exercises, (iii) small group discussions, (iv) case studies, (v) role-plays, (vi) question and answer, (vii) simulations, (viii) debates, (ix) games, (x) hypothetical problems, (xi) moots, (xii) mock trials, (xiii) open-ended stimulus, (xiv) opinion polls, (xv) participant presentations, (xvi) taking a stand, (xvii) thinking on your feet – PRES formula, (xviii) problem solving – FIRAC formula, (xix) values clarification, (xx) fishbowl, (xxi) jigsaw, (xxii) “each one teach one”,(xxiii) visual aids, (xxiv) the use of experts, and (xxv) field trips.

The discussion of each teaching method includes a brief explanation of the method and how it is used.

10.1 Brainstorming

Brainstorming is a means of encouraging a free flow of ideas from students. It is an important learning technique because it encourages students to generate creative ideas without fear of criticism.

During brainstorming the law teacher invites students to think of as many different ideas as they can, and records all the suggestions on a black board or flip chart even if some of them might appear to be wrong. If the answers seem to indicate that the question is not clear, it should be rephrased. Law teachers should postpone any criticisms of the suggestions made until all the ideas have been written down. Thereafter, the suggestions may be criticised, and if necessary ranked in order of priority.¹⁴⁰

10.2 Ranking exercises

Ranking exercises involve making choices between competing alternatives. The law teacher can either use a brainstormed list developed by the students¹⁴¹ or give the students a list of items to rank, for example, 5 to 10 different items. Students should then be required to rank the items from e.g., 1 to 5, or 1 to 10, with 1 being the most important and 5 or 10 the least. Students can be asked to: (a) justify their ranking, (b) listen to people who disagree, and (c) re-evaluate their ranking in the light of the views of the other participants. For example, students may be asked to rank certain crimes from the most serious to the least serious.¹⁴²

A variation of ranking is to ask students to place themselves on a continuum based on their feelings about some statement or concept. For example, students may be asked to indicate their feelings on the death penalty by standing in a line and placing themselves on a scale from “strong approval” of the death penalty at one end and “strong disapproval” at the other. Students should then have an opportunity to justify their ranking, to listen to students who disagree with their viewpoints, and to re-evaluate their position based on the discussions they have heard. They could indicate this by moving their position on the line.¹⁴³

10.3 Small group discussions

Small group discussions should be carefully planned with clear guidelines regarding the procedure to be followed and the time allocated. The groups should usually not exceed five people to ensure that everyone has a chance to speak. The groups should be numbered off by the law teacher (e.g. 1 to 5), or formed by taking every five people in a row or group and designating them as teams for group discussions.

The groups should be given instructions concerning their task – including how long they will have to discuss a topic or prepare for a debate or role play and how the group should be run (e.g. elect a chairperson and a rapporteur who will report back to all the other students).

Groups should be told to conduct their proceedings in such a way as to ensure that stronger students do not dominate and everyone has a fair opportunity to express themselves. A simple way of achieving this is to use “token talk” whereby group facilitators give each participant five matches or

140 See below para 10.2.

141 See above para 10.1.

142 See David McQuoid-Mason, Lloyd Lotz, Lindi Coetzee, Usha Jivan, Sibonile Khoza and Tammy Cohen Street Law: Practical Law for South African Students 2ed (2004) 66-68.

143 See below para 10.16.

other tokens and requires the participants to surrender their token each time they speak. Any person who speaks on five occasions will have no tokens left and can no longer speak.

10.4 Case studies

Case studies are usually conducted by dividing students into three large groups of lawyers for plaintiffs or defendants (or prosecutors and accused persons) and judges, and then further subdividing the large groups into small groups to consider suitable arguments or solutions. Individuals from each group can be selected to present arguments or to give judgements on behalf of the group. A variation might be for one group or set of groups to argue for one side, another group or set of groups to argue for the other side, and a third group or set of groups to give a decision or judgement on the arguments.

When requiring students to discuss case studies an eight step procedure can be used:

Step 1: *Select the case study.*

Step 2: *Get the students to review the facts* (ensure that they understand them – in plenary).

Step 3: *Get the students to identify the legal issues involved* (identify the legal questions to be answered – in plenary).

Step 4: *Allocate the case study to the students* (in small groups).

Step 5: *Get the students to discuss the relevant law and prepare arguments or judgements* (in small groups).

Step 6: *Get the students to present their arguments* (arguments on behalf of the plaintiff and defendant should be presented within the allocated time – in plenary or in small groups).

Step 7: *Get the students to whom the arguments were presented to make a decision* (e.g. students allocated the role of judges or the students as a whole – in plenary or in small groups).

Step 8: *Conduct a general discussion and summarize* (in plenary).

Case studies are often based on real incidents or cases, and at the end, after the students have made their decisions, the law teacher can tell them what happened in the real case. Case studies help to develop logical and critical thinking as well as decision-making.

10.5 Role plays

In role plays students draw on their own experience to act out a particular situation (e.g. a police officer arresting somebody). Students use their imagination to flesh out the role play. Role plays can be used to illustrate a legal situation.

The law teacher should use the following seven steps when conducting role plays:

Step 1: *Explain the role play to the students* (describe the scenario).

Step 2: *Brief the students who volunteer* (or are selected) to do the role play.

Step 3: *Brief the other students to act as observers* (give them instructions on what to look out for).

Step 4: *Get the students to act out the role play* (this can be done by one group in front of all the students or in small groups consisting of role players and observers).

Step 5: *Ask the observer students to state what they saw happen in the role play.*

Step 6: *Ask all the students to discuss the legal, social or other implications of the role play and to make a decision on what should be done to resolve the conflict in the role play* (this can be done using small groups).

Step 7: *Conduct a general discussion and summarize.*

A variation of Step 6 would be to ask the students to act out a conclusion to what happened during the role play.

Although the law teacher sets the scene, he or she should accept what the students do. Role plays often reveal information about the student's experiences as a story in itself.

10.6 Question and answer

The question and answer technique can be used instead of lecturing. In order to use questions and answers effectively a checklist of the questions and answers should be prepared to ensure that all aspects of the topic have been covered by the end of the lesson. The questions must be properly planned beforehand to make sure that all the information necessary for the lesson or workshop has been obtained from the students.

Law teachers, when using the question and answer technique should wait for a few seconds, (e.g. at least about 5 seconds), after asking the question, in order to give students an opportunity to think before answering.

Instructors should be careful to ensure that more confident students do not dominate the question and answer session.

10.7 Simulations

Simulations require students to act out a role by following a script. They are not open-ended like role plays, and are carefully scripted to ensure that the objectives of the exercise are achieved.

Simulations usually require more preparation than role plays because the students need time to prepare to follow the script. The instructor should tell students about the persons or situation they are simulating before they act out the scene to give them time to rehearse. Simulations can be combined with case studies,¹⁴⁴ moots¹⁴⁵ and mock trials.¹⁴⁶

The procedure for conducting a simulation is similar to that for a role play and law teachers should follow the seven steps suggested above in para 10.5.

10.8 Debates

Debates should involve relevant controversial issues such as abortion, prostitution, legalization of drugs, capital punishment etc. A controversial issue means that there should be a substantial number of students in favour and against the proposition.

The students may be divided into two groups, or small groups, to prepare arguments for one or other side in the debate. The groups help the persons on each side who are chosen to debate on behalf of the group. The debate is conducted and the participants then vote in favour of or against the proposition.

144 See above para 10.4.

145 See above para 10.11.

146 See above para 10.12.

The law teacher can use the following steps to conduct a debate:

***Step 1:** Allocate the debate topic to groups of students and choose which groups will argue for and against the proposition.*

***Step 2:** Get the groups to prepare their arguments and to choose two debaters to present their arguments (one, the main debater, to present the group's arguments, and the other, a replying debater, to reply to the opposing group's arguments).*

***Step 3:** Allow the main debaters who are in favour of the proposition to present their arguments first within the designated time frame (e.g. 5 minutes).*

***Step 4:** Allow the main debaters who are against the proposition to present their arguments within the designated time frame (e.g. 5 minutes).*

***Step 5:** Allow the replying debaters who are in favour and against the proposition to briefly reply to their opponents within the designated time frames (e.g. 1 minute for each side).*

***Step 6:** Ask all the students to vote on which side presented the best arguments and deserved to win the debate.*

A variation of the debate is 'mini-debates'. Here all the participants are divided into triads (groups of three) to conduct mini-debates with debaters for and against the proposition in each triad, together with an adjudicator who controls the debate, decides who the winner is, and reports back to all the other students.

10.9 Games

Games are a fun way for people to learn because most people, whether they are adults or children, enjoy playing games. Games may be used as 'ice breakers' but they may also be used to teach important topics in the law. Games can illustrate complicated legal principles in a simple experiential format. Where games are used to teach about the law they should not just be fun but should also have a serious purpose.

An example of a game that can be used to teach values and knowledge and introduce students to the need for law and types of laws that exist in democratic societies is what the present writer calls the "Pen Game". (There are many variations of this game). The Pen Game is played as follows:

Step 1: The law teacher announces that the need for some sort of legal system will be illustrated by playing a game.

Step 2: The law teacher checks that each student has a pen (or a paper clip, or a bottle top or any other suitable object). Once the law teacher is satisfied that each student has a pen (or other object) the law teacher informs them that they will be playing the "pen" (or some other object) game.

Step 3: The law teacher tells the students that as it is a game they need to be in teams and divides them into teams using small groups or by rows if they are in a class room setting.

Step 4: The law teacher tells the students that as they have teams they need to have team captains and designates the students on the right hand side of each group or row as the team captains.

Step 5: The law teacher checks that the students know who are in their teams, who their team captains are and that they are playing the "Pen Game".

Step 6: The law teacher tells the students to start playing the "Pen Game" – ignoring any requests for rules.

Step 7: The law teacher allows the students to make up their own rules regarding the game for a couple of minutes but then tells them that they are not playing the game properly.

Step 8: The law teacher tells the team captains to pass the pen to the team members on their left and restarts the game. After a minute or so the law teacher stops them and tells them that they are not playing the game properly.

Step 9: The law teacher tells the team captains to hold the pen in their right hands and then to pass it to the team member on their left. After a minute or so the law teacher again stops them and tells them that they are not playing the game properly.

Step 10: The law teacher tells the team captains to hold the pen in their right hands, pass it to their left hand, and then pass it to the team member on their left. After a minute or so the law teacher again stops them and tells them that they are not playing the game properly.

Step 11: The law teacher tells the team captains to hold the pen in their right hands, pass it to their left hand, and then pass it to the right hand of the team member on their left. After a minute or so the law teacher again stops them and tells them that they are still not playing the game properly.

Step 12: The law teacher tells the team captains to hold the pen in their right hands, pass it to their left hand, pass it to the right hand of the team member on their left – but not to any members wearing spectacles (or any other distinguishing feature such as rings or clothes of a certain colour). After a minute or so the law teacher again stops the game and arbitrarily chooses one of the teams as the winners.

Step 13: The law teacher debriefs the game to find out how the students felt about it, why they felt the way they did, and what they learnt from the game.

Step 14: Summary and conclusion: The law teacher checks that the students understand why society needs laws to prevent confusion and chaos, laws should not work retrospectively, laws should not discriminate against people, people should have access to impartial courts that apply the rule of law, citizens should participate in the lawmaking process.

The “Pen Game” teaches knowledge and values – students not only learn why we need laws in society but also appreciate why laws are necessary. Law teachers should ensure that games are structured in such a way that they meet the learning outcomes for the exercise. Not only should the game cover the various principles to be learnt but the law teacher should ensure that during the debriefing all the outcomes have been achieved.

Games can be used to teach knowledge, skills and values.

10.10 Hypothetical problems

Hypothetical problems are similar to case studies, except that they are often based on fictitious situations. They can be more useful than case studies in the sense that a particular problem can be tailor-made for the purposes of the workshop. Furthermore, they are often based on an actual event (e.g. a newspaper report), even though it is not an officially reported legal case. The advantage of hypothetical problems is that appropriate changes can be made to the facts depending on the purposes of the exercise.

Hypothetical problems are particularly useful when teaching about human rights in an anti-human rights environment, because reference does not have to be made directly to the home country. Even though the facts may be identical to those in the home country the hypothetical problem can present

them as occurring in a foreign country.¹⁴⁷

When dealing with hypothetical cases, just as in case studies, students should be required to argue both sides of the case and then to reach a decision. To this end law teachers can use Steps 1 to 8 mentioned for case studies in para 13.4.

10.11 Moots

Moots involve case studies in which students are required to argue an appeal on a point of law. Moots are different from mock trials because there is no questioning of witnesses, accused persons or experts as there is in mock trials.¹⁴⁸ All the questioning would have been done at the trial stage. The moot is the appeal stage after the trial has been heard. The only people the appeal court sees and hears are the lawyers who argue the appeal.

In law faculties moots are usually conducted formally and students dress in robes and argue the appeal in a simulated moot court environment. Law students are required to carry out the preparation work on an individual basis and to present their arguments individually as legal counsel.

A variation used in street law-type clinics is for students to prepare arguments in small groups, as is sometimes done with case studies, and then to elect a representative to present the arguments of the group. Steps 1 to 8 for case studies can be used for these types of moots.¹⁴⁹

Another method of presenting moots in street law-type clinics is to use “mini-moots” where students are divided into groups of three with a lawyer on each side and a “judge” to control the proceedings, give a judgement and report back to all the other students.¹⁵⁰

10.12 Mock trials

Mock trials are an experiential way of learning that teaches students to understand court procedures. Mock trials take a variety of forms. In law school programmes teaching criminal or civil proceedings the trials can be spread over a full semester with students being carefully coached on each aspect of the trial. Law students are required to prepare and participate on an individual basis.

In legal literacy and street law programmes large numbers of students can be used in mock trials. For example, mock trials using five witnesses and an accused can involve up to 28 participants - 8 lawyers for the plaintiff or prosecution team and 8 for the defence team, 3 judges, 5 witnesses, an accused, a registrar, a court orderly and a time-keeper. One lawyer on each side can make an opening statement, each lawyer can question one witness or the accused, and one lawyer on each side can make a closing statement. The chief judge can control the proceedings, each judge can question one witness or the accused, and one judge can be responsible for giving the judgement. The registrar calls the case, court orderly keeps order in court and the time-keeper keeps the time.¹⁵¹

Students are taught the different steps in a trial.¹⁵² They are also taught basic skills like how to make

147 David McQuoid-Mason “Teaching Human Rights in a Hostile Environment: A Lesson from South Africa” (2003) 22 Windsor Year Book of Access to Justice 213-226.

148 See below para 10.12.

149 See above para 10.4.

150 For example, see below Annexure T, Street Law Lessons, para 1.2.5.1.

151 See below Chapter 10.

152 See below para 10.2.

an opening statement, how to lead evidence, how to ask questions and how to make a closing statement. Students play the role of witnesses, court officials, judges and lawyers.

Generally on how to conduct a street law-type mock trial see Chapter 14.

10.13 Open-ended stimulus

Open-ended stimulus exercises require students to complete unfinished sentences such as: "If I were the Judge ..." or "My advice to the Minister of Justice would be ...".

Another method of using an open-ended stimulus is to provide students with an untitled photograph or cartoon and require them to write a caption.

Students may also be provided with an unfinished story and asked to give their own conclusion or to act out the conclusion in a role play.¹⁵³

10.14 Opinion polls

An opinion poll allows students to express their opinion on the topic of study. A poll allows for a spread of opinions (for example, strongly agree, agree, undecided, disagree, strongly disagree). Opinion polls can (a) serve as the basis for discussion; (b) give the law teacher feedback on the values, attitudes and beliefs of the students; and (c) can be used to assess changes in attitudes.

To conduct an opinion poll, the law teacher should ask each student to express privately his or her opinion on the subject (e.g. by individually writing the opinion down). The law teacher should then ask students for their individual views and record them on a black board or flip chart in a table that reflects the views of all the students. This can be done by a simple show of hands. For example, how many strongly agree with statement number 1? Students should then be asked to justify their opinions and to listen to opposing points of view. If no one takes an opposing point of view, the law teacher can ask students what the arguments can be made for the opposing position.

The law teacher can use various poll items to check the consistency of students' beliefs and may wish to follow the opinion poll with a case study on the subject being discussed. For example, if during an opinion poll a number of students say that criminals should be rehabilitated and not punished the poll could be followed by a case study about a violent criminal with a long history of offences. The students could then be asked whether they think that the particular criminal should be punished or whether they still believe in rehabilitation.

10.15 Participant presentations

Students can be given a topic to prepare for presentation. For example, students may be asked to research the topic formally (e.g. by consulting book, magazine, journal or newspaper articles on the subject), or informally (e.g. by asking parents, relatives or friends about particular aspects of the law and how it has affected their lives). Students can then be called upon to make a presentation to all the other students. Thereafter, the presentations are discussed by all the students.¹⁵⁴

¹⁵³ See above para 10.5.

¹⁵⁴ See David McQuoid-Mason "Incorporating Justice and Ethical Issues into First Year Undergraduate Law Courses: A South African Experience" (2002) 1 Journal of Commonwealth Law and Legal Education 107-125.

10.16 “Taking a stand”

“Taking a stand” requires students to stand up for their point of view by physically standing up and verbally justifying their position. A controversial topic should be chosen.

As an example, students might be asked who are in favour and who are against the death penalty. Students would then have to take a stand under a placard stating “In favour”, “Against” or “Undecided”, and would have to articulate their opinions on the death penalty.

The following procedure can be followed:

Step 1: Prepare placards with headings: “In favour”, “Against” and “Undecided” or other suitable headings.

Step 2: Introduce the controversial topic on which the students will be required to take a stand (e.g. the death penalty, legalization of drugs or prostitution etc). Tell students that they may move their position if they hear a particularly good or bad argument.

Step 3: Request students to take a stand under the placard that reflects their point of view.

Step 4: Get students to justify their position by making a single argument – alternatively giving students under each placard an opportunity to express their point of view.

Step 5: Get any students who moved their position to give their reasons for doing so.

Step 6: Test the consistency of the student’s positions by introducing questions involving extreme examples (e.g. in a death penalty debate check whether those against would say that even Adolf Hitler who was responsible for killing millions of people should not be given the death penalty – had he been caught alive).

Step 7: Summarize the discussion and conclude.

To assist the students in articulating their viewpoints in a logical manner they may be required to use a formula like the PRES formula.¹⁵⁵

“Taking a stand” not only teaches students the skill of articulating an argument but also requires them to clarify their values.

10.17 The PRES formula- “Thinking on your feet”

The PRES formula has been developed to help students, particularly law students, to construct a logical argument when asked to think on their feet.

The PRES formula requires students to present their arguments by expressing the following: (a) their Point of view; (b) the Reason for their point of view; (c) an Example or Evidence to support their point of view; and (d) to Summarize their point of view.

For example, opinions on the death penalty could be articulated as follows using the PRES formula:

1. Argument in favour of the death penalty for murder

My Point of view is that I am in favour of the death penalty for murder.

The Reason is that I believe that if you unlawfully take someone’s life you deserve to

155 See para 8.17.

lose your own.

The Evidence for my point of view is the Old Testament of *The Bible* that says “An eye for an eye and a tooth for a tooth”.

Therefore in Summary I am in favour of the death penalty for murder.

2. Argument against the death penalty for murder

My Point of view is that I am against the death penalty for murder.

The Reason is that judges can make mistakes.

An Example is the English case of Timothy Evans who was found to have been innocent after he had been executed.

Therefore in Summary I am against the death penalty for murder.

3. Undecided argument on the death penalty for murder

My Point of view is that I do not know whether I am in favour or against the death penalty for murder.

The Reason is that I do not know whether it makes any difference to the murder rate in a country.

For Example in the United States of America where some states have the death penalty and others do not the murder rate stays the same.

Therefore in Summary I do not know whether I am in favour or against the death penalty for murder.

Steps when teaching the PRES formula:

Step 1: Introduce and explain the PRES formula.

Step 2: Demonstrate the PRES formula.

Step 3: Pose questions to individual students on controversial issues and ask them to immediately use the PRES formula.

Step 4: Debrief and conclude on the value of the PRES formula.

The PRES formula can be combined with other learning methods such as “take a stand”.¹⁵⁶ If students are required to make submissions rather than to express a point of view the PRES formula can become the SRES formula (Submission, Reason, Evidence/Example and Summary). The PRES formula teaches the valuable skill of being able to think on one’s feet.

10.18 Problem solving

When solving a legal problem law students can construct a logical framework by using the FIRAC formula. The FIRAC formula refers to the following:

F = Facts

I = Issues

R = Rule of law

A = Application of rule of law to facts

C = Conclusion

156 See above para 8.16.

Step 1: Ascertaining the facts

The relevant facts concerning the case or problem must be identified: For example, the question may involve a detailed description of how a doctor behaved during an operation that was conducted negligently. The relevant facts that point to negligent conduct must be identified.

Step 2: Ascertaining the issues

The issues or legal questions to be answered must be identified: For example, the question might be: Did the doctor act negligently?

Step 3: Identifying the rule of law

The relevant rules of law must be discussed – if there are conflicting rules these should be mentioned: For example, the rule of law regarding negligence by a doctor is that the doctor failed to exercise the degree of skill and care of a reasonably competent doctor in his or her branch of medicine (i.e. a reasonably competent doctor would have foreseen the likelihood of harm and would have taken steps to guard against it).

Step 4: Applying the rule of law to facts

The rule of law must be applied to the facts: For example, the rule of law regarding negligence by doctors must be applied to the facts in order to determine whether or not on the facts the doctor was negligent. On the given facts, did the doctor's conduct measure up to that of a reasonably competent doctor in his or her branch of medicine?

Step 5: Reaching a conclusion

After applying the rule of law to the facts, a conclusion should be reached on the whether, for example, the doctor's conduct was negligent.

The FIRAC formula can also be used to write opinions and to answer problem questions in written examinations.

10.19 Values clarification

Values clarification exercises encourage students to express themselves and to examine their own values, attitudes and opinions as well as those held by others. Thus, students are given an opportunity to examine their attitudes and beliefs. At the same time they are asked to consider other points of view. A value clarification exercise promotes communication skills and empathy for others.

Value clarification is important for promoting the development of the ability of students to listen, as well as their communication skills, their empathy for others, their ability to solve problems and make decisions, their reasoning and critical thinking skills, and their ability to maintain consistency regarding their attitudes and beliefs.

The steps that can be used by law teachers to teach values clarification are the following:

Step 1: Ask students to express their opinions (i.e. identify their position on an issue).

Step 2: Ask students to clarify their opinions (i.e. explain and define their positions).

Step 3: Ask students to examine the reasons for their opinions (why they believe something; the reasons for their position; and the arguments and evidence that support their position).

Step 4: Ask students to consider other points of view (e.g. by asking students who hold opposite viewpoints to present their views, or asking students to write down the arguments for opposing viewpoints, or by the law teacher presenting opposite views for discussion).

Step 5: Ask students to analyse their position and other points of view (e.g. by asking students to identify the strongest and weakest arguments in support of their position, and the strongest and weakest arguments of students opposed to their opinion).

Step 6: Ask students to make a decision on the issue (i.e. students should re-evaluate and resolve the conflict between the various points of view to find the best result).

Step 7: Conduct a general discussion and summarize.

10.20 'Fishbowls'

"Fishbowls" can be used for observations of case studies, simulations, role plays or any other lawyering activity where students are required to critically analyse what has transpired during the activity. They are also useful when dealing with values and attitudes. For instance, in gender-sensitivity exercises fishbowls can be used to enable students to observe the differences between how women relate to each other in given situations as opposed to what men do in similar circumstances.

An example of the steps in a fishbowl is the following:

Step 1: The law teacher introduces the exercise by mentioning that the students will be divided into small groups to prepare for a role play.

Step 2: The law teacher divides the students into small groups of lawyers interviewing a client and clients who are about to be interviewed - with not more than five students in each group.

Step 3: The lawyers in the small groups prepare the questions they will ask during the interview and the clients in their groups prepare the questions they will ask and what they will tell the lawyer.

Step 4: The law teacher calls for volunteers from the groups to role play the interview between the lawyer and the client in front of all the other students. The remaining members in the groups are told that they are observers and the law teacher gives them a checklist of things to look out for during the role play.

Step 5: The role play is conducted and the observers make notes.

Step 6: At the end of the role play the law teacher asks the observers what they observed.

Step 7: The law teacher conducts a general discussion and concludes the exercise.

Fishbowls can be used to teach knowledge, values and skills in combination with a number of other learning methods.

10.21 Jigsaw

The jigsaw method is useful for introducing students to procedures such as legislative hearings where special parliamentary committees listen to representations from different interest groups regarding proposed changes in the law. The jigsaw is used to enable the different interest groups to consult with each other before they make representations to a parliamentary or other committee that is hearing arguments from people or organisations that have different interests.

Jigsaws can be conducted using the following steps:

Step1: Brainstorm ideas to select two interest groups in favour of the proposed changes to the law

and two that would be against.

Step 2: Divide students into two groups in favour of the change, two groups against the change (“home groups”), and a group of parliamentary committee members.

Step 3: The home groups meet to discuss the arguments they will make to the parliamentary committee. At the same time the parliamentary committee discusses the issues and the questions they will ask the home groups.

Step 4: The home groups subdivide into multi-interest groups with representatives from each home group joining a multi-interest group to hear each other’s viewpoints. The parliamentary committee continues its discussions.

Step 5: The multi-interest group members return to their home groups, report back to their colleagues, and in the light of what they have learned from the other groups, the home groups refine their arguments for the parliamentary committee. The home groups elect two representatives to present their arguments to the parliamentary committee: one to make the arguments, the other to deal with questions. The parliamentary committee continues its discussions.

Step 6: The home groups each have a limited time frame (e.g. two minutes each) to present their arguments to the committee. The committee has a limited period for questions (e.g. one minute per home group).

Step 7: The parliamentary committee has a limited time frame (e.g. two minutes) to consider its decision and to present it (e.g. a further two minutes).

Step 8: The law teacher debriefs the lesson and summarizes.

The jigsaw is a fairly complicated procedure and the time frames need to be carefully managed by the law teacher.

10.22 “Each one teach one”

“Each one teach one” is a technique that requires all the students to become involved in teaching each other about a particular area of the law. Each student teaches another student a section of the law to be covered so that by the end of the exercise all the students would have learned about the whole topic.

The following steps may be followed when using the “each one teach one” technique:

Step 1: The law teacher prepares a number of cards with statements on them that cover different areas of the topic (e.g. certain legal definitions). A sufficient number of cards must be prepared to ensure that the topic is covered in accordance with the desired outcomes.

Step 2: The cards are distributed to the students and the students are told that they must teach their colleagues what is on the cards.

Step 3: The students move around the room teaching each other what is on their cards.

Step 4: Once all the students have taught each other what is on their cards the law teacher ends the exercise.

Step 5: The law teacher checks with the students to ensure that they have all learned what was on the cards.

Step 6: The law teacher debriefs the lesson and summarizes.

The “each one teach one” procedure must be carefully controlled to make sure that all the information on the different cards has been transferred to all the students.

10.23 Visual aids

Visual aids take the form of photographs, cartoons, pictures, drawings, posters, videos and films. Photographs, cartoons, pictures and drawings can be found in text books, newspapers, magazines etc. Videos and films are usually available in libraries and resource centres or from the organisations that produce them.

Visual aids can be used to arouse interest, recall early experiences, reinforce learning, enrich reading skills, develop powers of observation, stimulate critical thinking and encourage values clarification.¹⁵⁷ Students can be required to describe and analyse what they see, and through questioning, to apply the visual aid to other situations.

When using visual aids the law teacher may use the following steps:

Step 1: Students describe what they see (focus on the elements of the visual aid and describe everything seen, including any symbols).

Step 2: Students analyze what they see (e.g. how the elements of the picture relate to each other; the point the photographer or artist is trying to make; the meaning or theme of the picture; and what the figures or people represent).

Step 3: Students apply the idea of the visual (i.e. apply the idea to other situations by thinking about what the picture reminds them of; whether they can think of other events similar to it; and how the idea applies to local people and communities).

Step 4: Students clarify their beliefs (i.e. express their opinions on the visual aid, e.g. whether they agree or disagree with the photographer or artist's point of view, how they feel about the idea; and what they think should be done about the problem shown in the visual aid).

10.24 Use of experts

Inviting experts can provide students with a wide variety of information, materials and experience not available in any books. The use of experts can give students valuable insights into how the law and social justice issues operate in practice.

Law teachers should use the following steps when using experts:

Step 1: Select an appropriate expert (e.g. a lawyer, community leader, judge, ex-offender or a government official).

Step 2: Prepare the speaker and the class (tell the expert and the students about the outcomes for visit, e.g. ask the students to prepare questions beforehand).

Step 3: Conduct the class (get the expert to give a short talk, or get them to play their normal role – e.g. a judge in a mock trial or to comment on students playing their role).

Step 4: Debrief the visit (students should be asked what they learnt from the expert; whether he or she answered all their questions; and how what they heard from the expert relates to what they had previously learnt about the topic).

10.25 Field trips

Field trips are useful because law teachers can choose both interesting and relevant places for

157 See above para 13.19.

students to visit. The trips should be arranged so that the experience of the students is consistent with the learning outcomes for the exercise.

Students should be prepared before the visit, and told to look out for specific things. They should also be asked to record their reactions on an observation sheet that should be prepared beforehand. The sheets can form the basis of a discussion when the students return from the field trip.

Law teachers should use the following steps when arranging field trips:

Step 1: Decide where to go (e.g. the courts, prisons, police stations, hospitals, government offices etc)

Step 2: Plan the visit (students and hosts should be prepared for the visit: e.g. students should have observation sheets, and hosts prepared for briefings).

Step 3: Conduct the visit (students should observe the activities; ask questions; comment on specific things; and, complete the observation sheets).

Step 5: Debrief the visit (students should report back on what they saw; how they felt; what they learnt; and, how what they learnt related to previous knowledge).

10.26 Conclusion

The above mentioned interactive learning and teaching methods are just some examples of what can be done to ensure that students and other participants participate in an active learning process.

There are many other methods that can be used, and computer technology has made a vast new array of teaching methods available (such as the use of powerpoint presentations).

Clinical law teachers should actively try to continually be as creative as possible in their attempts to involve students in the learning process.

CHAPTER 11: STREET LAW MOCK TRIALS

Contents:

- 11.1 Introduction
- 11.2 Preparation for a mock trial
- 11.3 Steps in a mock trial
- 11.4 Simplified rules of evidence
- 11.5 Special procedures
- 11.6 Conducting a mock trial
- 11.7 Mock trial package: *S v Serjee*

Outcomes:

At the end of this chapter you will be able to:

1. Explain the how to prepare for a Street law mock trial.
2. Explain the steps, simplified rules of evidence and special procedures used in a Street law mock trial.
3. Conduct a mock trial using the *S v Serjee* mock trial package.

11.1 Introduction

Mock trials are simulated court proceedings. They may be based on real cases or hypothetical (made up) problems. Mock trials can be either formal or informal. The format chosen depends upon the outcomes for the exercise. The easiest mock trials to run are those involving the criminal process.

Mock trials allow students to experience court room procedures and understand how the courts resolve disputes. Mock trials enable students to see how lawsuits are dealt with by lawyers and judges and how the procedures impact on witnesses, accused persons and experts. They also help students to develop (a) critical thinking skills; (b) the ability to analyze problems; (c) strategic thinking; (d) listening and questioning skills; (e) oral presentation skills; (f) the ability to think on their feet; and, (g) skills in preparing and organizing material. Mock trials promote co-operative learning and affect attitudes towards the legal profession. Students are prepared for possible future involvement as parties and witnesses in trials. Mock trials help to lessen fear of the courts, and provide students with the knowledge and skills needed to perform their roles in the simulated court effectively.

As has been mentioned law school mock trials tend to be based on individual work by the students involved. However, street law-type mock trials are aimed at involving as many students as possible in the mock trial process. The steps in a mock trial are the same for both individual-based and street law-type mock trials as they are based on the sequence of steps that occur in real life trials.

11.2 Preparation for a street law mock trial

The law teacher should use the following steps when preparing for a street law mock trial:

Step 1: Distribute the mock trial materials to the class

Read through the charge or summons, the facts of the case and the witness's statements with all the participants. The law teacher should:

- (a) Make sure that the students understand the facts of the case, the nature of the charge (or

summons) and the applicable law.

- (b) Get the students to read through each of the statements and to highlight those parts of the statements that favour the prosecution (or plaintiff) and those that favour the defence.

Step 2: Assign or select students for the various roles in the mock trial

Depending on the type of trial, students should be selected to play the roles of lawyers, witnesses, experts, judges, registrars, court orderlies, time keepers and court observers. For the role of judge, it is often helpful to invite a resource person, such as a lawyer, law student, or real judge. If this is not possible, law teachers or students may act as judges.

Step 3: Prepare participants for the trial

In order to involve the maximum number of students the law teacher should divide the class into training groups. Students should be divided into:

- Teams of lawyers, witnesses, experts and accused persons for the prosecution and defence. Each team has the responsibility for preparing its side of the case and needs to prepare opening statements, questions for their witnesses and those of the other side, and closing statements.
- Teams of judges, (if more than one judge will be used), who need to know how to run the trial and must prepare questions for the witnesses and a preliminary judgement that will be subject to change after hearing the case.
- Teams of registrars, court orderlies and time keepers who need to be prepared for the various tasks in a trial (e.g. arrange time charts).

11.3 Steps in a mock trial

A number of events occur during a trial, and most trials must happen in a particular order. For the purposes of this chapter a *criminal trial* will be used as an example. (In a *civil trial* the plaintiff or his or her lawyer would bring the case instead of the prosecutor.) The following steps occur in a mock trial:

1. The court is called to order by the court orderly.
2. The judge or judges enter and sit down.
3. The registrar calls out the name of the case.
4. The judge puts the charge to the accused and asks him or her to plead.
5. The accused pleads guilty or not guilty.
6. The prosecution and defence teams introduce themselves.
7. The prosecutor makes an opening statement.
8. The defence lawyer outlines the defence.
The prosecutor presents the case: The prosecutor calls the first witness and conducts the direct examination of the witness. The defence lawyer then cross-examines the witness. Afterwards the prosecutor re-examines the witness if necessary. The judge may ask questions to clarify issues.
9. The steps in 9 above are completed for each of the prosecution's other witnesses.
10. The prosecutor closes the case.
11. The defence lawyer presents the case in same manner as the prosecutor in 9

above: The defence lawyer calls the accused first (if he or she is going to give evidence) and conducts the examination-in-chief (also known as direct examination). The prosecutor cross-examines the accused. The defence lawyer re-examines the accused if necessary. The judge may ask questions to clarify certain issues. The same procedure is followed in respect of the witnesses for the defence.

12. In 12 above the accused must be called before the other defence witnesses if he or she is going to give evidence – to make sure that the accused does not change his or her story to make it fit with that of the other witnesses.
13. The defence lawyer closes the defence case.
14. The prosecutor makes a closing argument.
15. The defence lawyer makes closing argument.
16. The prosecutor may reply to the defence's argument but only on matters of law raised by the defence - not the facts.
17. The judge or judges adjourn the case to consider their verdict.
18. The judge or judges give their verdict.

In a *criminal case* following steps occur when an accused is convicted. (These steps do not occur in a civil case. In a *civil case* the judge decides in favour of one, or other, or neither of the parties, and makes an appropriate court order B e.g. defendant must pay compensation.)

19. If the accused is convicted, the defence offers evidence in mitigation (reasons why the sentence should be reduced).
20. The prosecution is given a chance to say why the sentence should not be reduced or why it should be increased.
21. The judge or judges sentence the accused.
22. The judge tells the accused that he or she can appeal.

11.4 Simplified rules of evidence

Certain rules have been developed to govern the types of evidence that may be used in a trial, as well as the manner in which evidence may be presented. These rules are called the "rules of evidence" and have been designed to ensure that accused persons have a fair trial. The lawyers and the judge are responsible for making sure that these rules are obeyed.

Lawyers make sure that the rules of evidence are obeyed by making "objections" to evidence or procedure wrongly used by the other side. When an objection is raised the lawyer stands up and says "I object" and gives the reasons for the objection. The lawyer against whom the objection is raised will usually be asked by the judge to reply. The reply should tell the judge why the question or the witness= answer is not against the rules of evidence.

The rules of evidence used in real trials can be very complicated. A few of the most important rules of evidence have been adapted for mock trial purposes, and include the following.

11.4.1 Rule 1: Leading Questions

Leading questions may not be asked when direct evidence is being obtained by the prosecutor or defence lawyers from their own witnesses or the accused or experts. When questioning their own witnesses or other parties called by them prosecutors and defence lawyers should use "open-ended"

questions beginning with “Who” “Where” “What” “Why” “When” or “How”. The same applies to questions during re-examination.

For example:

Open questions: “Who was there?” “Where were you sitting?” “What happened next?” “Why did you do it?” “When did it happen?” “How did it happen?”

The above are open questions because the person asked cannot give a “yes” or “no” answer.

Leading questions may only be used in cross-examination. A leading question is one which suggests the answer desired by the questioner, usually by stating some facts not previously discussed and asking the witness to give a “yes” or a “no” answer. For example, a question which states: “You did that didn’t you?” expects a “yes” answer, and one that states “You did not do that did you?” expects a “no” answer. Another example is the following:

Leading question: “So John, you never heard or saw Dan tell his younger brother that the plan was to steal the typewriter, did you?”

If a lawyer asks leading questions of their own witness, the opposing lawyer should object.

Objection: “Objection, your honour, counsel is leading the witness.”

Possible response: “Your honour (or “Your worship”), leading is allowed in cross-examination” or “I will rephrase the question”.

The question would not be leading if it were to be rephrased so that it does not ask for a “yes” or “no” answer.

Rephrased question: “What, if anything, did you hear Dan tell his younger brother about the plan to steal the typewriter?”

11.4.2 Rule 2: Witness goes beyond the question

Witnesses' answers must be in response to the questions. Answers that go beyond the questions are objectionable. This occurs when the witness provides much more information than the question calls for, for example:

Question: “Jabu, where do you work?”

Witness: “I am a teacher at the Village High School. On 15 August 2004, I saw the two boys holding the new Olympia typewriter. I knew that they were stealing the typewriter. Dan who was at the school door, obviously was the mastermind behind the theft.”

Objection: “Objection, your honour, the witness is going beyond the question.”

Possible response: “Your honour, the witness is telling us a complete sequence of events.”

11.4.3 Rule 3: Relevance

Questions or answers that are irrelevant and add nothing to the understanding of the issue in dispute are objectionable. Questions and answers must be related to the subject matter of the case. This is called “relevance”. Questions and answers that do not relate to the case are “irrelevant”, for example: In a theft case, the police officer is asked: ‘Officer Jabu, how many wives do you have?’

Objection: “Your honour, the question is irrelevant.”

Possible response: “Your honour, this series of questions will show that Officer Jabu’s first wife was a teacher at the Village High School and was once assaulted by a student at the school.”

(If Officer Jabu does not have such a wife, the response should be: "I will withdraw the question.")

In practice, the judge usually gives some freedom to the lawyers to ask questions, relying on the lawyers good faith to ask questions that are relevant to the case.

11.4.4 Rule 4: Hearsay

Usually statements made by people who are not going to be called as witnesses in court cannot be used as evidence in the court case. Only statements made by people who are going to be called as witnesses can be used. This is because if people are not called to give evidence as witnesses the truth of their evidence cannot be tested by cross-examination in court.

There are many exceptions to the hearsay rule, but the only two that apply in mock trials are:

1. A witness may repeat a statement made by the accused provided that the witness actually heard the statement.
2. Statements made by the accused which go against his or her interest may be used as evidence.

This is because in both instances the accused will have a chance in court to dispute the truth of the statements. Examples of hearsay evidence that are allowed are the following:

Dash, a witness, says: "Mandla told mother that he would get his school fees somehow."

Objection: "Objection, your honour, this is hearsay."

Possible response: "Your honour, since Mandla is the accused, the witness can testify to a statement he heard Mandla make." Or, "Your honour, this is a statement against his own interest."

11.4.5 Rule 5: First-hand knowledge of events

Witnesses must testify about things that they themselves have seen, heard or experienced. For example:

Teacher Naranda testifies: "Mandla and Bert must have entered the typing room first."

Objection: "Your honour, the witness has no first-hand knowledge of who entered the typing room."

Possible response: "Your honour, the witness talked to the accused after the theft and was told what had happened."

11.4.6 Rule 6: Opinion evidence

Unless a witness is qualified as an expert in the area under question, the witness may not give an opinion about matters relating to that area of expertise. However, if the evidence is about something that ordinary people know about, an ordinary witness may give an opinion (e.g. whether it was a hot or cold day). For example:

Ordinary person: "Juvenile delinquency will continue to grow unless we use whippings on a regular basis" (This is an objectionable opinion unless it is given by an expert on juvenile delinquency).

Ordinary person: "Mandla seemed to be very frightened" is within the common experience of an ordinary witness.

Objection: "Your honour, the witness is giving an opinion."

Possible response: "Your honour, the witness may answer the question because ordinary persons can tell if someone is frightened."

11.4.7 Rule 7: Beyond the scope of cross-examination

In cases where the lawyer has reserved time to re-examine a witness after cross-examination, the

lawyer on re-examination may only ask questions related to topics that the opposing lawyer raised during cross-examination. For example:

After cross-examination of Officer Duma in which the defence counsel only asked about the argument between the accused and his brother, the prosecutor in re-examination asks:
Question: "Officer, at what time did the teacher contact you from the Village High School?"
Objection: "Objection, your honour, counsel is raising matters not covered in cross-examination."
Possible response: "Your honour, by inquiring into the argument between the brothers, counsel opened the topic of the entire arrest process." Or, "I will withdraw the question."

11.4.8 Rule 8: Beyond the scope of the problem in the mock trial

This only applies to mock trials. Questions that go beyond the facts contained in the mock trial problem are objectionable. However, minor details regarding a character's role may be asked and added. For example:

Question: "Das, where did you attend secondary school?"
Objection: "Objection, your honour, this is beyond the scope of the problem."
Possible response: "Your honour, the witness is giving minor details to describe his background to the court. The facts will not have a significant impact on the outcome of the trial."

This objection only applies to mock trials and not real trials.

11.5 Special procedures

There are certain special procedures that have to be followed when introducing evidence or dealing with witnesses who are accomplices or who contradict themselves.

11.5.1 Procedure 1: Introduction of physical evidence

The lawyers may wish to offer as evidence written documents or physical evidence, such as a stolen typewriter or a murder weapon. Special procedures must be followed before these items can be considered by the judge as evidence.

In the case of physical evidence, like a typewriter, the prosecutor must use the last person with the custody of the typewriter to get the evidence admitted to court. This person must then testify to the events to show that the typewriter has been under his or her control since the time the typewriter was brought to the police station. After testifying to this "chain of custody", the lawyer must ask the judge to admit the typewriter as Exhibit No. 1. Where documents are being entered into evidence the letters of the alphabet are used to identify them, e.g. Exhibit A.

Things other than documents are marked with numerals (e.g. Exhibit 1,2,3, etc.).
Documents are marked with the letters of the alphabet (e.g. Exhibit A, B, C, etc.).

11.5.2 Procedure 2: Accomplice witnesses

Witnesses who are alleged to have participated in the crime charged in the trial, but have not yet themselves been charged, are called "accomplice witnesses". The use of their evidence against the person charged with the crime has to be considered with great care. This is because accomplice witnesses have a reason to lie to prevent them being prosecuted for the same crime. Making accomplice witnesses give evidence that could be used against them in a later prosecution is against

the requirements of a fair trial in the Constitution.

A special procedure is used when accomplice witnesses testify. Accomplice witnesses are warned by the court that if they testify satisfactorily, the judge will order the prosecutor not to charge them with the crime that they are alleged to have committed. This is called granting the witness “immunity”.

The prosecutor must inform the judge that the witness is being offered as an accomplice witness. The judge will then warn the witness. For example:

Judge to witness: “I am informed that you took some part in the offence charged here. If you tell the truth and give satisfactory evidence, I will order that you should not be prosecuted and that the things you say here will not get you into trouble in any way. Are you willing to be sworn in and to testify under these conditions?”

11.5.3 Procedure 3: Dishonest or confused witnesses

In cross-examination, the lawyer may want to prove that the witness should not be believed. This can be done by showing that the witness has said something before that is different from what the witness is now saying. The witness may have said something different when giving evidence earlier or may have made a sworn statement to the police which contradicted the evidence that he or she gave later.

For example, if a State witness gives evidence different from that given in the sworn statement, the prosecutor may hand the sworn statement to the defence and allow the defence lawyer to cross-examine the witnesses on the statement. The following steps should be used:

Step 1: Ask the witnesses if he or she recognises the affidavit.

Step 2: Ask the witnesses to read the section that differs from the present answer.

For example:

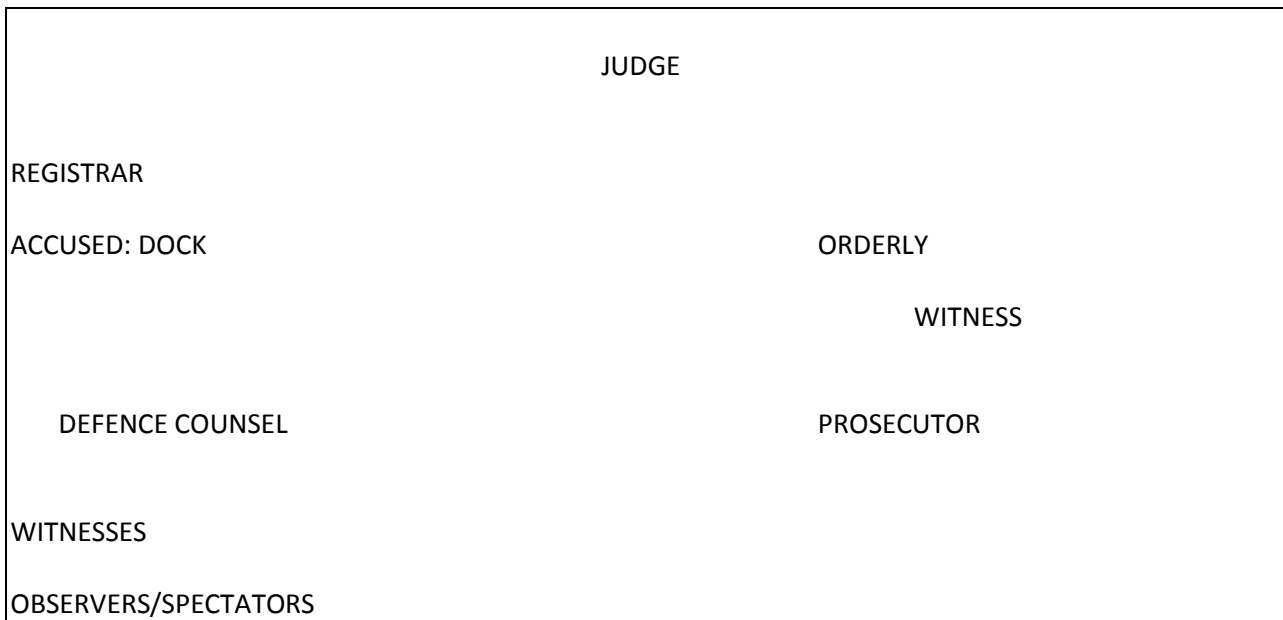
Defence lawyer: “Now, Naran, you testified in your direct examination that Mandla acted very nervously when you found the boys at the school on the night of 15th August, didn’t you?”
Teacher: “Yes, that is what happened.”
Defence lawyer: “Do you know what this paper is? Please tell the judge what it is.”
Teacher: “Yes, that is my sworn statement to the police.”
Defence lawyer: “Will you please read the second-last line of this paragraph?”
Teacher: “I thought that Mandla seemed quite open and natural about having the typewriter.”
Defence lawyer: “That is sufficient, thank you.”

11.6 Conducting a mock trial

The following steps should be taken before, and when, conducting a mock trial:

11.6.1 Lay out the court room

It is important for students to be familiar with the physical setting of the court room. The following diagram depicts the layout of a typical court room:



Lawyers conduct the trial while standing on their feet at the table for counsel. One lawyer remains seated while the other lawyer conducts his or her case.

11.6.2 Participants take their places

The lawyers, the accused (or parties in a civil case), witnesses, experts, registrar, court orderly, time keeper, and courtroom observers (spectators) take their places. The witnesses may or may not be allowed in court before they have given their evidence.

11.6.3 Orderly calls the court to order

As the judge or magistrate is about to enter the courtroom, the court orderly stands and says in a loud voice, "Silence in court!".

11.6.4 The registrar or clerk informs the judge or magistrate about the case

"Your Lordship (judge) or Worship (magistrate), I am calling case (give name and number) for hearing."

11.6.5 The charge is put to the accused

The judge or magistrate asks the accused to stand: "Will the accused please stand?". The judge or magistrate says to the accused: "Are you (name of the accused)? You are charged with the crime of (mentions the crime and puts the charge to the accused). How do you plead, guilty or not guilty?" The accused replies "guilty" or "not guilty".

11.6.6 Introduction of counsel

The judge or magistrate asks the counsel to introduce themselves e.g. "Who appears?" The prosecutor replies: "I am X and I appear for the State, My Lord (or Your Worship)". The defence lawyer replies: "I am Y and I appear for the defence, My Lord (or Your Worship)".

11.6.7 Opening statement

The opening statement is the introduction to the case. Usually it is only done by the prosecutor who says what the charges are and what evidence will be led. In mock trials the defence lawyer usually says what the accused's defence is. The prosecutor always begins.

11.6.8 Prosecution case

The process of examining the witnesses begins. First the prosecutor's team presents its witnesses and evidence, then the defence team presents its witnesses and evidence. If the accused is going to give evidence he or she must be called first when the defence begins its case.

Each time a witness is called to the witness stand, the court orderly asks the witness whether he or she has any objection to taking the oath to tell the truth. If they do not the orderly administers the oath, by raising the right hand, and asking the witness to raise their right hand and asking: "Do you swear that the evidence that you are about to give is the truth, the whole truth and nothing but the truth? If so, raise your right hand and say, 'So help me God'." The witness should respond "So help me God".

If witnesses do not wish to take the oath they may make an affirmation in which case they are asked: "Do you affirm that the evidence that you are about to give is the truth, the whole truth and nothing but the truth?" – without any raising of the hand.

The lawyer who calls the witness asks a series of questions called "direct examination" (or "examination-in-chief"). These questions are designed to get the witnesses to tell their stories, saying what they saw, heard, experienced or knew about the case. The questions must ask only for facts, not for opinions -unless the witness has been declared an "expert" in the area under question or is giving an opinion about things in common experience. During direct examination the lawyer may only ask questions and may not make any statements about the facts, even if the witness says something wrong. Here the lawyer must use open-ended questions (e.g. What? Where? When? Why? Who? How?).¹⁵⁸

When the direct examination is completed, the lawyer for the other side then asks questions to show weaknesses in the witness's evidence through a process called "cross-examination". The purpose of the cross-examination is to show the judge that witnesses who give unfavourable evidence should not be believed because they: (a) cannot remember facts; (b) did not give all the facts during direct examination; (c) told a different story at some other time; (d) have a special relationship with one of the parties (maybe a relative or a close friend); or (e) bear a grudge against one of the parties. The cross-examination questions are designed to bring out one or more of these factors.¹⁵⁹ Usually the questions are framed as statements with which the witness or the accused is asked to agree or disagree.

Sometimes, witnesses called by one side give evidence that helps the other side. The lawyer for the side getting the unexpected help should remember to use the evidence in the closing argument. After cross-examination, the prosecutor (or plaintiff's counsel) may "re-examine" the witness about matters that were raised in the cross-examination. During re-examination open-ended questions must be used. No further cross-examination is permitted after the re-examination.

¹⁵⁸ See above para 14.3.1.

¹⁵⁹ See above para 14.3.1.

When the prosecutor has closed the prosecution case, the defence opens its case.

11.6.9 Defence case

The defence case is conducted in the same way as the prosecutor's case except that the defence calls witnesses for direct examination and the prosecutor cross-examines. If the accused is going to give evidence, he or she must be called as the first witness. Immediately after the accused and each defence witness has given evidence he or she may be cross-examined by the prosecutor. The defence may re-examine the accused and each defence witness after the prosecutor has cross-examined them but the prosecutor may not cross-examine them again.

11.6.10 Closing argument

The purpose of the closing argument is to convince the judge that the evidence presented entitles the side that presented it to win the case. The closing argument should include:

- (a) a summary of the charges against the accused and what the law requires to be proved;
- (b) a summary of the evidence presented that is favourable to the presenting lawyer's case; and (c) a summary of how the law, when applied to the evidence and facts in the case, should enable the judge to rule in favour of the presenting lawyer's case.

New information may not be introduced in the closing argument. In a *criminal case* the prosecutor closes first, then the defence, and then the prosecutor may reply to any new points raised by the defence.

11.6.11 Deliberation and verdict

In making a decision, the judge considers the evidence presented and in order to determine the facts decides which witnesses were most credible or believable. Once having established the facts the judge applies the law to the facts and comes up with a decision in favour of one or other of the parties.

11.6.12 Time frames

To ensure that the mock trials are completed within a reasonable time (in this instance one hour), the following time limits are suggested:

Opening statement: 3 minutes each for the prosecution and defence.

Direct examination: 7 minutes for each witness (or 5 minutes, with 2 minutes reserved for re-examination).

Cross-examination: 4 minutes for each witness.

Closing argument: 3 minutes each for the prosecution and defence.

Reply 1 minute by the prosecution.

If, during direct examination or cross-examination, a lawyer objects to a question of counsel or an answer of the witness, this time should not be counted as part of the allocated time. This means that when counsel argue about an objection and the judge rules on the objection "the clock stops" and the time taken is not counted towards the 7 minutes of the direct examination or the 4 minutes of cross-examination.

Counsel may "reserve" time in order to get a second chance to ask questions. So, for example, if the prosecutor reserves 2 minutes to re-examine one of the witnesses, he or she only gets 5 minutes for direct examination. The defence counsel will have 4 minutes of cross-examination, but the prosecutor

will then have an additional 2 minutes for re-examination. There is no further cross-examination after re-examination.

If time limits are used, the time keeper should have time cards that read “2 min”; “1min”; “0”. For each part of the trial that is timed, the time keeper should hold up the appropriate card to the judge and to the lawyer who is asking questions to let them know how much time is left.

11.7 Mock trial package: S v Serjee

S v Serjee is a mock trial package for a simple assault case that can be used by law teachers to show how the court process works. The mock trial can be based on the script or the students can role play the events. Law teachers should follow the instructions for conducting a mock trial in para 11.5 above.

11.7.1 Facts of the case

Juma and Betty go to a disco to dance on 20 July 2005. Serjee who has been drinking comes up to their table and says that he knows Betty. He tries to talk to her. Juma gets angry and asks Serjee to leave. An argument takes place and a fight follows. The police arrive and Serjee is arrested for assaulting Juma. Serjee claims that Juma caused the fight and he was only defending himself.

11.7.2 The charge against Serjee

The charge against Serjee reads as follows:

In the District Court of Durban (or some other town)

Serjee (hereafter referred to as the accused)

Is guilty of the crime of assault

In that upon or about the 20th day of July 2005 and at or near Dingo’s Disco in the district of Durban the said accused did unlawfully and intentionally assault Juma by striking him in the face with his fist.

Benedict John
Senior Public Prosecutor
September 2005

11.7.3 Evidence

There is no physical or documentary evidence in this case.

11.7.4 Witnesses

The following witnesses may assist the prosecution case:

1. Juma, the complainant.
2. Betty, Juma’s girl friend.
3. Carol, Betty’s friend.

The following witnesses may assist the defence case:

1. Serjee, the accused.
2. Naidu, a waiter at the disco.
3. Tom, a friend of Serjee’s.

11.7.5 The law applicable

The prosecution will try to prove that Serjee assaulted Juma. Assault is defined as “an unlawful and intentional physical attack or the threat of an attack on another person”.

Serjee’s lawyer will try to show that Serjee was acting in self-defence. Self-defence allows a person who is unlawfully attacked by another to use reasonable force to defend him or herself. The force used, however, must be reasonable and equal to the attack that it has prevented. The person defending him or herself must not use excessive force and should run away instead of fighting if he or she is able to do so.

11.7.6 What must be proved?

In order to obtain a guilty verdict the prosecution must prove “beyond a reasonable doubt” that Serjee (a) unlawfully, (b) intentionally, (c) physically attacked or threatened to attack Juma. This means that the prosecution must prove all the elements of the crime beyond reasonable doubt.

Serjee may defeat the prosecution case by showing that any one of the elements was not proved beyond reasonable doubt by the prosecution. For example, Serjee could do this by showing that his act was not unlawful because he acted in self-defence. To prove self-defence Serjee would have to persuade the court that Juma attacked him first, he used reasonable force to defend himself and he could not run away because Juma prevented him from doing so.

11.7.7 What is the possible penalty?

If Serjee is found guilty of assaulting Juma he may be imprisoned or ordered to pay a fine.

11.7.8 Witnesses’ statements

Statement by Juma (prosecution witness and complainant):

My name is Juma and I live in Albert Park, Durban. I am 19 years old am studying for a Business Management degree at the University of KwaZulu-Natal. I am in my first year of study.

On the night of 20 July 2005 I had taken my girlfriend, Betty to the Dingo Disco in Main Street, Durban. While we were sitting at the table listening to the music a guy came up and started talking to Betty. I asked her if she knew him and she said “no”. I then told him to leave. He was very drunk and kept bothering Betty. I then stood up and told him to leave before I called the manager. About the same time he raised his fists and when I turned to walk away he punched me on the nose with his fists. I fell to the floor with blood pouring from my nose which he had broken. Betty started screaming and Serjee walked away.

Statement by Betty (prosecution witness and girlfriend of Juma):

My name is Betty and I live in Albert Park, Durban. I am 19 years old and a first year arts student at the University of KwaZulu-Natal.

On the night of the 20th July 2005 I was with my boyfriend Juma at the Dingo Disco when an old friend of mine, Serjee, came over to our table. Serjee had been drinking, and he grabbed my arm and told me to dance with him. Juma asked me if I knew him, and I said “no” because Juma is very jealous. Juma told Serjee to leave before there was trouble. Serjee did not leave and Juma stood up to argue with him. The next thing I knew was that they were fighting – hitting each other with their fists. I saw Juma fall to the floor with blood streaming over his face. I screamed and Serjee walked away.

Statement by Carol (prosecution witness and friend of Betty):

My name is Carol and I live in Albert Park, Durban. I am 18 and a half years old. I am a first year music student at the University of KwaZulu-Natal. I am a friend of Betty's and attend History of Music lectures with her at the University. I have seen Duma and Serjee at the Disco on previous occasions.

On the night of the 20th July 2005 I was with some friends at the Dingo Disco. I noticed Juma and Betty enter the Disco and sit at a table about two meters away from us. As I was talking to my friends and listening to the music I suddenly heard some loud shouting and looked up to see Serjee punching Juma. Juma fell to the floor with blood all over his face. Betty began screaming and Serjee walked away.

Statement by Serjee (the accused):

My name is Serjee and I live in Albert Park, Durban. I am 22 years old and a fourth year medical student at the University of KwaZulu-Natal. I also play in a band called Pulse which sometimes plays at the Dingo Disco.

On the 20th July 2005 I was at the Dingo Disco. I was walking around seeing who was there when I saw Betty. I had gone out with her for six months and not heard from her for the last couple of months. I went over and asked her how she was. I had had a couple of drinks but I was not drunk. I asked her to dance, and the guy next to her looked at me in a funny sort of way. I know Betty well and knew that she wanted to dance with me so I took her by the arm. Then this guy sitting next to her confronted me. I told him that I did not want any trouble. He jumped up and before I knew it he grabbed and hit me in the face. I hit him back but he only let go of me when I punched him on the nose and he fell to the floor. Betty started screaming and I walked away. I am usually a gentle person but if I had not hit the guy I would not have been able to get away from him.

Statement of Naidu (defence witness and waiter at Dingo Disco):

'My name is Naidu and I am 25 years old. I am employed as a waiter at the Dingo Disco in Durban. I know Serjee because he plays in a band here occasionally.

'On 20th July 2005 I was at the Dingo Disco. This one guy was sitting with a girl when Serjee went over to them. Serjee had only had two drinks. I know because I was waiting on his table. Serjee indicated to the girl that he wanted to dance, and then he held her arm to help her up. The guy she was with became angry and started shouting. Serjee smiled and told him to relax. The guy jumped up and grabbed Serjee. Serjee hit him back with his fist and they really started punching each other. The guy only stopped grabbing Serjee when he punched him on the nose and he fell to the floor bleeding. The girl started screaming and Serjee was able to walk away.

Statement of Tom (defence witness and friend of Serjee):

'My name is Tom and I am a fourth year medical student at the University of KwaZulu-Natal. I live in Albert Park, Durban. I am 23 years old and am a friend of Serjee. We have been together at medical school since first year.

'On the 20th July 2005 I was at the Dingo Disco. I was sitting at Serjee's table when he decided to walk around to see who was there. He saw his old girl friend, Betty, and went across to talk to her. It looked as if he asked her to dance because he took hold of her arm with his hand. This seemed to make the guy sitting next to her angry because he started shouting. He then suddenly jumped up grabbed Serjee. Serjee tried to escape but the guy started punching him. Serjee eventually punched

him on the nose and the guy fell to the floor. At the same time Betty started screaming. Serjee was now free from the guy's clutches so he was able to walk away. Serjee is a gentle person he would never knowingly hurt anyone – he punched the guy to free himself.

11.7.9 Conducting the mock trial

The case of *S v Serjee* can be conducted as a mock trial over a period of three and a half hours. Two and a half hours for preparation (on the steps in a mock trial, the simple rules of evidence, ascertaining the facts, discussing the criminal charge and the law, and preparing the questions and arguments) and one hour to present the case.

The law teacher should use the following steps to prepare for and conduct the mock trial:

Step 1: Explain the purpose of a mock trial, its steps and the simple rules of evidence.

Step 2: Get the students to read the facts of the case and check that they understand them.

Step 3: Get the students to read the charge and check that they understand it.

Step 4: Explain the law to the students and what the prosecution and defence will have to do to succeed in their cases.

Step 5: Get the students to read each statement and highlight the parts of the statements that assist the prosecution and which help the defence.

Step 6: Divide the students into teams for the prosecution and the defence as well as judges and court officials.

Step 7: Get the students in their teams to prepare questions for direct examination, cross-examination and re-examination of their witnesses and the accused. They should also prepare their opening statements and closing arguments and for any objections they may wish to raise should certain questions be asked. In doing so they should take into account the previously highlighted facts in each statement that supports their case and need to be brought to the attention of the court. While preparing their questions students must bear in mind the simplified rules of evidence mentioned in para 11.3 above. Students acting as judges, the registrar, the court orderly and the time keeper should also be briefed on their roles.

Step 8: When the students are ready the mock trial should be conducted using the steps in the mock trial mentioned in para 11.2 above.

Step 9: At the end of the exercise the law teacher should debrief the mock trial.

11.7.9 Teams for the mock trial

Prosecution team

1. Prosecutor: Opening statement.
2. Witness: Juma.
3. Witness: Betty.
4. Witness: Carol.
5. Prosecutor: Direct examiner of Juma.
6. Prosecutor: Direct examiner of Betty.
7. Prosecutor: Direct examiner of Carol.

8. Prosecutor: Cross-examiner of Serjee.
9. Prosecutor: Cross-examiner of Naidu.
10. Prosecutor: Cross-examiner of Tom.
11. Prosecutor: Closing argument.

Defence team

1. Defence lawyer: Opening statement.
2. Accused: Serjee.
3. Witness: Naidu.
4. Witness: Tom.
5. Defence lawyer: Direct examiner of Serjee.
6. Defence lawyer: Direct examiner of Naidu.
7. Defence lawyer: Direct examiner of Tom.
8. Defence lawyer: Cross-examiner of Juma.
9. Defence lawyer: Cross-examiner of Betty.
10. Defence lawyer: Cross-examiner of Carol.
11. Defence lawyer: Closing argument.

Court officials

1. Judge or judges/assessors.
2. Registrar of the court.
3. Court orderly.
4. Time-keeper.

CHAPTER 12: TEACHING ETHICS AND PROFESSIONAL RESPONSIBILITY

Contents:

- 12.1 What is meant by ethics and professional responsibility?
- 12.2 An ethical framework for clinical law students
- 12.3 Professional rules of conduct
- 12.4 The consequences of breaching law clinic ethical rules of conduct
- 12.5 Conclusion

Outcomes:

At the conclusion of this lesson, students will have a clear understanding of ethics and professional responsibility as it applies to clinical law students.

12.1 What is meant by ethics and professional responsibility?

12.1.1 Ethics

Ethics refers to the code of professional conduct that should be observed by legal practitioners and clinical law students when interacting with clients, other members of the profession, persons concerned with the administration of justice and the general public.

Although there are a number of professional ethical codes for different branches of the legal profession such as judges, barristers (advocates) and solicitors (attorneys) it is possible to develop an ethical framework that provides general guidelines in the form of ethical principles.¹⁶⁰

12.1.2 Professional responsibility

Professional responsibility refers to the responsibility of lawyers regarding their relationships with society, the courts, their clients and themselves.

12.1.2.1 Relationship with society

Clinical law students (and their supervisors) should be prepared to assist in the administration of justice by doing legal aid work when called upon to do so. Law students in developing countries are a privileged group and owe a particular duty to assist their less fortunate compatriots. All law students should be encouraged to undertake a measure of community service during their legal studies. When interacting with society student practitioners should always act in a manner that does not undermine their integrity as future legal practitioners.

12.1.2.2 Relationship with the courts

Although clinical law students may not appear in court they may assist clients in preparing documents for use in court (e.g. written bail applications or pleas in mitigation of sentence). In such circumstances law student advisers have the duty to refrain from misleading the court and to refrain from wasting the court's time.

Should students appear in court under student practice rules¹⁶¹ they are bound by the same ethical rules as qualified legal practitioners. This means that they have the duty to: (a) accept personal

¹⁶⁰ See below para 10.2.

¹⁶¹ As is possible in Uganda after they have graduated from the law faculty.

responsibility for their conduct; (b) refrain from expressing personal opinions; (c) disclose all relevant decisions; (d) refrain from misleading the court; (e) be courteous; (f) refrain from wasting the court's time; (g) disclose facts within the court's notional knowledge; and (h) the duty when prosecuting to act with scrupulous fairness.¹⁶²

12.1.2.3 Relationship with their clients

Clinical law students' duties to their clients include: (a) continuously protecting the interests of their clients; (b) not breaching client confidentiality – without consent; (c) speaking on behalf of clients when required to do so; (d) continuously keeping clients informed as to progress in their cases; (e) respecting clients' privileged information; (f) not fabricating defences; and (g) in criminal cases, making clients fully aware of all the consequences of a guilty plea or where the client insists on pleading guilty against the advice of the student practitioner and the supervisor.¹⁶³

12.1.2.4 Relationship with themselves

The duties of clinical law students to themselves are similar to those owed to other persons and the court. Their duties to themselves include the duty to act ethically at all times; the duty not to expose themselves to charges of dishonesty or incompetence; the duty to do their work diligently and professionally; the duty to tell their supervisors if they are being allocated too many cases; and the duty to conduct themselves in a manner that does not undermine their professional status as student practitioners.¹⁶⁴ The ethical framework in terms of which these duties should be carried out is discussed below.

12.2 An ethical framework for clinical law students

A useful ethical framework for clinical law students may be achieved by adapting the bioethical principles developed for the medical profession. The latter have been encapsulated in four basic principles – the recognition of the need to (a) respect the client's right to autonomy; (b) practice beneficence; (c) ensure non-maleficence; and (d) to ensure that justice is observed.¹⁶⁵ These principles could be applied to clinical law students as follows:

12.2.1 Client autonomy

Client autonomy means that law clinic students (and their supervisors) should always recognize the right of clients to decide for themselves the course of action they would like to follow. Most importantly clients must consent to being represented by a law clinic student rather than a qualified lawyer. Once clients have agreed to student representation students should adopt client-centred interviewing and counselling techniques. This means that clinic law students should present the client with all the options together with their consequences: The client should then make the decision on which option to use - unless the client specifically asks the student practitioner to decide.

12.2.2 Beneficence ('doing good')

Beneficence means that clinical law students (and their supervisors) should always 'do good' for their

¹⁶² For a detailed description of these duties in respect of trial advocacy, see Robin Palmer and David McQuoid-Mason *Basic Trial Advocacy* (2000).

¹⁶³ For a detailed description of these duties in respect of trial advocacy see Robin Palmer and David McQuoid-Mason *Basic Trial Advocacy* (2000). See also below para 15.2.

¹⁶⁴ For a detailed description of these duties in respect of trial advocacy see Robin Palmer and David McQuoid-Mason *Basic Trial Advocacy* (2000).

¹⁶⁵ TL Beauchamp and JF Childress *Principles of Biomedical Ethics* 2 ed (1994).

clients. Student practitioners should always take positive steps to act in the best interests of their clients. The client's interests must be promoted before those of anyone else – within the constraints of the law. Where conflicts of interests arise between the interests of the client and those of the clinical law student the interests of the former must prevail.

12.2.3 Non-maleficence ('do no harm')

Non-maleficence means that clinical law students should never harm their client's interests – whether intentionally or negligently through acts or omissions. Where there is a danger that clients' interests may be harmed this must be thoroughly canvassed with clients and the latter must decide whether or not to accept the threatened risks of harm. No decisions that may harm a client's interests must be made by clinical law students (and their supervisors) without the informed consent of the client. Where for ethical or personal reasons, a clinical law student needs to withdraw from assisting a client in a case he or she must withdraw from the case in a manner that is not harmful to the client (e.g. by ensuring that somebody else will take over the case).

12.2.4 Justice

The justice principle means that all clients should be treated equally and fairly by clinical law students (and their supervisors). No matter how poor or deprived the client, or how heinous or horrendous the client's alleged crime, all clients must be treated equally. Furthermore, in criminal cases all clients should be presumed innocent unless the client informs the student that he or she is guilty. Even then there is a duty on the clinical law student to ascertain that all the elements of the crime have been satisfied before proceeding on the basis of the client's guilt. It is the task of the court not the student practitioner to determine whether or not the client is guilty.

12.2.5 Conclusion

If clinical law students always follow the four basic principles of autonomy, beneficence, non-maleficence and justice they will be sure to carry out their professional responsibilities in an ethical manner.

A number of qualities have been suggested as desirable for a person to be a good trial lawyer and it is submitted that the same qualities apply to lawyers and clinical law students as well. These qualities can be summarized as follows: (a) clarity and order of language; (b) honesty and integrity; (c) judgement; (d) objectivity; (e) courage; (f) alertness; (g) tenacity; (h) sincerity; (i) humanity; (j) adaptability; (k) hard work; and, (l) professionalism.¹⁶⁶

12.3 Professional rules of conduct

Clinical law students may not be subject to the professional rules of conduct of the legal profession but the clinic should develop a set of relevant rules regarding professional responsibility and get the students to agree to abide by them.

Rules for professional conduct in law clinics should deal with the following: (a) the law student-client relationship; (b) the law student-supervisor relationship; (c) the law student and the profession; (d)

¹⁶⁶ See generally Richard Du Cann *The Art of the Advocate* (1980) 49-64; cf Pat Stilwell *Cross-Examination* (1997) 1-3. For a detailed description of these qualities see Robin Palmer and David McQuoid-Mason *Basic Trial Advocacy* (2000).

confidentiality; and (e) gifts and donations.¹⁶⁷

12.3.1 Law student-client relationship

It has been suggested that the following rules should apply to the law student-client relationship with legal aid clients:¹⁶⁸

Law clinic student-client relationships

1. Legal aid clients are entitled to competent and efficient service.
2. Legal aid clients should always be treated patiently and courteously – no matter how difficult they may be.
3. Legal clients who are unduly difficult should be referred to the clinic supervisor and dealt with politely, but firmly
4. Legal aid clients are entitled to disregard the student counsellor's advice and to request that some other action be taken. In such a case the client should be warned of the possible consequences.
5. Law clinic students should inform their clients as to how the case is likely to develop.
6. Law clinic students should ensure that undertakings to clients are carried out – otherwise they should explain promptly why they were not.
7. Legal aid clients should always be advised about new developments in their cases.
8. Law clinic student advisers should deal honestly and openly with their clients.
9. Law clinic students should not allow themselves to be placed in a position where there is a conflict of interest (e.g. where they act simultaneously for opposing clients).
10. Law clinic students must not enter into personal relationships with clients.
11. Law clinic students must keep their client's confidences (see below Confidentiality).
12. Legal aid clients should be informed that law clinic students are not qualified lawyers and that if litigation arises their case would be taken over by a supervisor or other qualified lawyer.

12.3.2 Law clinic student-supervisor relationships

The following rules have been suggested regarding the law clinic student-supervisor relationship:¹⁶⁹

Law clinic student-supervisor relationships

1. Supervisors have overall responsibility for the administration of the legal aid clinics
2. Supervisors and staff members should not generally handle files personally – unless they are involved in litigating on behalf of a clinic client – they should supervise the work of the law clinic students
3. Law clinic students should always check with their supervisors before giving legal advice.
4. In order to ensure professional standards all steps taken should be discussed with the supervisor beforehand.
5. As a general rule advice should not be given over the telephone – the person should be told to call in at the clinic. Where, however, such advice is given, it should be checked with the supervisor, and recorded together with the name of the caller in and 'advice book'.
6. Professional standards should be maintained at all times to ensure the credibility of the clinics.

12.3.3 Law clinic students and the profession

The following rules should be applied to relationships between law clinic students and the profession:

¹⁶⁷ DJ McQuoid-Mason An Outline of Legal Aid in South Africa (1982) 283-286.

¹⁶⁸ McQuoid-Mason An Outline of Legal Aid 283-284.

¹⁶⁹ McQuoid-Mason An Outline of Legal Aid 284.

Law clinic students and the profession

1. Where applicable law clinic students should adhere to the ethical rules of the legal profession.
2. Courtesy should be observed in all dealings with members of the legal profession (and anybody else), whether in person, by telephone or in correspondence.
3. Law clinic students, however, should not allow themselves to be bullied, and if sure of their ground, should courteously pursue their standpoints while protecting the interests of their clients.
4. Any altercations with legal practitioners, civil servants or members of the public should be referred to the supervisor.
5. Once a legal practitioner is acting for the other side, the law clinic student must not contact his client's opponent directly but must communicate with the practitioner concerned.
6. Law clinic students who wish to interview witnesses should ensure that they are not being used by the other side's attorneys, or in criminal matters by the state. Such witnesses may, however, be interviewed with the consent of the other side's attorneys – usually in their presence.
7. Law clinic students should ensure that their contact with the legal profession does not endanger the reputation of the law clinics.

12.3.4 Confidentiality

The following rules apply to the right to confidentiality of legal aid clients:¹⁷⁰

Confidentiality

1. Confidentiality concerning the personal affairs of legal aid clients should be maintained at all times.
2. Where a legal aid client's case is used for teaching purposes, the client's name should be deleted or substituted.
3. Any information given should be regarded as confidential and must not be disclosed, except in a suitably amended form, for teaching purposes.
4. A law clinic student should not disclose a client's address to another (including the revenue authorities or the police) without the client's consent.
5. A law clinic student who subsequently joins a law firm that is acting against his or her former client, may not use any information he or she received as a law clinic student against such client.

12.3.5 Gifts and donations to law clinic students and clinics

The following rules should apply to the receiving of gifts or donations by clients to law clinic students, law clinic staff or the law clinic itself.¹⁷¹

¹⁷⁰ McQuoid-Mason An Outline of Legal Aid 285.

¹⁷¹ McQuoid-Mason An Outline of Legal Aid 285-286.

Gifts and donations to law clinic students and clinics

1. A law clinic student may not accept any fee or other reward, direct or indirect, for assisting a client.
2. A client may make a donation to a legal aid clinic. Where such a donation is handed to a law clinic student, the latter must immediately hand it over to the law clinic's administrative assistant so that it can be paid into the clinic's funds.
3. Personal gifts of a non-financial nature (e.g. a box of chocolates or a bottle of wine) may sometimes be accepted – but in all instances the matter should be discussed with the supervisor.
4. Law clinic students may not in any way intimate to clients that they may indicate their gratitude in a material form.
5. Where a non-monetary gift is offered there can be no suggestion, before the matter is finalized, that a law clinic student would be prepared to accept it.

12.4 The consequences of breaching law clinic ethical rules of conduct

The consequences of breaching law clinic ethical rules of conduct by law clinic students will depend on the nature of the breach and the type of clinical programme for which the students are enrolled.

12.4.1 Nature of the breach

If the breach of the ethical rules of conduct arise from dishonesty that is also a breach of the university's student discipline rules, the student may be disciplined according to the latter. A finding of guilt regarding an offence of dishonesty involving a law clinic student may have to be reported to the secretary of the local law society or bar association if such a duty has been imposed upon the university in respect of the conduct of future legal practitioners.¹⁷²

12.4.2 Type of clinical programme

If the students are enrolled in a credit-bearing clinical law course any departure from the ethical rules of conduct may be regarded as misconduct. Any serious breach of such rules may result in disciplinary action in the university student discipline court if the offence is also covered by the university's rules for student discipline. Depending on the findings of the student discipline court or the seriousness of the breach the result might be that the student will fail the clinical law course.

12.4.3 Due process to be followed

In all instances where a law clinic student is alleged to have breached an ethical rule of conduct he or she must be given a hearing – including the right to present his or her side of the case - in accordance with the rules of natural justice.

12.5 Conclusion

Ethical conduct and professional responsibility are key elements of any effective clinical legal education training programme. The clinical experience should provide students with the basic ground rules for good ethical practice and professional responsibility which should stand them in good stead in their future legal careers. The inculcation of good ethical values and a commitment to professional responsibility will also ensure that law students assisting clients in social justice matters will do so in a manner that is both professional and responsible.

¹⁷² For instance, as required by the KwaZulu-Natal Law Society.

CHAPTER 13: TEACHING INTERVIEWING SKILLS AND COUNSELLING

Contents:

- 13.1 Introduction
- 13.2 Stages of the interviewing and counselling process

Outcomes:

The ability to plan, prepare and conduct an effective client interview, and to provide the client with appropriate counselling and advice following the interview.

13.1. Introduction

The purpose of an interview with a client is to establish relevant legal issues. For example, the purpose of the initial client interview is to establish whether the client has a legal problem or issue and discuss remedies available to them. For example, this interview would differ from a later interview with the same client consulting for trial as the objective is to prepare the client to give evidence on legal issues.

Client counselling is a procedure that follows the identification of the relevant issues, and has the purpose to explain all options flowing from the issues, advising the client on the advantages and drawbacks of the various legal options available, and finally guiding the client to make a choice of one or more of the options available.

13.2 Stages of the interviewing process¹⁷³

The interviewing process has various distinct phases:

1. Preparation for the interview: this includes preparing the physical environment (directions; parking; setting up or arranging tables and chairs; water and drinking glass; etc); completing the client information sheet; meeting the client and escorting the client to the interview table ('meet and greet'); indicating toilet facilities and reading the client file (if applicable).

When meeting a client for the first time, it is very important to get all of their details and their particulars. You must ensure that you have enough information to contact them after they have left the clinic. This session it is very important to get as much information from the client as possible¹⁷⁴.

This will include cell phone numbers, cell phone numbers of family members, spouses and next of kin. When asking for an address, ask the client to draw a map with directions to their home including landmarks like shops and schools. If they live in a rural area, ask for the contact number of the chief/headman. If it becomes apparent that it will be difficult to contact them once they have left the clinic, set a date for a follow up appointment at the initial meeting to ensure that they come back to the clinic.

¹⁷³ See Annexure K client- interviewing and advising guide and annexure M: summary of interviewing steps

¹⁷⁴ See Annexure J- Client intake form and interviewing sheet

2. Starting the interview: Open-ended positive words (e.g. 'How can I help you?' or 'why have you come to see us today?' and not 'What is your problem?')

3. Let the client tell the story: Let the client talk without interruption and listen carefully; maintain regular eye contact and jot down notes as the client talks; list possible legal issues that arise; note client's demeanour, body language and voice inflections; resist the temptation to interrupt even if the story is disjointed; do not offer legal advice or conclusions at this stage, even if asked); avoid premature problem identification.

4. Develop a chronology: When the client has completed telling the story, develop a chronology (i.e., start at a given point and note down events in time sequence, step by step) for each of the potential legal issues you had noted earlier. Use progressively more closed questions to "funnel" the client's version into a chronology. At the end of the chronology on each potential issue, confirm your initial view on whether a legal issue exists or not. Once all the issues have been identified, confirm them with the client again.

5. Counselling: The interviewing process is followed by the counselling stage. This entails listing various available options flowing from the issues, explaining the advantages and disadvantages of each option, considering non-legal options, advising the client on your opinion of the preferred option given the client's circumstances, and guiding the client to make a choice on one or more of the available options.

6. Closing the interview: Once the client has made an informed choice, the last stage is to confirm the choice(s), confirm what further actions you will take and what actions the client must take, and finally seeing the client out of the offices.

Note that it is important that the law clinic develop a checklist for dealing with clients to ensure no aspects of the process are overlooked¹⁷⁵.

This checklist should include:

Preparation

- prepare for interview with client
- familiarity with charge, relevant law
- familiarity with facts
- familiarity with court policy

Conducting Interview

- make client feel relaxed
- explain how the Clinic works
- confidentiality
- personal history
- update current contact information, employment, etc.

¹⁷⁵ Specific checklist for specialist interviews (criminal and divorce matters) should also be created.

- no note taking during initial interview
- ask about witnesses
- ask about statements, searches, etc.
- ask about mitigation
- review relevant facts, taking notes
- discrepancies
- obtain any releases

Counselling Skills

- Advice to Client
- explain the law, including affirmative defenses
- discuss exposure
- don't talk to anyone about the case
- explain the procedure of the prosecution, trial
- discuss whether client should testify
- discuss plea bargaining, accord & satisfaction
- answer questions

Professional Responsibility

- don't confront client
- don't judge client
- don't become a witness
- encourage candour
- be candid

Pretrial Proceedings: Witnesses

- Identify Witness, Pro and Con
- Background Information
- Arranged Interview
- Unarranged Interview
- Identify yourself and client
- Find out what they know
- Find out what they have said, to whom
- Whether coming to court
- Who they can talk to

13.3 Proper Interview Techniques

From Eyewitness Evidence: A Guide to Law Enforcement, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice.

INITIAL (PRE-INTERVIEW) CONTACT WITH THE WITNESS

Principle:

A comfortable witness provides more information.

Policy:

Investigators shall conduct themselves in a manner conducive to eliciting the most information from the witness.

Procedure:

On meeting with the witness but prior to beginning the interview, the investigator should:

1. Develop a rapport with the witness.
2. Inquire about the nature of the witness' prior law enforcement contact related to the incident.
3. Volunteer no specific information about the suspect or the case.

Summary:

Establishing a cooperative relationship with the witness likely will result in an interview that yields a greater amount of accurate information.

CONDUCTING THE INTERVIEW

Principle:

Interview techniques can facilitate witness memory and encourage communication both during and following the interview.

Policy:

The investigator shall conduct a complete, efficient, and effective interview of the witness and encourage post interview communication.

Procedure: During the interview, the investigator should:

1. Encourage the witness to volunteer information without prompting.
2. Encourage the witness to report all details, even if they seem trivial.
3. Ask open-ended questions (e.g., "what can you tell me about the car?"; augment with closed-ended, specific questions (e.g., "What color was the car?").
4. Avoid leading questions (e.g., "Was the car red?").
5. Caution the witness not to guess.
6. Ask the witness to mentally recreate the circumstances of the event (e.g. "Think about your feelings at the time.").
7. Encourage nonverbal communication (e.g., drawings, gestures, objects).
8. Avoid interrupting the witness.
9. Encourage the witness to contact investigators when additional information is recalled.
10. Instruct the witness to avoid discussing details of the incident with other potential witnesses.
11. Encourage the witness to avoid contact with the media or exposure to media accounts concerning the incident.
12. Thank the witness for his/her cooperation.

Summary:

Information elicited from the witness during the interview may provide investigative leads and other essential facts. The above interview procedures will enable the witness to provide the most accurate, complete description of the event and encourage the witness to report later recollections. Witnesses commonly recall additional information after the interview that may be critical to the investigation.

IMPROPER INTERVIEW TECHNIQUES

Interview Script prepared by Virginia State Police detective to be used by investigators interviewing witnesses:

The purpose of the interview concerns the murder of Tammy Baker on 12/3/97. She was about to leave for work when she noticed an object near her doorstep. She picked it up and it exploded and killed her and her unborn child. We are interviewing people who we believe in some way be associated with Coleman L. Johnson, Jr., also known as Mike Johnson. Johnson lived for a short time with Tammy Baker and we believe he is the father of the unborn child or he believed he was the father of the child. They were involved in an unfriendly controversy at the time of her death regarding his not wanting to pay child support. We have uncovered information regarding Coleman Johnson, Jr. which leads us to believe he may have caused this bomb to be set. Our investigation thus far indicates you have an association with Johnson and/or his mother, Dianne Johnson who live at 314 Maney Drive in Newport News.

Sample of questions asked:

- Johnson's temperament? Do you ever recall seeing him get mad and what type of things make him mad? How angry does he get?
- Johnson's relationship with ex-wives/girlfriends?
- Where does he hang out?
- What is his relationship with his mother?
- Did Johnson or his mother ever talk about Tammy Baker and her pregnancy?
- What are his hobbies? Is he interested in explosives or guns?
- Is he tight with money
- Are you aware of any mental problems or signs of instability?
- Have you ever heard him threaten anyone or talk about getting even with anyone?

CHAPTER 14: TEACHING BASIC RESEARCH SKILLS

Contents:

- 14.1 What is the purpose of research?
- 14.2 Research using printed media
- 14.3 Computer-based research

Outcomes:

1. The ability to research in an efficient and structured manner
2. An understanding of online research resources.

14.1 What is the purpose of research?

Once a legal issue has been identified in the interviewing process, a clinical law student will have to research the law applicable to that issue.

14.2 Research using printed media

There is no single method that is used to research legal problems. Starting out, however, it is useful to follow this sequence:

1. Use a textbook
2. Find relevant legislation
3. Find applicable case law
4. Broaden your research

By applying these steps, the student will learn a set of research skills.

14.2.1 Use a textbook

Given the mass of materials available in any law library, students may start to research with a good textbook. That said, the following are important points to note:

1. Textbooks are not law, they are merely the authors opinion about the law
2. In general, you cannot rely on a textbook as legal authority in court, or when answering a problem question.
3. Different authors hold different views. For this reason, it is advisable to read as widely as possible.
4. Textbooks tend to become outdated very quickly. Invariably there will have been important legal developments since the textbook that you consult was updated.

For these reasons, a textbook is merely a starting point for research. A good textbook will point the student in the right direction. After consulting the textbook, you must get hold of the law itself. This will enable you to form your own opinion about what the law says and to take account of any important legal developments.

14.2.2 Find relevant legislation

Having made a start you must, as mentioned, find the law itself, beginning with the relevant statutes. Legislation can be found compiled in law reports in law libraries or online¹⁷⁶.

14.2.3 Find applicable case law

As mentioned, having found the relevant legislation, your next step is to find court case reports (that is, law reports) that have considered this legislation. Bear in mind that the courts do not strictly speaking, make law. Rather, their job is to interpret and apply the law. Case law is important for the following reasons:

- 1) Courts interpret statutes when they apply those statutes. In so the courts give meaning to the statutes.
- 2) Cases are the best place to find the common law, for it is the courts that have developed the law that has not been codified.
- 3) In terms of the doctrine of precedent, a court's interpretation of a statute or common law will bind lower courts.
- 4) Courts are impressed by, and attach great importance to, cases, even when they are not bound by them. Much legal argument consists in using cases to support a particular interpretation of either the common law or a statute.

14.2.4 Broaden your research

Once you have located statutes and cases, you should be able to determine the law as it applies to the legal question. However, legal research is no longer simply about finding the relevant legal rules, and for most legal problems, you will have to consider whether there is any conflict with the constitution. If there is, a law may be struck down as unconstitutional according to a constitutional supremacy clause.

The difficulty is how to go about researching this 'constitutional dimension' of a problem. There might be no precedent available on a particular constitutional issue. Often such questions are raised and discussed in textbooks with which I advised you to commence your research. However, many textbooks tend to describe the law, instead of commenting on it. For this reason, it is also advisable to consult law journals. Law journals typically contain 'articles' (which are in-depth discussions of legal issues) and 'comments' (which are shorter opinions about recent cases or other legal issues). Articles contain useful research and discussions of particular areas of law.

14.2.5 Conclusion

Once you have gathered all the relevant law and other materials- that is, once you have located all the relevant legislation and cases, as well as relevant academic opinion- you are in a position to give an answer to the legal problem posed. In doing this, it is advisable to keep the hierarchy of laws and the hierarchy of courts in mind. If you encounter conflict between two laws, apply the hierarchy of laws and ask yourself which law should prevail. If on the other hand, you encounter conflicting case law, apply the hierarchy of courts and establish which precedent should prevail.

¹⁷⁶ See paragraph 14.3 below

14.3 Internet-based research

14.3.1. Introduction

The internet is a useful tool in legal research. Online legal information can be updated quicker and be accessed more widely than print sources. When used correctly, this means that researchers from around the world have access to the most current law.

Note that when researching online, it is important that the researcher only use credible websites and sources of information. It is often difficult to verify the credentials of authors online and researchers need to be wary of information not obtained from recognised and credible legal websites. Remember to reference the author and website correctly.

Online databases are accessed via the Internet. To access the information, type the website address into the address bar of your web browser (e.g. Internet Explorer). This will open the home page of the database.

14.3.2. LexisNexis¹⁷⁷, Jutastat Online¹⁷⁸ and Sabinet Online¹⁷⁹

In South Africa, there are many online legal databases including LexisNexis, Jutastat Online and Sabinet Online. These sites are not freely accessible and researchers need to have paid a subscription fee before access will be granted. In addition, these sites may not be workable elsewhere in Africa, however LexisNexis is busy expanding into many African countries and the programmes are accessible via the internet.

Researching using the internet will follow the same structure as researching in print media—researchers must first find the current law in legislation and court decisions before broadening the research to journal articles.

Jutastat Online and LexisNexis are useful in finding specific law reports and legislation or for searching generally on a legal topic.

LexisNexis and Jutastat Online databases have similar website layouts. This layout includes:

- The table of contents on the left of the screen, which is an expandable list that displays and provides links to the contents of the database;
- A horizontal navigation bar on the top of the screen that allows you to view the information gathered in various views;
- A document pane, that shows a complete view of the document in which you are working; and
- A choose search form window that allows you to perform quick searches for information

177 www.lexisnexis.co.za/

178 www.jutalaw.co.za/

179 www.sabinet.co.za/

Sabinet Online contains publications including journal articles which may be useful in researching for recognised publications opinion of areas of law.

14.3.3. Free online legal databases

The Southern African Legal Information Institute (SAFLII)¹⁸⁰ is an online repository of legal information from South Africa. SAFLII is currently the largest free-access collection of online legal materials from South Africa. The SAFLII website hosts the legal materials from other countries in the region¹⁸¹, which are obtained through partnerships and collaborative efforts with governments, courts, law societies and more recently through linking to other Legal Information Institutes being established in these regions.

Other Legal Information Institutes include Malawi Legal Information Institute¹⁸² and African Legal Information Institute (AfricanLII)¹⁸³ and Australasian Legal Information Institute (AustLii)¹⁸⁴. Additional online legal databases are IREX¹⁸⁵ and US Embassy¹⁸⁶ can be useful.

These websites are freely accessible compilations of legal materials including law reports from different courts¹⁸⁷ and legislation.

180 www.saflii.org.za/

181 These include Angola, Botswana, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe

182 <http://www.malawilii.org/>

183 <http://www.africanlii.org/>

184 <http://www.austlii.edu.au/>

185 <http://www.irex.org/>

186 www.usembassy.gov/

187 See first two pages of a case from SAFLII attached as Annexure L.

CHAPTER 15: TEACHING LEGAL WRITING

Contents:

- 15.1 General writing skills
- 15.2 Specific writing skills
- 15.3 The Components of Writing: Letters, Words, Sentences and Paragraphs
- 15.4 Six rules to apply in order to 'state what you mean'
- 15.5 Applying the six rules of effective writing to specific examples
- 15.6 Planning persuasive legal writing
- 15.7 Methods of Persuasion: Logic, Information and Emotion
- 15.8 Specific writing skills

Outcomes:

At the end of this chapter you will be able to:

1. Write clearly and concisely by stating what you mean
2. Understand the basic components of writing
3. Understand the methods of persuasion
4. Plan and draft legal letters

15.1 General writing skills

15.1.1. Introduction

We write¹⁸⁸ for many purposes, but the bulk of the lawyer's writing work is writing to *inform* and writing to *persuade*. These general skills are the foundation upon which all legal drafting skills are built. The methods used to convey information, or to attempt to persuade in writing, are numerous: they include memoranda, letters,¹⁸⁹ legal opinions, documents exchanged before a trial commences (pleadings and notices), court documents containing your main points (or 'heads') of argument when appealing to a higher court against the decision of a lower court, and representations (formal requests made in writing to some authority on behalf of clients). Also, as a law student, you will have to write essays and assignments and write answers to examination questions.

Whatever the kind of writing you are doing, and whether your goal is to inform or to persuade, the fundamental skill you have to develop is to *state what you mean* when you write.

15.2 The key writing skill: *State what you mean*

The ability to express yourself clearly and concisely in writing is one of the most important, and neglected, of all communication skills. Writing, after all, is merely the expression of your thoughts on paper. The reason most people have a problem with expressing themselves on paper is that when writing, they have to be far more disciplined than when speaking. When articulating thoughts orally, people are not forced to economize or choose words that express exactly what they want to say. They know they can keep talking to clarify anything that may be unclear, and that the person to whom they are speaking will ask questions if something is not understood.

188 The use of the term 'write' in this chapter includes keyboard typing – the focus is on how to transmit your thoughts on paper.

189 The use of the term 'letter' includes letters and documents sent by electronic mail (e-mail).

When writing, you have to be certain that you are able to express yourself unambiguously. Your watchword must always be to *state what you mean*. If you have written a sentence, reread it and ask yourself if it reflects *exactly* what you want to say. If not, rewrite it until it does. Don't be satisfied that 'the reader is bound to get the gist of it'. Submit yourself to a rigorous standard – if a sentence does not reflect exactly what you intend to convey, rewrite it.

15.3 The Components of Writing: Letters, Words, Sentences and Paragraphs

15.3.1 Letters: Vowels and consonants

A letter is a symbol that represents a sound. Letters are classified into vowels (a, e, i, o, u) and consonants (b, c, d, f, and the remaining letters of the alphabet, excluding vowels).

15.3.2 Words

A word is a collection of letters that has a meaning, thus: cat; house; eat; run; justice; happy. Abstract words describe general ideas or concepts: for example, 'transport' (a general word that includes concepts of 'moving') and 'proceed' (a general word that means to move from one point to another). Concrete words describe specific actions or things: for example, 'flying in a plane' (a specific method of transport), and 'walk' (a specific method of proceeding).

15.3.3 Clauses

A 'clause' is a small group of words with an independent meaning, which forms part of a sentence, but which is itself not a whole sentence. (In this book, we confine the use of the term 'phrase' to indicate a pithy saying or idiomatic expression that may be in the form of a clause or a whole sentence: for example, 'You can add another string to your bow by . . .')

A clause contains both a subject (thing or person) and a predicate (action). For example, in the clause 'John went home', 'John' is the subject, and 'went home' is the predicate.

15.3.4 Sentences

A sentence is a group of words in sequence that conveys information. A complete sentence consists of at least one subject and of at least one verb. For example, 'John went home at 9 o'clock' and 'I do' are complete sentences.

15.3.5 Paragraphs

A paragraph is a sentence or collection of sentences dealing with one issue or topic. It is a distinct section of writing, set apart from other sections of writing in the same document by numbering, indenting or spacing. (For example, the three sentences contained in this paragraph are, taken together, an example of a 'paragraph'.)

15.4 Six rules to apply in order to 'state what you mean'

By applying the following six rules, you will ensure that you always state what you mean in writing:

- 1 Use the shortest meaningful *word* you can.
- 2 Avoid using unnecessary *phrases* or *clauses*.
- 3 Use short *sentences*.
- 4 Deal with only one issue per *paragraph*.
- 5 Know how to use *punctuation* marks.
- 6 Consider the physical *presentation* of your writing.

15.4.1 Rule 1: Use the shortest meaningful word you can

(a) *The word must reflect the exact nuance of meaning required*

When choosing a word to convey your intended meaning, use the shortest word available to convey the exact meaning you intend. For example, let us assume that a written police report contains the following statement (based on the example in Chapter 3 above):

I observed the accused proceeding in the direction of the trees, where he obtained a wooden

object, and proceeded to assault the complainant.

Consider the meaning conveyed by the word 'observed': did the policeman *carefully watch* because he had been observing the accused for some time; did he merely *happen to see* what the accused did; or did he *see* the accused act suspiciously, and *then* carefully watch him? To convey his exact meaning, he should choose words that exactly match his actions.

For example, if he had merely 'happened to see' the accused, the most appropriate word to reflect this meaning would be 'noticed'. Thus, 'I noticed the accused . . .'. (Although 'saw' is shorter, it does not reflect the exact nuance of meaning required.)

(b) *Use concrete rather than abstract words*

Consider the example above, again: the mental images evoked by abstract words such as 'proceed', 'wooden object', 'obtained' and 'assault' will differ greatly from reader to reader. As your aim is to avoid ambiguity – i.e., your chosen words must contain only the meanings you intend – you will have to replace those abstract terms with concrete words. For example, replace 'wooden object' with 'large stick'; 'obtained' with 'picked up'; and 'assault' with 'hit him on the head with the stick'.

Note, however, that sometimes very short words may also lack meaning. For example, if the policeman had said 'where he *got* a wooden stick' instead of 'where he *obtained* a wooden stick', the meaning is not improved: 'got' merely means that it 'came into his possession' – we still do not know *how* it came into his possession.

Be aware, however, that sometimes the abstract word is best suited to your needs: for example, you may use the abstract words 'unreasonable behaviour' because you do not want to confine yourself to certain kinds of unreasonable behaviour only.

(c) *Avoid jargon and 'legalese'*

'Jargon' describes a common language of specialized words used within a specific subject or profession as short-cut words for communication among members of that profession. For example, one lawyer will know what another lawyer means when he says his client acted *mala fide* ('in bad faith'). However, although these words aid communication within the profession, they tend to confuse, intimidate and exclude people outside the profession concerned. When writing for people outside the profession, one must, therefore, ensure that jargon is avoided.

'Legalese' is a reference to words that can be classified as legal jargon: for example, the overuse of words like 'the aforementioned', 'whereas', 'hereinafter', 'the said document', etc. Often, the use of these words is essential to ensure that all possible contingencies are covered in a piece of legal writing (for example, a written contract). In most cases, however, their use is unnecessary and even confusing.

(d) *Avoid tautology*

Tautology is the repetition of different words with the same meaning. For example, 'Please return my book back to me' is tautologous as the word 'return' means 'give back'. Other examples are 'in *actual* fact', '*mutual* co-operation', '*forward* planning', '*revert* back' and '*group*

together’.

(e) *Beware of qualifying words and overemphasis*

Rylance¹⁹⁰ advises as follows:

Qualifying words can be overused. When we wish to emphasize a point, words like ‘absolutely’ ‘completely’ ‘really’, ‘totally’, and even ‘very’ appear when they are inappropriate. Once identified, you can delete them without losing any meaning. For example:

Counsel’s advice *totally* convinced me that a change of tactics was *definitely* needed.
is improved without loss of emphasis by deleting the qualifying words:

Counsel’s advice convinced me that a change in tactics was needed.

Similarly, the word ‘very’ is often best deleted. For example:

My client is *very* determined to appeal this decision
is better as:

My client is determined to appeal this decision.

When you wish to give your writing special emphasis, select a stronger or more descriptive word that needs no qualification, rather than qualifying a neutral or moderate word. For example:

The plaintiff’s claim was *totally* unrealistic

Is better as:

The plaintiff’s claim was absurd.

(f) *Qualifying an absolute*

Words such as ‘crucial’ and ‘supreme’ are absolute words – ‘crucial’ means absolutely essential and can, therefore, not be qualified by your saying ‘very crucial’. Similarly, ‘supreme’ means as high ‘as you can go’ – it cannot be qualified as ‘extremely supreme’. Other absolute words like ‘unique’, ‘true’ and ‘unanimous’ can likewise not be qualified: for example, ‘*very* unique’, ‘*completely* unanimous’, and ‘*absolutely* true’. (Note, however, it is acceptable when speaking colloquially to emphasize the truth of the statement you are making by saying, ‘It’s *absolutely* true!’.)

(g) *Be consistent in your use of words*

Do not use *different words* intended to mean the same thing in one piece of writing. For example, if you start out by referring to the *agreement* Abel and Ben entered into, don’t, later in the same piece of writing, refer to this agreement as a ‘contract’: the reader may think that the choice of a new word implies a change in intended meaning (this habit is also referred to as ‘elegant variation’).

(h) *Avoid ‘buzz-words’*

Avoid buzz-words that have been popularized by the media, especially as these are often intentionally vague: for example, ‘feedback’, ‘redeploy’, ‘input’, ‘interface’. Another favourite is the overuse of the word ‘discourse’ (which means written or spoken communication).

(i) *Using gender-neutral language*

Try to use gender-neutral language whenever possible. It is preferable to use neutral terms, such as ‘manager’ (which can denote both a male or female manager), ‘firefighter’ (rather than

‘fireman’), and ‘police officer’ (rather than ‘policeman’). Sometimes, however, a gender-neutral construction can sound artificial: for example, ‘waitron’ (‘waiter’ is gender-neutral and perfectly acceptable) and ‘home executive’ (for ‘housewife’). However, relatively new usages such as ‘spokesperson’ (for ‘spokesman’) and ‘chairperson’ (for ‘chairman’) have become generally acceptable and are not jarring.

A problem that often arises is whether to use, ‘he and she’ and, ‘his and her’ rather than just the conventional, ‘he’ and ‘his’. A way to avoid this dilemma is to use the plural (‘they’) where possible and where it is grammatically correct to do so. (Note that when interpreting parliamentary statutes, the masculine term ‘he’ must be read to include the feminine ‘she’.)¹⁹¹

(j) *Know how to use the dictionary and thesaurus*

You must be fully conversant with the use of the dictionary (see Chapter 1). Another useful aid to finding the exact word to fit your intended meaning is a word-finder (or ‘thesaurus’) of which the best known is *Roget’s Thesaurus*.¹⁹²

Be particularly aware of words that are often confused with each other. For instance, don’t use ‘disinterested’ (meaning ‘neutral’) when you mean ‘uninterested’ (which means ‘lacking interest’), and don’t use ‘refute’ (i.e., ‘prove an allegation to be false’) when you mean ‘deny’ (i.e., ‘allege that an allegation made is not true’).

Other words that are often confused with each other are:¹⁹³

- | ‘abdicate’ (formally renounce an office) vs ‘abrogate’ (repeal or cancel);
- | ‘amiable’ (good-natured) vs ‘amicable’ (friendly, pleasant);
- | ‘compliment’ (sincerely praise) vs ‘complement’ (add to; to complete);
- | ‘effect’ (to cause or bring about) vs ‘affect’ (to influence);
- | ‘forego’ (go before) vs ‘forgo’ (do without);
- | ‘infer’ (conclude or deduce) vs ‘imply’ (insinuate);
- | ‘principal’ (chief – in charge) vs ‘principle’ (general rule);
- | ‘license’ (verb: to license) vs ‘licence’ (noun: licence document or disc);
- | ‘practise’ (verb: to practise) vs ‘practice’ (noun: a medical/legal/dental practice);
- | ‘rebate’ (discount or deduction) vs ‘refund’ (reimbursement); and
- | ‘stationary’ (not moving) vs ‘stationery’ (writing materials).

Finally, be especially vigilant about words such as ‘may’, ‘shall’, ‘will’, ‘must’ and ‘can’, as they may mean different things in different contexts. For example, ‘may’ could mean any of the following:

- (i) That you have a *choice* in whether to do something. For instance, a statute may provide that ‘a court *may* order . . .’ – this wording gives the court the choice (or ‘discretion’) to make (or not make) a particular order;
- (ii) That you are *permitted* to do something: ‘Yes, you *may* go to town’; or
- (iii) That you *might* do something, if the mood strikes you: ‘I *may* go to town later’.

Do not use ‘can’ (which means something is possible) when you mean ‘may’ in the sense of ‘permit’: for example, ‘*May* I have an apple?’ rather than ‘*Can* I have an apple?’.

15.4.2 Rule 2: Avoid using unnecessary phrases or clauses

We often clutter our writing with meaningless or confusing phrases and sayings which only serve to obscure the meanings we intend and to lengthen sentences. Avoid such ‘padding’ wherever possible.

191 By virtue of section 7 of the Interpretation Act, 1958.

192 3 ed (Random House, 1998). You may also use The Oxford Paperback Thesaurus (Oxford University Press, 2001), which is a companion volume to The Concise Oxford Dictionary, the dictionary we recommend in Chapter 1.

193 Rylance 1994, p 61.

Be especially careful to avoid clichés (hackneyed phrases that have become virtually meaningless through overuse), for example:

- I 'in actual fact' (all facts are 'actual' – rather say 'in fact');
- I 'it goes without saying' (then don't say it!);
- I 'the bottom line' (the reader can see the bottom line – you need not mention it).

Rylance puts it as follows:

The danger with clichés is that they provide prefabricated phrases that can become tired substitutes for original thought. They have a nasty habit of suggesting themselves as we write. If you begin to write 'alliance', somehow 'unholy' might slip in or if there is an 'irony', it might easily become a 'bitter irony'. Used with care, an occasional cliché will not harm your writing. If you use one, use it because it expresses your meaning clearly and not simply because it is familiar.¹⁹⁴

15.4.3 Rule 3: Use short sentences

The longer the sentence, the more difficult it becomes to remember what has been read. Consequently, long sentences frequently result in misunderstandings and confusion, and are best avoided. (Consider how difficult it is to make sense of section 2(7)(a) of the Apportionment of Damages Act, 1956, due to the over-long sentences used: see Chapter 4.7 above.).

In general the following rules should be applied:

(a) *Each sentence should contain no more than two items of information*

To ensure that meanings contained in a sentence are easy to follow, a general rule is that a sentence should not contain more than two items of information. For example, the sentence, 'Mr Reddy was present when the will was signed, and was still there when Mrs Reddy left the room', contains two items of information:

- (1) Mr Reddy was present when the will was signed; and
- (2) Mr Reddy was present when Mrs Reddy left the room.

(b) *Use the active rather than the passive voice*

Compare, for example, 'Peter kicked the ball' (active voice) to 'The ball was kicked' (passive voice). We notice that the sentence in the active voice is clear and unambiguous, whilst the sentence in the passive voice is ambiguous, as we do not know *who* kicked the ball.

Although the preference for the active voice is a general rule, Wydick¹⁹⁵ suggests five situations where the use of passive voice is appropriate:

- (1) When the *thing* done is important and *who* did it is not: 'The subpoena was served on the 19th of January';
- (2) When you don't know who did it: 'The ledgers were mysteriously destroyed';
- (3) To place the emphasis at the end of a sentence: 'As he walked through the door, the man was shot';
- (4) When a sense of detached abstraction is appropriate: 'In the eyes of the law, all people are equal'; and
- (15) When you intentionally want to reduce the emphasis on an aspect. For example, to avoid stating outright that your client knocked out the plaintiff's teeth, you could say, 'The plaintiff's teeth were knocked out'.

(c) *The word order in a sentence can affect the meaning of a sentence*

In many languages, the sequence of words within a sentence does not affect its meaning. In English, however, meaning *is* affected by the order of the words. Consider the following

194 Ibid, p 42.

195 Wydick 1994 Plain English for Lawyers 3 ed Durham, NC: Carolina Academic Press, p 30.

examples:¹⁹⁶

- | 'The defendant was arrested for fornicating under a little-used municipal ordinance';
- | 'My client has discussed your proposal to fill the drainage ditch with his partners';
- | 'Beyond any doubt insane, Judge Weldon ordered the applicant's transfer to a mental hospital'.

The word order of these examples will have to be changed to remove ambiguity or absurdity, for example:

- | 'The defendant was arrested, in terms of a little-used municipal ordinance, for fornicating';
- | 'My client has discussed, with his partners, your proposal to fill the drainage ditch';
- | 'Judge Weldon ordered the transfer of the applicant, who was beyond any doubt insane, to a mental hospital'.

(d) *Beware of 'squinting' modifiers: 'often' and 'only'*

Wydick¹⁹⁷ explains as follows:

Beware of the 'squinting' modifier – one that sits mid-sentence and can be read to modify either what precedes it or what follows it: A trustee who steals dividends often cannot be punished.

What does *often* modify? Does the sentence tell us that crime frequently pays? Or that frequent crime pays?

Once discovered, a squinting modifier is easy to cure. Either choose a word that does not squint, or rearrange the sentence to avoid the ambiguity. For example:

'When workers are injured frequently no compensation is paid'.

If that means that injured workers frequently receive no compensation, the squinting modifier could be moved to the front of the sentence, like this:

'Frequently, workers who are injured receive no compensation.'

The word *only* is a notorious troublemaker. For example, in the following sentence the word *only* could go in any of seven places and produce a half a dozen different meanings:

'She said that he shot her.'¹⁹⁸

To keep *only* under control, put it immediately before the word you want it to modify. If it creates ambiguity in that position, try to isolate it at the beginning or ending of the sentence:

Ambiguous

Lessee shall use the vessel only for recreation.

Shares are sold to the public only by the parent corporation.

Not ambiguous

Lessee shall use the vessel for recreation only.

Only the parent corporation sells shares to the public.

(e) *Master the rules of English grammar*

The correct use of grammar is important for both the presentation and the meaning of your writing. A full discussion about the general rules of English grammar is, however, beyond the scope of this book.¹⁹⁹

196 Ibid, p 48.

197 Wydick op cit, p 48.

198 (1) Only she said that he shot her [she, and nobody else said it]; (2) She only said that he shot her [she said this, and nothing else]; (3) She said only that he shot her [same as (2)]; (4) She said that only he shot her [he, and nobody else shot her]; (5) She said that he only shot her [he shot her, and did nothing else to her]; (6) She said that he shot only her [she was the only one who was shot by him]; (7) She said he shot her only[same as (6)].

199 A simple, straightforward introduction to English grammar is contained in Chapter XI of *Mend your English* by Ian Bruton-Simmonds (Ivy Publications: London, 1990).

15.4.4 Rule 4: Deal with only one issue per paragraph

A paragraph is a series of sentences dealing with the same issue. The initial sentence of the paragraph usually states your contention or point of view, whilst the remaining sentences usually support, explain or illustrate the contention. (Sometimes this initial sentence is called the *topic sentence*.) Note that a paragraph can also consist of a single sentence if the issue concerned is self-contained.

15.4.5 Rule 5: Know how to use punctuation marks

(a) *The power of punctuation*

How you use punctuation marks in a sentence may drastically affect its meaning. Consider, for example, the effect on meaning caused by the placement of the punctuation marks in the following unpunctuated sentence: 'A woman without her man is nothing'.

Compare: 'A woman without her man, is nothing,'

with: 'A woman: without her, man is nothing'.

Even moving a single comma one word along in a sentence may result in exactly the opposite meaning. For instance, a woman, in anticipation of her husband's future death, buys a gravestone and has it inscribed as follows:

HERE LIES JOHN TAKEN TO HEAVEN HE IS NOT NEAR HELL SHALL HE DWELL.

Now, when her husband dies, and if she has had a good marriage, she will punctuate the inscription as follows:

HERE LIES JOHN. TAKEN TO HEAVEN HE IS, NOT NEAR HELL SHALL HE DWELL.

If the marriage has been bad, she could punctuate the gravestone thus:

HERE LIES JOHN. TAKEN TO HEAVEN HE IS NOT, NEAR HELL SHALL HE DWELL.

(b) *The main functions of punctuation marks*²⁰⁰

- (1) The comma (,)
The primary function of a comma is to indicate a short pause: for example, 'Justice must be done, and also be seen to be done'. It is also used to separate nouns (especially in lists) and to separate clauses within sentences.
- (2) The semi-colon (;)
This indicates a pause longer than a comma, but not as long as a full stop. It is also used to connect two sentences that are closely related: for example, 'The defendant did not intend to break the plaintiff's leg; he was only trying to stop him from fleeing'.
- (3) The colon (:)
A colon is usually used to introduce a list or to introduce further clarification of what precedes the colon: for example, 'To prove the crime of Murder, the State must prove the following:
 1. An unlawful act;
 2. Done with intention;
 3. That causes the death;
 4. Of a human being'.Another example:
'The intruder's intention was clear: he wanted to steal the money'.
- (4) The full stop (.)
The full stop indicates the end of a sentence.
- (5) The ellipsis (...)
The ellipsis is a series of three spaced dots used to indicate

200 For a full discussion of all the functions of the various punctuation marks, see MB Ray and JJ Ramsfield 1993 Legal Writing: Getting it Right and Getting it Written 2 ed West, St Paul.

- omissions in quotations. It is also used to indicate an unfinished sentence.
- (6) The exclamation mark (!) The use of an exclamation mark should be avoided unless it is part of a quotation. This is because it is the written equivalent of shouting. It is often misused in attempts to indicate emphasis or excitement (for example, 'Next week, I'm on holiday!')
- (7) The question mark (?) The question mark is self-evident. It indicates that a question is being asked (for example, 'What is the time?').
- (8) The dash (–) The dash is dangerous as it can be used as a substitute for a colon, brackets or a pair of commas, and therefore has the potential to cause confusion (for example, 'Naomi is on a diet of fruit – bananas, pears and apples – and is rapidly losing weight', or 'The doctor's decision – although understandable – was, nevertheless, illegal').
- (9) The hyphen (-) The hyphen is a short dash. Its main purposes are to indicate that one word is modified by another (for example, 'The high-powered executive'), or to prevent confusion (for example, 'At the end of the lease, the flat was re-leased').
- (10) Round brackets () (Also called 'parentheses') Round brackets should only be used to indicate information that may disrupt the flow of the sentence: for example, 'Crimes against persons (murder, rape and robbery) generally carry heavier sentences than crimes against property (theft, fraud and forgery)'. Do not use parentheses to include information in the text that should properly be contained in a footnote.
- (11) The apostrophe (') The apostrophe is used to indicate possession. In the case of a singular noun, append an 's to the end of the noun: 'It is James's horse', 'The horse's owner is James'. In the case of plural nouns, add just the apostrophe to the end of the noun: 'The boys' parents'. (Remember to make the singular noun plural, before adding the apostrophe: for example, if referring to two boys named James both of who own the same horse: 'It is the Jameses' horse'.)
- It is also used to indicate a contraction of two words: for example, 'don't' for 'do not', 'you're' for 'you are', 'it's' for 'it is'.
- Apostrophes are also used to indicate plurals where confusion would otherwise result: for example, 'He said, "The word 'assassin' has two a's"'. (Also called 'inverted commas')
- (12) Quotation marks (" " or ' ') Quotation marks are used to enclose the actual words of others – in other words, when you quote them *verbatim*: for example, 'Queen Victoria said: "We are not amused"'. Quotation marks are also used when referring to a word itself rather than to what the word represents – usually when defining a word: for example, 'Comity' is a reference to the

good relations between countries.

Further rules of usage:

- Use single quotation marks (' ') for a quotation within a quotation.
- Quotations of fifty words or more should not be contained within quotation marks but be indented and typed in single-line spacing.
- If you wish to indicate an error in the item you are quoting (to show that it was not your mistake), put '[sic]' immediately after the error: for example, 'Professor Jackson said, "Edwin Aldrin [sic] was the first man on the moon"'. (Neil Armstrong, was, of course, the first man to step on the moon)
- If you wish to emphasise part of a quotation, you should underline that section and indicate that the underlining is yours, by adding '(my emphasis)' immediately after the quote. For example, 'It is said that "lawyers have two common failings. One is that they do not write well, and the other is that they think they do"²⁰¹ (my emphasis)'. Note that, if you prefer, you can indicate emphasis by italicising the relevant section instead of underlining it.

15.4.6 Rule 6: Consider the presentation of your writing

(a) *Spelling*

Remember to spell-check your writing before finalizing your draft, as spelling errors can affect the meanings of sentences. Remember that doing a spell-check cannot replace careful proof-reading: the spell-check will not detect words correctly spelt but used in the wrong contexts (for example, 'The first car to arrive was bigger then [instead of 'than'] the second' and 'The frantic children couldn't find there [instead of 'their'] puppies'). Pay particular attention to words that are commonly misspelt: 'liaise' (not 'liase'); 'disappoint' (not 'dissappoint'); 'monies' (not 'moneys'); 'adviser' (not 'advisor'); 'omission' (not 'ommision'); 'fulfil' (not 'fulfill'). Remember to use Standard British spelling and not the American standard: for example, 'behaviour' (not 'behavior'), 'cheque' (not 'check'), and 'sceptical' (not 'skeptical').

(b) *Margins and white space*

Leave generous margins, and do not cram the page with writing. Dense, closely printed text that covers the entire page is intimidating to the reader and is also difficult to read. Don't lose a good message in bad packaging.

(c) *Headings, sub-headings, numbering, indentation and line-spacing*

Headings and sub-headings help provide order and structure, and make the text more readable. Ensure that your numbering and indentation are consistent throughout the piece of writing, to prevent confusion. The standard line-spacing for legal-writing purposes is double-line spacing. This is also recommended for student essays and assignments as it makes marking easier.

(d) *Font choice and size*

The font (shape of the letters used) must be appropriate for the type of writing: for example, do not use Brush Script (which looks like this: Do not use Brush Script) for legal-writing purposes. Also, the size of your text must be easily readable in the context of the size of the page: for

example, the minimum font-size on an A4 page should not be less than 11 points.

(e) *Tabulation*

It is useful to tabulate long and complicated pieces of writing – this will immediately clarify the relationships between the sentences (does one sentence qualify another or not?), and also help to clarify understanding, as the act of tabulating converts long sentences into shorter ones. (See the example – ‘The first rule of lawyers’ ethics’ – in Paragraph 15.5 below).

15.5 Applying the six rules of effective writing to specific examples

(a) *The swimming pool notice*

Reread the section on reading comprehension in Chapter 4. The swimming pool notice reads as follows:

NOTICE!

Children of members using the playground and swimming pool are the responsibility of the parent and if they do not behave or remove or break any equipment they will be held liable for the replacement thereof.

After applying the three comprehension steps, we determined that the intention of the drafters of the notice was to make club-member parents responsible for their children’s behaviour and liable for any losses caused by their children. In order to redraft the notice to reflect *exactly* what the drafters intended, we shall apply the six ‘State what you mean’ rules. In applying these rules, we shall do the following: break up the single sentence used in the notice into two sentences; convert the passive to the active voice; correct the grammar (i.e., refer to ‘parents’ to be consistent with the plural word children); and change the heading to ‘Notice to members’:

NOTICE TO MEMBERS

Parents are responsible for supervising their children when their children use the playground or the swimming pool. If they break or remove any equipment, the parents concerned will be held legally liable to repair or replace it.

(b) *The ‘First Rule of Ethics’ example*

Let us assume that the following rule of ethics is contained in the General Code of Ethical Conduct applicable to all legal practitioners in South Africa. You are required to interpret the rule to establish what was intended by the drafters of this rule (see the three steps of reading comprehension in Chapter 4) and, thereafter, to apply the six ‘State what you mean’ rules to improve the rule’s expression and presentation. The rule (adapted from an example used by Wydick)²⁰² reads as follows:

THE FIRST RULE OF ETHICS

It goes without saying that every legal practitioner has a mandatory ethical duty not to disclose what he or she learns in confidence about his or her clients.

Clearly the aforementioned ethical requirement includes information that the client informs his lawyer about on a confidential basis. But of equal importance, the said duty imposed by the rules of ethics encapsulates what third parties relate to the legal practitioner concerning his or her client, in the event that the client has asked that such material be kept secret, or where revealing the third-party-derived, client-related information would cause harm or embarrassment to the client.

Comprehension:

To assist us to determine the intended meaning of this rule in the given context, it is useful to construct a block diagram setting out how the various sentences in the rule relate to each other:

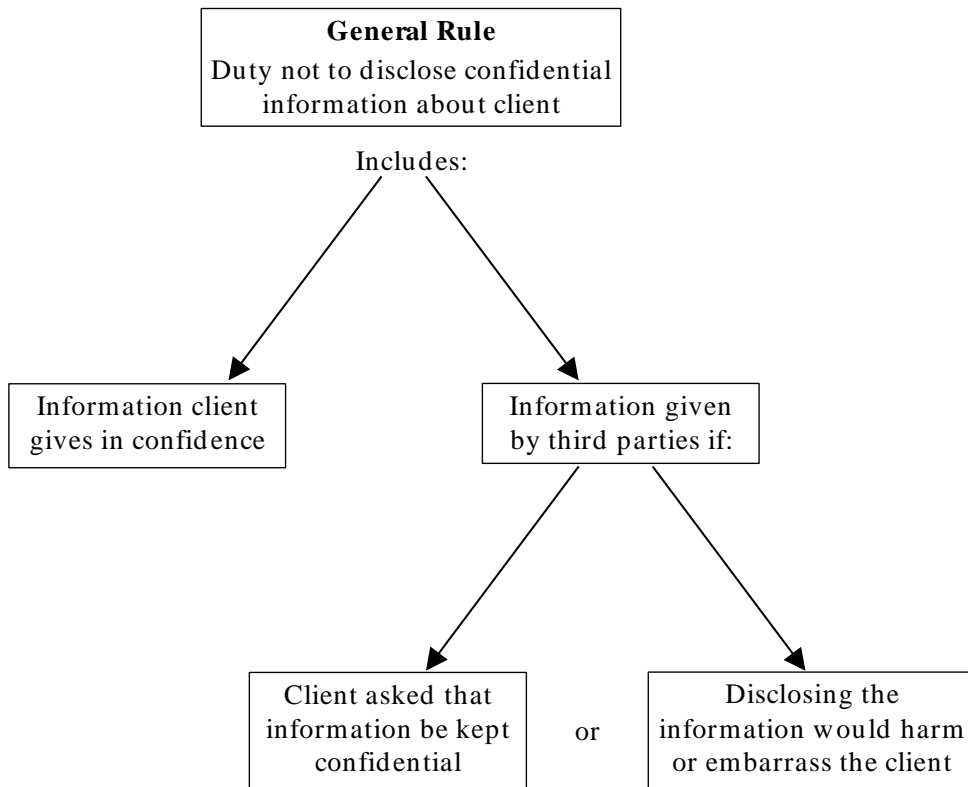


Figure 15.1 Block diagram illustrating the argument

Now, apply the six 'State what you mean' rules:

- I All redundant phrases and words that do not affect the meaning of the rule are crossed out (indicated in the text below).
- I All words referring to the same thing or concept are circled and numbered – only one word per concept must be chosen to ensure consistency (i.e., avoid elegant variation).
- I Long sentences are shortened by tabulating them: the re-written rule will, therefore, have a similar format to the block diagram above.

THE FIRST RULE OF ETHICS

It goes without saying that every legal practitioner has an mandatory ethical duty not to disclose what he or she learns in confidence about his or her clients.

This ethical duty
Clearly the aforementioned ethical requirement includes the duties: (a) Not to disclose information the information that he client informs his lawyer about on a in confidence; and ^{↳ gives the legal practitioner} confidential basis. But of equal importance, the said (b) Not to disclose information that duty imposed by the rules of ethics encapsulates what third parties ^{give} relate to the legal practitioner, ^{if:} concerning his or her client, in the event that ¹⁾ the client has asked that such material be kept secret, or ^{this information confidential,} ^{2) if disclosing this} where revealing the third party derived, client-related information would cause harm or embarrassment to the client.

Figure 15.2 The edited text of the 'First Rule of Ethics

The rewritten rule now reads as follows:

THE FIRST RULE OF ETHICS

Every legal practitioner has an ethical duty not to disclose confidential information about his or her clients. This ethical duty includes the duties:

- 1 Not to disclose information the client gives the legal practitioner in confidence; and
- 2 Not to disclose information that third parties give the legal practitioner, if:
 - 2.1 The client has asked that this information be kept confidential, or
 - 2.2 If disclosing this information would harm or embarrass the client.

15.6 Planning persuasive legal writing

There are three essential steps in the planning of any type of persuasive writing:

Step 1 Identify and list your objectives

What aims are you trying to achieve with the piece of writing? Any subsidiary objectives must also be identified and listed.

Step 2 Identify and list your strategy and tactics

Your 'strategy' is your overall plan to achieve your objectives, and your 'tactics' are the steps within this overall plan.

Step 3 REPOV – 'Recipient's Point of View'

Finally, read your completed draft from the intended recipient's point of view, in order to see whether your objectives are likely to be achieved. Then make the necessary alterations to your writing.

We shall now illustrate these three steps with examples:

Amy, a 20-year old student, has been going out with Ben, a fellow student, for a year, and now wishes to end their relationship by sending him a 'Dear John' letter:

- Step 1 Main objective:* To end the relationship with Ben.
Subsidiary objective: To remain on friendly terms with Ben after the relationship is ended.
- Step 2 Strategy and tactics:* Strategy: Orally raise her need for 'space' with Ben over a period of two weeks, and then hand-deliver the 'Dear John' letter to him via his sister.
Tactics: In the letter, make it absolutely clear that their relationship is ended, but place all blame on herself in order to maintain Ben's self-esteem. Maintain a neutral but friendly tone in the letter. Not to give false hope of the possible resumption of the relationship.
- Step 3 REPOV:* Read the draft letter from Ben's point of view (i.e., 'putting herself in Ben's shoes'). Make the necessary alterations.

Note that if Amy's only objective had been to end the relationship, she could have done it in a very businesslike way, as follows:

Ben Larkin
Room 174
Men's Residence
Durban

Amy Radebe
Room 471
Women's Residence
Durban

BEN

1 September 2001

ENDING OF RELATIONSHIP BETWEEN A. RADEBE AND B. LARKIN: 20 JULY 2000 TO 1 SEPTEMBER 2001

Please note that this relationship is herewith ended.

Yours faithfully,

AMY RADEBE

This letter will achieve the main objective of ending the relationship, but will certainly not achieve the subsidiary objective of maintaining a cordial relationship with Ben.

A letter that comes closer to achieving the identified objectives is the following:

Amy Radebe
Room 471
Women's Residence
Durban

Ben Larkin
Room 174
Men's Residence
Durban

1 September 2001

Dear Ben

You will have realized by now that, for a while, I have just not been myself. I think I have reached a stage in my life where I need some space to think and discover myself again.

As hard as this is, I think it would be best for both of us if we no longer see each other. I realize that you are not, in any way, to blame for this situation – it is my problem and I have to deal with it.

Although our relationship is at an end, I hope we can still remain on good terms. Thank you for all you've done for me, and for the good times we've had together.

Yours faithfully

AMY RADEBE

15.7 Methods of Persuasion: Logic, Information and Emotion

You may attempt various approaches to persuade the recipient of your writing to accept your point of view. The three most common methods of persuasion are, firstly, ensuring that your argument is logical; secondly, giving the recipient sufficient information to make an informed decision; and thirdly, using emotion as a tool of persuasion. We shall now briefly consider each of these methods in turn:

15.7.1 Logic

Logic is vital to your argument. The various methods of logical persuasion are fully discussed in Chapters 2 and 6.

15.7.2 Information: 5 Ws & an H

Always give your reader sufficient information to enable him or her to make an informed decision. Remember to apply the mnemonic, 'Five Whiskies and a Hotel' (5Ws + H), which stands for:

- (i) Who?
- (ii) Where?
- (iii) When?
- (iv) What?
- (v) Why?
- (vi) How?

to ensure that your piece of writing contains all the information your reader may require to make a decision.

Newspaper reporters are taught to include the 5Ws + H in the first paragraph or two of their reports, thereby ensuring that their readers get the most important information ('Must know') as quickly as possible. Further information ('Should know') and ('Nice to know') may be added thereafter. When this information is edited to fit the available space on a page of a newspaper, the editor will cut from the bottom: thus, the 'nice to know' information will be cut first, followed by the 'should know'. What the reader 'must know', however, has to remain. This approach is depicted in the so-called 'Reporter's Triangle':

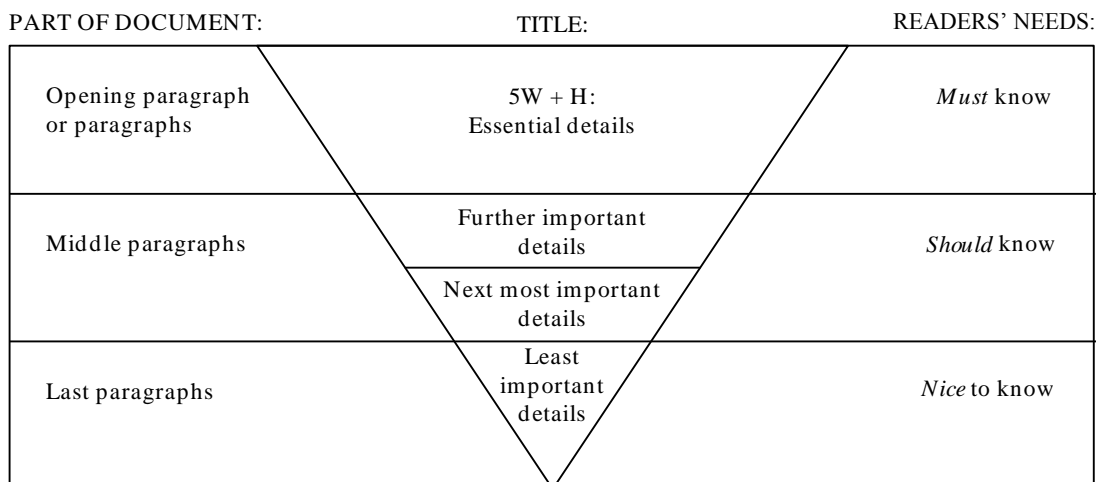


Figure 15.3 The Reporter's Triangle

15.7.3 Tone and emotion

The tone of the writing may strengthen or undermine its persuasive force. Tone refers to the writer's attitude towards the reader and the subject-matter of the writing. For example, a rude, aggressive tone may induce anger in your reader, thereby lessening the chances of persuasion. Other emotions that may be deliberately (or unintentionally) evoked by the tone of the writing are sympathy, empathy, irritation, compassion, sadness, amusement and pity. The following reputedly authentic letter,²⁰³ for example, contains an unashamed emotional appeal to gain sympathy. It also – unintentionally – evokes amusement. It was written in 1905 by the station master at Londiani, Uganda, to his supervisor at Nairobi, requesting permission to travel to India to get married:

Most Honoured and Respected Sir,

I have the honour to humbly and urgently require Your Honour's permission to relieve me of my onerous duties at Londiani so as to enable me to visit the land of my nativity, to wit, India, forsooth.

This in order that I may take unto wife a damsel of many charms who has long been cherished in the heartbeats of my soul. She is of superfluous beauty and enamoured of the thought of becoming my wife.

Said beauteous damsel has long been goal of my manly breast, and I now am fearful of other miscreant deposing me from her lofty affections. Delay in consummation may be ruination most damnable to the romance of both damsel and your humble servant.

Therefore I pray Your Honour, allow me to hasten to India and contract marriage forthwith with said beauteous damsel. This being done happily I will return to Londiani to resume my fruitful official duties and perform also my matrimonial functions. It is dead loneliness here without this charmer to solace my empty heart.

If Your Honour will so far rejoice my soul to this extent and also as goes equally without saying that of said wife to be I shall pray forever as in duty bound for Your Honour's lifelong prosperity, everlasting happiness, promotion of most startling rapidity and withal the fatherhood of many Godlike children to gambol playfully about Your Honour's knees to heart's content.

If, however, for reasons of State or other extreme urgency, the Presence cannot suitably comply with terms of this humble petition, then I pray your most excellent Superiority to grant me this benign favour for Jesus Christ's sake, a gentleman whom your honour very much resembles.

I have the honour to be, Sir, Your Honour's most humble and dutiful, but terribly lovesick, mortal withal, servant.

(Signed) BA (failed by God's misfortune) Bombay University, and now Station Master, Londiani.

The request for leave was granted notwithstanding the writer's failure to consider his request from the recipient's point of view ('REPOV'). For example, the writer makes no mention of any arrangements made to ensure the smooth running of the Londiani railway station in his absence, nor does he stipulate the duration of leave for which he is applying.

Next, we consider a case study in which some of these methods of persuasive writing are illustrated in a legal context.

15.8 Specific writing skills

15.8.1 Case study: A dispute between neighbours – *Abel Achebe v Ben Baxter*

The facts

Abel Achebe is a 21-year old university student who has been renting a house, situated at 1 Devon Road, Berea in Durban, for two years. One of his neighbours is Ben Baxter, who lives at 3 Devon Road. Ben is a 30-year old car salesman.

Abel had a habit of parking his car, a 1988 Nissan Sentra, in his yard, under the branches of a tree growing in Ben's yard. These branches jutted into Abel's yard and provided welcome shade for Abel's car.

On 4 July 2001, Ben decided to trim this tree. In the course of trimming the tree, he cut a branch that fell onto Abel's car. The branch smashed the windscreen, dented the bonnet and cracked the dashboard. Abel and a water-meter inspector (who happened to be on Abel's property at that time) also saw Ben cut the branch, and saw the branch fall onto Abel's car. Up to that stage, Abel and Ben had been on good terms.

Abel's car was not insured, and he obtained three quotations for the repair of the damage to his car. These were the quotations he received:

- I Ace Panelbeaters: R2 600,00
- I Blake Panelbeaters: R3 000,00
- I Chariot Panelbeaters: R2 850,00.

On 10 July 2001, he went to Ben's house with the quotations to discuss the damage to his car. Ben received him in a friendly fashion, and told Abel to leave the quotes with him as he 'wanted to think about the matter'.

After two weeks, Abel had still not heard from Ben, and decided to approach his friend, Cathy Chetty, a law student, for advice on what to do next.

15.8.2 The legal opinion²⁰⁴

The first question is whether Abel is likely to win if he takes Ben to court for refusing to pay for the damage to Abel's car.

Cathy may give Abel her oral or written opinion about the prospects of success if legal action is taken against Ben. Her opinion will follow this logical sequence:²⁰⁵

Step 1 *The facts*

Cathy will carefully interview Abel to ensure that she has all the necessary information (i.e., 'facts') on which to base her legal opinion.

204 What follows is the basic approach to drafting a legal opinion to provide a basis for understanding the contents of the letters of demand Abel will send to Ben. The actual drafting of legal opinions is beyond the scope of this book.

205 Following the 'FIRAC' approach: 1. Facts; 2. Issue; 3. Rule of Law; 4. Apply to facts; 5. Conclusion. This is also the correct approach to answering problem-type questions in law tests and examinations.

Step 2 The issue

Cathy will then decide what the central issue is. In other words, she must ask what it is the client (Abel) wants.

Step 3 The rule of law

The next step is to research and state rules of law (Chapters 12 and 13: Research skills) applicable to the issue – in other words, the legal tests that have to be applied to decide the issue.

Step 4 Apply the rules of law to the facts

At this stage, the rules of law are applied to the facts of the case.

Step 5 Conclusion

Cathy now reaches a conclusion based on the preceding four stages: is the legal action against Ben likely to be successful?

Now, apply these five steps to the information given in 15.8.1, above:

Step 1 Facts

All the necessary information has been obtained from Ben.

Step 2 Issue

On the given facts, is Ben liable to compensate Abel for the loss Abel suffered? (Abel's loss would be the amount of R2 600, being the lowest of the three repair quotations obtained.)

Step 3 Rules of law

The wrong done to Abel by Ben is a civil wrong called a 'delict' (or 'tort'). The legal remedy for this kind of delict is the Aquilian action. To succeed in this action, Abel will have to prove four separate things (or 'elements'):

- (1) Wrongfulness;
- (2) Fault (in the form of intention or negligence);
- (3) Causation; and
- (4) Monetary loss.

Step 4 Apply the rules of law to the facts

(1) Wrongfulness

That Ben's action (cutting the branch and letting it fall onto Abel's car) was wrongful (i.e., wrong in the eyes of the community as a whole, or contrary to the 'legal convictions of the community') will be easily proved on the facts (two eye-witnesses).

(2) Fault

That Ben was at fault (i.e., he acted intentionally or negligently: either he cut the branch to let it fall on Abel's car on purpose [intentionally] or a reasonable person in Ben's position would not have cut the branch in similar circumstances [negligence]) can be inferred from the facts. At the very least, one can infer negligence on Ben's part, in the absence of a reasonable explanation from him.

(3) Causation

The falling branch caused the damage to Abel's car. The fact that the sawed branch fell onto Abel's car will also be easy to prove (two eye-witnesses: Abel and the water-meter inspector).

(4) Monetary loss

Abel will have to prove the amount of the monetary loss he suffered as a result of the damage caused. In addition to the repair quotations obtained, Abel may have to get an independent expert (mechanical engineer or professional vehicle assessor) to inspect his damaged car. This inspection will confirm which one of the three quotations is reasonable and should be accepted.

Step 5 Conclusion

Abel's prospects of succeeding in getting compensation from Ben are very good. After receiving Cathy's legal opinion, Abel knows that, should he be forced to take Ben to court, he would probably win the case. However, the taking of legal action should always be a last resort as it is expensive, time-consuming and damaging to personal relationships. Abel therefore decides that his next step will be to write a friendly note to Ben requesting that Ben pay the R2 600 required to fix his car.

15.8.3 A friendly, hand-written letter to Ben

(a) *Planning the letter*

Step 1 Objectives

- (1) To inform Ben that Abel insists on compensation for the damage to his car.
- (2) To attempt to persuade Ben to pay the amount of R2 600.
- (3) To maintain a cordial personal relationship with Ben.

Step 2 Strategy and tactics

Overall strategy: To maintain a friendly, chatty tone in the letter, but with a clear message that the payment of the R2 600 must be made.

Tactics: Ensure that the salutation (i.e., 'Dear Ben'), the body of the letter, and the ending (i.e., 'Cheers') are consistent in tone. Suggest a follow-up meeting to agree on details, and give a deadline for a positive response from Ben.

Step 3 REPOV

Read the draft letter from Ben's point of view before sending the final copy. Make the necessary alterations.

(b) *The final copy of the friendly letter*

1 Devon Road
Berea
Durban
4001

Ben Baxter
3 Devon Road
Berea
Durban
4001

1 September 2001

Hi Ben,

Long time no see! I hope you are keeping well.

I thought I would drop you a short note about the branch incident, as I haven't heard from you since our discussion a few weeks ago.

Could we get together soon to sort it out? I have now got three repair quotations which I have attached to this letter.

I would appreciate it if you could get back to me by Monday, as I really need to have my car fixed now.

Look forward to hearing from you.

Cheers,

ABEL

If Ben now ignores this letter, Abel's next option will be to send a more formal letter of demand.

As the amount of Abel's loss is less than R3 000,00, his claim falls within the jurisdiction of the Small

Claims Court.²⁰⁶ Also, in terms of section 29 of the Small Claims Court Act, 1984, Abel is not permitted to serve a Small Claims Court summons on Ben until he has first sent Ben a letter of demand. This letter of demand has to be delivered to Ben by hand, or sent to him by registered post. In addition, the letter must indicate that the recipient (Ben) has a period of 14 days, calculated from the day he receives the letter, in which to settle the claim.²⁰⁷

15.8.4 The letter of demand

(a) *Planning the letter of demand*

Step 1 Objectives

- (1) To issue a formal demand for payment in the amount of R2 600 in order to repair Abel's car.
 - (2) To attempt to persuade Ben to pay this amount.
 - (3) To ensure that the letter of demand complies with the Small Claims Court Act.
- (Note that maintaining a good relationship with Ben is no longer an objective.)

Step 2 Strategy and tactics

- (1) Ensure that all the elements of the delict committed by Ben are covered in the letter of demand.
- (2) Use a formal tone – ensure that the salutation, body of the letter and its ending match in tone.
- (3) Give Ben sufficient information to enable him to make a settlement offer.

Note that the letter of demand may become an item of evidence at the Small Claims Court hearing. Ensure, therefore, that the *contents* of the letter are consistent with the contents of the first 'friendly' letter, and also ensure that not too much information is divulged (for example, the letter may mention that an independent eye-witness saw the incident, but the name of the witness should not be disclosed – this would be tactically unwise, as Ben may approach this witness prior to the day of the hearing).

Also, do not indicate anywhere on the letter of demand that you intend to proceed in the Small Claims Court²⁰⁸ – the fear of incurring legal costs in the Magistrate's Court may be sufficient to persuade Ben to pay the R2 600 claimed by Abel.

Step 3 REPOV

Read your draft from Ben's point of view to ensure your three objectives have been met.

206 Section 15(a) of the Small Claims Court Act (No. 61 of 1984). The purpose of the Small Claims Court is to adjudicate small civil claims – currently the maximum award this court can make is R3 000. Litigants before this court are not permitted to be represented by lawyers.

207 Section 29(1) of the Small Claims Court Act, 1984.

208 Nothing in the Small Claims Court Act requires you to indicate in your letter of demand that you intend to proceed in the Small Claims Court, should your demand not be complied with.

(b) *The final letter of demand*
BY HAND

1 Devon Road
Berea
Durban
4001

Mr B Baxter
3 Devon Road
Berea
Durban
4001

22 September 2001

Dear Sir

DEMAND FOR PAYMENT: R2 600 LOSS INCURRED DUE TO DAMAGE CAUSED TO MOTOR VEHICLE ND 113 189

I refer to the incident that occurred on 4 July 2001, when the branch of a tree you cut fell on my car, ND 113 189, causing extensive damage to it.

The damage caused to my car was entirely your fault, as you were negligent in not taking proper care when cutting the branch.

The branch you cut badly damaged the front of my car, also smashing its windscreen and cracking its dashboard.

On 7 July 2001, I obtained three quotations for the repair of the damage caused by the branch to my car. These quotations are attached to this letter. As you can see, the lowest quotation is for an amount of R2 600 (two thousand six hundred rand). I have also attached to this letter an affidavit from an expert motor assessor, Mr Sello Mothibe, in which he assessed the pre-collision market value of my car to be R12 000. It is clear that the market value of the car far exceeds the reasonable cost of repair of R2 600.

I, therefore, demand that you pay me the amount of R2 600 (two thousand six hundred rand) within 14 days of receipt of this letter. Should you fail to do so, I shall proceed, without further notice to you, with legal action against you to recover this money.

Yours faithfully,

(Signed)

ABEL ACHEBE

Should Ben still refuse to pay, Abel will take the letter of demand to the Clerk of the Small Claims Court and arrange for a summons commencing legal action to be served on Ben.

Abel will now have to convert the contents of the letter of demand into 'particulars of claim'. The 'particulars of claim' are a new document in which the details of his legal claim are set out in a specific format. The pages containing the particulars of claim will then be attached to the summons form (which contains Ben's address, at which the summons will be served, and the time and date of the hearing), and this document will then be served on Ben (i.e., delivered to Ben in terms of section 29(2) of the Small Claims Court Act).

Finally, we shall see how Abel's particulars of claim will look when drafted.

15.8.5 **Abel's Particulars of Claim**

PARTICULARS OF CLAIM

1. The plaintiff is Abel Achebe, an adult male student, who resides at 1 Devon Road, Berea, Durban.

2. The defendant is Ben Baxter, an adult male salesman, who resides at 3 Devon Road, Berea, Durban.
3. The whole cause of action arose within the area of jurisdiction of this court.
4. On 4 July 2001, at or near 1 Devon Road, Berea, Durban, the defendant wrongfully caused damage to the plaintiff's motor vehicle, registration number ND 113 189, by cutting a branch which then fell onto this motor vehicle.
5. The damage to this motor vehicle was due to the fault of the defendant, who was negligent in one or more of the following respects:
 - 5.1 He cut the branch off a tree without keeping a proper lookout as to where the branch would fall;
 - 5.2 He cut the branch off without taking reasonable precautions to ensure it would not cause damage to the plaintiff's property;
 - 5.3 He failed to prevent the branch from falling on the plaintiff's motor vehicle in circumstances where he could and should have prevented it from falling on the motor vehicle.
6. As a result of the damage caused by this branch to the plaintiff's motor vehicle, the plaintiff suffered a loss of R2 600, being the reasonable costs of repair of the plaintiff's motor vehicle. This cost of repair is lower than the reasonable pre-collision market value, less the reasonable post-collision market value, of the vehicle.
7. Despite demand, the defendant has refused or omitted to compensate the plaintiff for this loss.

WHEREFORE the plaintiff claims:

- 7.1 Payment in the amount of R2 600,00;
- 7.2 Interest at the prescribed rate²⁰⁹ from the date of demand to the date of payment;
- 7.3 Costs in terms of section 37 of the Small Claims Court Act, 1984.

²⁰⁹ The interest that may legally be charged is published in the Government Gazette from time to time, and, at the time of writing, stands at 15,5%.

CHAPTER 16: BASIC TRIAL PREPARATION SKILLS

Contents:

- 16.1 Preparing a trial plan
- 16.2 Preparing a witness for trial

Outcomes:

1. The ability to prepare a trial plan in civil and criminal trials;
2. The ability to properly prepare a witness or trial

The two basic skills law students in a law clinic must have are the ability to prepare a basic trial plan and the skills to properly prepare witnesses for trial.

16.1 Preparing a trial plan

The statement of Ace Khumalo²¹⁰ is a slightly modified version of the statement of an accused that stood trial on a charge of murder before Mr Justice Levinsohn in the Durban and Coast Local Division of the High Court in 1990. The names of the accused and witnesses have been changed. This statement will form the basis of the case study that will be used to illustrate the topics that will be covered below.

A simple trial plan (for both the defence and prosecution), based on the information contained in Ace Khumalo's statement:

Steps in preparing a trial plan

- a. The charge that Mr Khumalo faces is that of murder, in that he allegedly:
 1. unlawfully [1st element]; and
 2. intentionally [2nd element];
 3. caused the death [3rd element];
 4. of a human being [4th element].
- b. In the first vertical column of the trial plan, these four elements are entered in separate blocks²¹¹
- c. In the second vertical column, list the State witnesses who are likely to be called to prove each of these four elements. The fact that the deceased was a human being will obviously be admitted, leaving the State the task of proving, beyond a reasonable doubt, the elements of unlawfulness, intention and causation to secure a conviction of murder.
- d. In the third vertical column, list all the possible defence witnesses on each of the elements.
- e. In the fourth vertical column, list other types of items of evidence (objects; documents; circumstantial evidence) relevant to each of the elements.
- f. In the fifth vertical column, list possible legal defences that could negative (cancel) each element of the crime. Relevant decided cases may also be noted here.
- g. The last column is reserved for general notes and follow-up actions to be taken.
- h. The trial plan (which should ideally be prepared on a large sheet of paper using different

²¹⁰ See Annexure W

²¹¹ See attached as Annexure X

colour pens for contrast) then becomes your 'blueprint' for the coming final consultations and the trial itself.

16.2 Preparing a witness for trial

The final consultation before trial should be held as close as possible to the date of the trial- preferably the day before the trial.

The object of the final consultation is to ensure that the witness you intend calling are fully prepared for the trial.

The following topics will be discussed under these headings:

1. Steps when preparing witnesses for trial

2. Things to remember when preparing a witness.

1. Steps when preparing witnesses for trial

- a. Number the statements of your witnesses in the order that you intend calling them.
- b. Draw up a segmented examination-in-chief witness sheet for each of your witnesses. This is done by dividing the version contained in the witness statement into three or four segments (for example, actions prior to the incident; the incident itself; actions after the incident; and explanations for certain actions). See the witness sheet based on the Ace Khumalo case study²¹²
- c. Explain the relevant portions of the case to the witness in plain language- the witness must understand for what purpose he or she is being called in the context of the trial as a whole.
- d. Ask the witness to carefully read the witness statement.
- e. Then explain to the witness that you will now lead him exactly as you intend to lead him in court. Ask the witness to stand behind a chair to simulate the witness box, and you must also stand when leading him as you will do in court. It is important that you do not merely sit and talk the witness through his statement, or even worse, read the statement back to the witness without doing the simulation.
- f. Now lead the witness exactly as you intend to lead him at court, noting on your witness sheet any errors, hesitation, distracting mannerisms, and the use of ambiguous words. This process (with the correction of errors identified) will usually have to be repeated at least three to ten times before you will be satisfied that the witness is ready or trial.

2. Things to remember when preparing a witness

- a. Insist that the witness uses short, descriptive and meaningful words; for example, 'walk' rather than the meaningless 'proceeded'; 'struck him on the left arm with a stick' rather than the meaningless 'assaulted him with a wooden object on his body'; and so forth.
- b. Train the witness in the practical conventions such as the correct way to address the court; whom to look at when testifying, and so forth.
- c. Play the role of the opposition lawyer (prosecutor or opposing counsel) to test weaknesses in the witness's version, and correct potentially damaging responses such as arguing with the opposing lawyer, volunteering unasked for information and losing his temper. It is important

²¹² See attached as Annexure Y

to confront your witnesses with weak points in their case- this process is known as 'defusing the landmines'. Do not succumb to the temptation to ignore potential weaknesses in your witnesses' evidence in the hope that they will not be uncovered by the opposing counsel.

- d. Explain the court layout to the witness, and also explain the sequence of events that will follow when the witness is called to testify, including the choice of taking the oath or the affirmation.
- e. If an exhibit or a document is to be handed into court through a witness, explain the questions you will ask, and the responses you expect, as part of the exercise. Also explain the procedure to refresh the witness's memory in the witness box, in case this should become necessary.
- f. Consider habits of speech that may distort meaning. For example, the witness may have a habit of saying that he is 'pretty sure' about something when he actually means that he is completely convinced and has no doubt at all. During your pre-trial consultation, the witness must be told to use words that reflect his intended meaning- therefore 'pretty sure' may have to be replaced by 'absolutely sure' in the pre-trial consultation, if that is what the witness means. Note that there is nothing unethical about this correction- 'absolutely sure' reflects what the witness wishes to say, and not the ambiguous 'pretty sue.'
- g. Be especially vigilant about the use of words that affect probability assessments, such as 'likely' or 'possible' or 'probable'. Warn your witnesses against being cajoled or bullied into concessions by the use of leading questions by the opposing counsel.

Example:

Opposing Counsel: Now, Mr Jones surely that you agree with me that given the number of people present, it is possible- and I am not saying that you did make a mistake- just that it is possible that you made a mistake?

If, during the pre-trial consultation, your witness was adamant that he had not made a mistake, your pre-trial preparation must reinforce his commitment to his version- he must not allow himself to be seduced into seemingly innocuous concessions.

Also inform the witness that he is entitled to explain his answer- he cannot be forced to reply only 'yes' or 'no' to a question under cross-examination. Should the cross-examiner insist on this, the witness must be equally insistent that he wishes to qualify his answer.

- h. When you are satisfied that the witness is adequately prepared, ask the witness if he or she has any questions on anything that may still be unclear.²¹³

213 For further information see R Palmer and DJ McQuoid-Mason Basic Trial Advocacy Skills (2000)

CHAPTER 17: TEACHING ALTERNATIVE DISPUTE RESOLUTION

Contents:

- 17.1 Negotiation
- 17.2 Mediation
- 17.3 Conclusion

Outcomes:

At the end of this chapter you will be able to:

1. Explain the steps in a negotiation and mediation.
2. Conduct a negotiation and mediation.

Students working in live client clinics need to develop skills related to alternative dispute resolution. The most important alternative dispute resolution skills they need to learn are negotiation and mediation.

17.1 Negotiation skills

Depending upon the time allocated for negotiation skills the training programme can be adapted. This section will explain the contents of a six hour negotiation curriculum. For clinical programmes that only have time for one negotiation lesson an introductory negotiation scenario and lesson plan is given in Annexure U.

A six hour negotiation skills course may consist of the following: a perception exercise; a psychological test; an introductory one-on-one negotiation exercise; a discussion of the negotiation process; a listening skills exercise involving paraphrasing; how to plan a negotiation; a negotiating values exercise; a two-on-two negotiation exercise; a discussion of principled negotiation; and, a final negotiation to test that students have internalised the concept of interest-based as opposed to position-based negotiation.²¹⁴

17.1.1 Perception exercise

The negotiation skills section begins with a perception exercise where students are shown a picture of the 'Old woman/Young woman' drawing²¹⁵ and then asked to record the age of the person they see. This inevitably results in the students recording a variety of ages from 17 years to 70 years. The exercise serves to show the students the importance of clarifying the issues before engaging in any negotiations - otherwise the parties will misinterpret the issues and talk past each other. A similar exercise can be used in which students are shown a grid of 16 squares and asked how many squares they can see. Answers vary from 16 to over 30.

17.1.2 Psychological make-up of students

The second part of the negotiation skills programme seeks to assist students to identify their personal psychological make-up when dealing with conflict. This can be done by using a tool such as the

²¹⁴ See Annexure A.

²¹⁵ In the public domain and commonly used by ADR facilitators.

Thomas-Kilmann²¹⁶ or some similar instrument. The Thomas Kilmann instrument presents respondents with 30 closed questions as to how they would react under situations where they experience the most conflict in their life.²¹⁷ The respondents then total up their scores under different profile headings: competing (forcing), collaborating (problem solving), compromising (sharing), avoiding (withdrawal) or accommodating (smoothing).²¹⁸ The different psychological characteristics can then be explained in the context of a simple example. For instance, students may be told that two people go on a picnic in a drought-stricken part of the country and have only one bucket of water to wash some wild fruits and a pair of very dirty boot soles. How would they deal with the situation using each characteristic? How would a competitor, collaborator, compromiser, avoider or accommodator each react in such circumstances?

17.1.3 Introductory negotiation exercise

The next part of the negotiation programme requires students to engage in an one-on-one negotiation exercise involving the buying and selling of a mattress in circumstances under which one party urgently requires to buy a mattress and the other needs to urgently sell it.²¹⁹ During debriefing the exercise is used to lay the foundation for some of the issues that arise during negotiations such as: Were the negotiators satisfied with their negotiation? Was the negotiation fair? Was “small talk” used? What were the opening positions? How is information about the different negotiators gathered? How much should be disclosed during a negotiation? How were concessions made? Was “bracketing” used?²²⁰ Was the buyer given credit to pay over time? Was either party operating against a deadline? What happens if you are an “accommodator” negotiating with a “competitor”? What are the ethics and legal implications of withholding the truth?

17.1.4 The negotiating process

The negotiating process is then discussed: Students are informed what negotiation is; what happens during the process; what should be achieved during a negotiation; what sort of information parties usually have about each other; what parties may be able to anticipate about each other’s needs; the need to maintain flexibility and not to be locked into a bottom line; how information is exchanged - verbally and non-verbally; the fact that knowledge is power; that usually the more information that is surfaced the better the agreement; the tensions that arise between retaining and sharing information; the dangers of releasing information if “under attack” from the other side; the use of small talk and silences to obtain information; and the need to adopt an interest-based approach rather than a position-based approach to negotiation.²²¹

17.1.5 Listening skills - paraphrasing

An important aspect of the negotiation process is the ability of the parties to listen to each other. Therefore, an exercise is done to teach students listening skills by using “paraphrasing”. Students brainstorm a list of highly controversial topics and are then required to team up with a colleague who genuinely takes the opposite view from them on a subject. The parties are then required to discuss the topic using the following format: One student will begin the discussion by making an important

216See Kenneth W Thomas and Ralph H Kilmann Thomas-Kilmann Conflict Mode Instrument (1974).

217Thomas-Kilmann Conflict Mode Instrument 1-4.

218Thomas-Kilmann Conflict Mode Instrument 6.

219“The Mattress Negotiation” was created by Richard A Salem, Conflict Management Initiatives (1987). See Annexure B.

220“Bracketing” involves, for example, a seller saying “I am prepared to sell this mattress for between \$100 and \$200”, or a buyer saying “I am prepared to buy this mattress for between \$100 and \$200”. In the first instance the buyer will only hear the lower price, in the second the seller will only hear the second price - so the bracketing is pointless.

221See below Roger Fisher and William Ury Getting to Yes: Negotiating Agreement Without Giving In (1983).

point. The other student will paraphrase what the first student said, to the satisfaction of the first student, before he or she can respond with their argument. The other student then makes his or her point. Thereafter the first student may not respond until he or she has correctly paraphrased the second student's argument etc. The students are then debriefed concerning what they experienced during the paraphrasing exercise and when paraphrasing can be used in legal practice.

17.1.6 Planning the negotiation

The students are given a checklist of what they should do when planning a negotiation. The list includes the following: What are the issues at stake? What information do you need from the other party? What are your sources of negotiating power? What negotiating strategy will you use? What will you say in your opening presentation? What response is the other party likely to make? How will you reply? What is the most you want? What is the least you can settle for? What is the likely result? What information do you have? What information do you need to get from others? What is your authority to settle? What alternatives do you have if you fail to settle?²²² The students are subsequently asked to use these criteria when planning for "The Tax Book Negotiation".²²³

17.1.7 Negotiating values

The students are required to consider a number of scenarios involving ethical issues that may arise during a negotiation.²²⁴ These include questions such as: Is a lawyer obliged to answer a fellow lawyer's question about whether he or she has a mandate from an incommunicado client (a client who cannot be contacted) if confirmation thereof will prejudice the client? If a lawyer has heard that his or her client has had a heart by-pass operation and is asked by another lawyer whether the client is "in good health" what should he or she reply to avoid prejudicing the client? Where a lawyer is winding up a deceased estate and suspects that a car that needs to be sold is defective, is he or she obliged to warn certain categories of potential buyers (e.g. a car dealer, a respondent to a newspaper advertisement, another lawyer, a parent) about the suspected condition of the car - if not asked by the person concerned? What would be the position if the lawyer was asked by any of the above list of potential buyers whether the car was "in good condition"?²²⁵

17.1.8 The Tax Book Negotiation

The 'Tax Book Negotiation' is a two-on-two negotiation between a team of two candidate attorneys, (who have been mandated by the principals in their law firm to sell a set of tax books), and a team of potential buyers consisting of two young lawyers, (who are partners in the process of setting up a tax law firm).²²⁶ The candidate attorneys face certain pressures that require them to sell the law books and have them delivered expeditiously while the young lawyers face certain constraints that prevent them from taking immediate delivery.²²⁷ The students are given sufficient time to prepare for the negotiation using the checklist set out above.²²⁸ The results of the negotiation are debriefed to the issues arising from the principles that emerged from 'The Mattress Negotiation'.²²⁹

222Richard A Salem "Considerations when Planning and Preparing for a Negotiation" (1991) Conflict Management Initiatives, Chicago.

223See below para 20.1.8. See Annexure D.

224 See Annexure C.

225See Richard A Salem "Negotiating Values" Conflict Management Initiatives (1990).

226 See Annexure D.

227"The Tax Book Negotiation" was adapted from a similar role play in Gerald Williams Legal Negotiations (1989).

228See para 20.1.6 above.

229See para 20.1.3 above (see Annexure B).

17.1.9 Principled negotiation

The elements of “principled negotiation” as propagated by Fisher and Ury²³⁰ are discussed with the students. These include deciding issues on the merits; looking for mutual gains; basing results on fair standards; being “hard on the merits” and “soft on the people”; not employing “tricks”; and not arguing over positions. Fisher and Ury state that the four points of principled negotiation involve the following: people, interests, options and criteria.²³¹

17.1.9.1 People

In respect of people negotiators must deal not only with the issue at hand and their relationship with each other, but must also take into account their perceptions, emotions and ability of communicate. To this end they should separate people from the problem and attack the problem - not each other.²³²

17.1.9.2 Interests

Regarding interests the parties should identify and talk about their interests and focus on such interests not their positions. They need to reconcile their interests not their positions as the latter may obscure their real interests.²³³

17.1.9.3 Options

It is necessary for negotiating parties to generate a variety of options before making a decision. This can be done by setting aside time for brainstorming in order to come up with ways of ensuring mutual gains. A failure to generate options by way of brainstorming may result in obstacles to creative thinking.²³⁴

17.1.9.4 Criteria

When choosing criteria the parties should insist that they are objective and do not simply consist of the other side’s “say so”. Both parties should be open to reason on criteria. Neither should yield to pressure by the other - all decisions should be made on the basis of principle.²³⁵

17.1.10 The Moroccan Sweet Treat Negotiation

“The Moroccan Sweet Treat Negotiation”²³⁶ is a one-on-one negotiation to demonstrate whether the students have learned anything about interest-based negotiation at the end of the course.²³⁷ Two rival mineral water manufacturers require the only available box of “Moroccan Sweet Treats” in order to solve their production problems otherwise they will be out of business. There is only one satisfactory solution which can result in a win-win situation if the negotiators adopt an interest-based approach to the negotiation.

230Fisher and Ury Getting to Yes (1983).

231Fisher and Ury chapter 2.

232Fisher and Ury 17-40.

233Fisher and Ury 41 -57.

234Fisher and Ury 58-83.

235Fisher and Ury 84-98.

236“The Moroccan Sweet Treat Negotiation” was devised by Richard A Salem, Conflict Management Initiatives, Chicago (1990).

237 See Annexure E.

17.2 Mediation skills

Mediation skills may also be taught as a six hour programme²³⁸ or at introductory level.²³⁹ This section will describe the six hour programme, but an introductory mediation lesson plan will be found in Annexure U.

The six hour programme may consist of an introductory activity illustrating what mediators do; a discussion of the characteristics of mediation; a presentation on empathic listening; a description of the steps in a mediation; a discussion of the mediation process; a mediation exercise involving an employment contract; a description of when mediation works and does not work; a discussion of the universe of alternative dispute resolution; a mediation exercise involving a business contract; and, a mediation exercise involving a divorce.²⁴⁰

17.2.1 What mediators do

Students are asked to volunteer for a short role play which illustrates the difference between how lawyers tend to approach clients during an interview and what mediators do. Three role players are required: a client, a lawyer and a mediator.

17.2.1.1 Lawyer-client interview²⁴¹

The interaction during the role play between the client and the lawyer is as follows:

Client: My neighbour's son got into my garage when I was away. He got on my bike and crashed into a tree at the bottom of the hill. He wrote the damn thing off.

Lawyer: Were there any witnesses?

Client: Not that I know about.

Lawyer: Was it a forced entry?

Client: No, I left the garage open.

Lawyer: Was there any other damage?

Client: No, that was all.

Lawyer: What were the damages?

Client: The bike cost me \$100 in 1990.

Lawyer: Was it insured?

Client: No.

17.2.1.2 Mediator-client interview

The interaction during the role play between the client and the mediator is as follows:

Client: My neighbour's son got into my garage when I was away. He got on my bike and crashed into a tree at the bottom of the hill. He wrote the damn thing off.

Mediator: Is there anything else?

Client: No, that was enough. What a cheek!

Mediator: How would you like to see this thing settled?

Client: What I want is an apology. And I want the boy to do it when his parents are present.

238 See below Annexure A.

239 See below Annexure T

240 See Annexure A.

241 Devised by Richard A Salem, Conflict Management Initiatives, Chicago (1991).

Mediator: Is there anything else?
 Client: Yeh, I want him to promise not to do it again.
 Mediator: What about the bike?
 Client: I do not care about the bike. It has not been used for five years since my kids moved out.

The role play is then debriefed to point out the difference between open and closed questions and the dangers involved in prejudging issues. Students are advised that lawyers should always use client-centred interviewing techniques and begin their consultations with open questions like those used by the mediator. Only after the wishes of the client have been established may they begin “funneling” the information with closed questions in order to determine whether the elements of any proposed legal action have been satisfied.

Finally, students are told that mediators: understand and appreciate the problems confronting the parties; impart the fact that they know and appreciate the problems of the parties; create doubts in the minds of the parties about the validity of the positions they have assumed with respect to the problems; suggest alternative approaches to the parties which may facilitate trust; build trust because they have no authority and depend upon acceptance by the parties; and, that mediators are good listeners.

17.2.2 Characteristics of mediation

Students are reminded that: mediation is an extension of negotiation; mediators are third parties with no stake in the outcome; mediators must gain trust; mediators have no authority; mediators control the process - not the outcome; the parties control the dispute and the outcome; mediation is voluntary - the parties can walk away at any time; all information disclosed at a mediation is private and confidential; mediation is future-oriented and does not dwell on the past; mediation is solution-oriented and does not apportion blame, guilt or punishment; mediators make suggestions - they do not give legal advice or tell the parties what to do²⁴²; and, mediators respect the parties’ ability to resolve their own disputes.

17.2.3 Empathic listening²⁴³

As a follow-up to the paraphrasing exercise done during the negotiation component the concept of “empathic listening” is discussed. Empathic listening involves the mediator:

8. Being attentive, alert and non-distracted. He or she should create a positive atmosphere with their non-verbal behaviour (e.g. not looking out of the window when the parties are telling their stories).
9. Being interested in the other person’s needs, by listening with understanding and letting the other person know that the mediator cares about what is being said.
10. Listening from the “okay mode” by being a sounding board, non-judgemental and non-criticising; not asking a lot of questions or “grilling”; acting like a mirror by reflecting what the mediator thinks is being said or felt; and, not using stock phrases like “it’s not that bad”, “you’ll feel better tomorrow”, “don’t be so upset”, and “you’re making a mountain out of a mole hill”.
11. Not becoming emotionally “hooked”. The mediator should not become angry, upset or argumentative, nor should he or she jump to conclusions or judgements.

²⁴² They may however suggest that the parties should consult a lawyer if it is clear that they require legal advice. The moment a mediator gives legal advice that favours one or other party the mediator’s neutrality is compromised.

²⁴³ See generally, Madelyn Burley-Allen Listening: The Forgotten Skill (1982).

12. Indicating that he or she is listening by: giving encouraging non-committal acknowledgments (e.g. “hum”, “uh huh”, ‘I see’, “right” etc); giving non-verbal acknowledgments (e.g. nods, matching facial expressions, presenting an open and relaxed body posture, using eye contact, and, if appropriate, touching); and, inviting more (e.g. “tell me more” or “I’d like to hear about it”).²⁴⁴

Students are reminded that if they want to be empathic listeners they ought to observe the following ground rules: They should not interrupt; not change the subject or move in a new direction; not rehearse in their head; not interrogate; not teach; and, not give advice. However, they should reflect back to the sender what they observe and how they believe the speaker feels.²⁴⁵

17.2.4 Steps in a mediation

The students are taken through the steps in a mediation from the initial introduction until the making of the agreement. They are informed that there are six basic steps involved:²⁴⁶

Step 1: Introduction

The mediator makes the parties relax and explains the rules. The mediator’s role is not to make a decision but to help the parties reach an agreement. The mediator explains that he or she will not take sides.

Step 2: Telling the story

Each party tells what happened. The person bringing the complaint tells his or her side of the story first. No interruptions are allowed. Then the other party explains his or her version of the facts.

Step 3: Identifying the facts and issues

The mediator attempts to identify the facts and issues agreed upon by the parties. This is done by listening to each side, summarizing each party’s views, and asking if these are the facts and issues as each party understands them.

Step 4: Identifying alternative solutions

Everyone thinks of possible solutions to the problem. The mediator makes a list and asks each party to explain his or her feelings about each solution.

Step 5: Revising and discussing solutions

Based on the expressed feelings of the parties, the mediator revises possible solutions and helps the parties to identify a solution to which both parties can agree.

Step 6: Reaching agreement

The mediator helps the parties reach an agreement with which both can live. The agreement should be written down. The parties should also discuss what will happen if either of them breaks the agreement.

244 Adopted by Richard A Salem, Conflict Initiatives, Chicago from Madelyn Burley-Allen Listening: The Forgotten Skill (1982).

245 Adopted by Richard A Salem, Conflict Initiatives, Chicago from Madelyn Burley-Allen Listening: The Forgotten Skill (1982).

246 See David McQuoid-Mason, Lloyd Lotz, Lindi Coetzee, Usha Jivan, Sibonile Khoza and Tammy Cohen Street Law: Practical Law for South Africans 2ed (2004) 32.

17.2.5 The mediation process

The mediation process is explained to the students. They are told that the mediation begins with the mediator welcoming the parties and getting them to introduce themselves. The mediator will make them feel as comfortable as possible. Thereafter the mediator will explain that his or her role is to assist the parties to reach a voluntary agreement through good faith negotiations, and that he or she has no authority to decide the matter - the parties must make their own decision. The mediator also explains that he or she is impartial and has no stake in the outcome. If the mediator has had any prior relationship with any of the parties beforehand he or she clarifies this with the parties to ensure that there are no objections to the person proceeding as the mediator.²⁴⁷

The mediator then explains the mediation process to the parties: The parties will each have an opportunity to describe the unresolved issues and must address their comments to the mediator. When one party speaks there should be no interruptions by the other party. Each party should take notes and respond later. After their presentations the mediator will help the parties to identify the issues and possible solutions through discussion and negotiation. Sometimes during the process it may be necessary for the mediator to meet separately (caucus) with one of the parties at their request or in order to make progress. When this happens the mediator should not be seen as taking sides as this opportunity is afforded to both parties. Furthermore, anything said to the mediator during a caucus will not be disclosed to the other party unless permission is given by the caucusing party.

The procedure that will be followed after the parties reach agreement will be explained to them (e.g. the agreement will be in writing and will include a clause stating what will happen if either party breaches the agreement). The mediation proceedings will be regarded as confidential. The mediator will throw away his or her notes after the mediation is concluded. The mediator will not reveal what happened during the mediation without the consent of both parties or unless ordered to do so by a court of law.

The mediator checks whether the parties have any questions and whether they agree to the procedures as set out in the description of the process. Both parties should audibly state that they agree to the process. The mediator congratulates the parties on choosing mediation, and tells them that he or she is confident that if they follow the procedures agreed to and negotiate in good faith they should be able to resolve the matter.²⁴⁸

17.2.6 The Famous Cape Malay Restaurant Mediation

The “Famous Cape Malay Restaurant Mediation”²⁴⁹ involves a chef who works in a restaurant and is promised a 10 % share of the profits. The agreement was sealed with a handshake between the chef and one of the partners but never reduced to writing. Although the chef received a handsome bonus at the end of the year, nothing further was said about the 10% share. When she queried this several months later she was told that the lawyers had been slow in preparing the paperwork. The restaurant continued to do well and she received a further sum of money which she was told was her “dividend from the profits”. The chef feels insecure because she has nothing in writing. As the success of the restaurant is due to her culinary skills she threatens to leave and set up her own restaurant nearby if she is not given an immediate 30% of the profits. She is then told that she cannot do so because her

²⁴⁷Adapted by the present writer from Richard A Salem, Conflict Management Initiatives, Chicago “Procedure for Opening the Mediation” (1990).

²⁴⁸ Adapted by the present writer from Richard A Salem, Conflict Management Initiatives, Chicago “Procedure for Opening the Mediation” (1990).

²⁴⁹The “Famous Cape Malay Restaurant Mediation” was devised by Richard A Salem and David McQuoid-Mason (see Annexure F).

10% share is subject to a restraint of trade agreement. The agreement prevents her from competing with the “Famous Cape Malay Restaurant” for five years within a radius of 10 kilometres. She does not remember agreeing to this and wants to consult a lawyer. Instead it is suggested that the parties try mediation and she agrees - although she still wants legal advice on her position (and will press the mediator to advise her on the law).

The students are divided into groups of three: one to play the part of the chef, one to play the part of the partner who promised the 10% share, and one to be the mediator. This means that each student in the class is involved either as a client or a mediator. With a class of 60 students 17 mediations can take place, while with a class of 90 students 30 mediations can take place. While the clients learn their scenarios the mediators are taken aside by the instructor and briefed on the mediation process. Once the mediators are comfortable with their roles as mediators they link up with their clients and commence their mediations.

The mediation process usually takes about 40 minutes and once the mediations are complete the students give feedback on their settlements and the mediation process itself. Those students who complete their mediation before the others are requested to give their mediators feedback on the process within their small groups before sharing it with the whole class.

17.2.7 When mediation works and does not work

Students are informed that mediation is not a panacea for all disputes and that sometimes it is appropriate and other times it is not.

For instance, mediation works when:

1. The court cannot provide relief.
2. The client wishes to settle promptly.
3. The client wishes to minimize costs.
4. Voluntary compliance is desirable.
5. The client wishes to avoid a court precedent.
6. The parties have difficulty negotiating.
7. The parties lack negotiating skills.
8. The parties assess the facts differently.
9. The parties assess the law differently.
10. The parties have a continuing relationship.
11. Complex trade-offs are required.
12. The client wants confidentiality.²⁵⁰

However, mediation does not work when:

1. The client cannot represent his or her best interests.
2. The client wants a court precedent.
3. One of the major parties is unwilling to mediate.
4. One party adamantly denies liability.
5. One party is likely to go insolvent.
6. A favourable court judgement is likely for one of the parties.
7. It is not possible to conduct the mediation without discovery of documents which one

²⁵⁰Adapted from Nancy H Rogers & Richard A Salem A Student's Guide to Mediation and the Law (1987) 44-51.

of the parties is not prepared to disclose.²⁵¹

17.2.8 The universe of mediation and arbitration

Students are provided with an understanding of the universe of mediation and arbitration. They are shown that negotiation and mediation fall under interest-based or consensual methods of resolving disputes, whereas arbitration (and litigation) fall under rights-based or adjudicative methods of dispute resolution.

Interest-based methods include mediation, in respect of disputes involving such issues as labour, communities, commercial transactions, the family, neighbourhood matters, public policy decisions and court affiliated processes. Other interest-based dispute resolution mechanisms include regulation-negotiation (where, for instance, a government department wishes to involve all the role players in getting them to agree to new regulations), and settlement weeks (where court rolls are cleared by requiring all matters set down for trial to be referred to a panel of mediators for a week or more in an attempt to get them settled).

The rights-based model uses litigation and arbitration but may also use variations of this. For instance, arbitration-mediation may be used whereby an arbitration award is sealed in an envelope and not disclosed to the parties, and the latter are encouraged to engage in a mediation process. Only if the mediation fails will the arbitration award be made public. Similarly, "private judging" may be used whereby a private judge is hired (e.g. a retired judge or senior lawyer) who hears all the evidence and then gives a judgement which may or may not be binding. Alternatively, "mini-trials" may also be conducted whereby all the evidence is presented and the parties have an opportunity to see how well their case is likely to fare in the real court case. The harsh reality of the likely outcome may well result in the parties agreeing to settle out of court.

There are also methods that are a combination of the interest-based and rights-based approaches to dispute resolution. For instance, non-binding arbitration may be used instead of the usual practice of binding arbitration. Likewise, a mediation-arbitration procedure might be followed whereby the parties agree to first try mediation and, if that does not work, to resort to arbitration.

17.2.9 The Missing Machine Mediation

The "Missing Machine Mediation"²⁵² involves a trucking company that delivers a machine for a machine manufacturer, who has a cash flow problem, to a third party. The buyers of the machine pay the transport costs to the trucking company's driver - but instead of paying \$1 200 they mistakenly only pay \$100. The mistake is discovered and the remaining \$1 000 is paid directly to the machine manufacturer - not the trucking company. Instead of paying the money to the trucking company, the machine manufacturer gets his daughter, who is also his secretary, to "stonewall" all enquiries by the trucking company for the next month, so that he can use the money to solve his cash flow problem. In the process the daughter is sexually harassed on the telephone by the trucking company's employees who become frustrated by her evasion of their enquiries. When the trucking company is asked to make another delivery on behalf of the machine manufacturer instead of delivering the machinery worth \$215 000, the company keeps it as security for the \$1 000 owed to it.

In the past the parties have had a good working relationship. The machine manufacturer was the

²⁵¹Adapted from Nancy H Rogers & Richard A Salem A Student's Guide to Mediation and the Law (1987) 51-58.

²⁵²Devised by Richard A Salem, Conflict Management Initiatives, Chicago (1990), based on an actual case (see Annexure G)..

trucking company's first customer and received a 30% discount because of its good record of prompt payment. When the cash flow problem arose, and the manufacturer held back the \$1 000, he tried to compensate the trucking company by giving it more work with another delivery. The trucking company had repaid the manufacturer's generosity by seizing machinery worth \$215 000 and refusing to release it until the \$1 000 had been paid. In addition the trucking company's clerks had sexually harassed the manufacturer's daughter who had done such a good job in protecting his interests. Because of their previous business record the parties agree to mediation rather than resorting to litigation.

As in the "Famous Cape Malay Restaurant Mediation", the students are divided into groups of three: one to play the part of the manager of the trucking company, one to play the part of the manager of the machine manufacturer, and one to be the mediator. Once again each student in the class is involved either as a client or a mediator and, while the clients learn their scenarios, the mediators are taken aside by the instructor and briefed on the mediation process. The mediators are then linked up with their clients and commence their mediations. The mediation process again takes about 40 minutes. Once the mediations are complete the students share information about the results of the negotiations and the mediation process.

17.2.10 The Blom Divorce Mediation

The "Blom Divorce Mediation"²⁵³ involves a threatened divorce between a doctor and a former teacher who runs a small arts and craft gallery. The couple has an eight year old boy and six year old girl and has been married for nine years. The doctor has a low income job with a medical clinic in a poor community which requires him to work 10 hours a day six days a week. He also serves on the boards of several non-governmental organisations and is seldom at home so there is no family social life. The wife is a qualified teacher of literature. She had previously worked as a teacher and later as a book store manager, but during the past three years, with financial help from her father, she and a neighbour had opened the gallery. The gallery has been losing money during the past three years although business has been slowly improving. As a result the wife's father pays out money each year to cover the losses.

The couple has a town house registered in both their names, but the husband makes all the bond payments. They also have cash in savings, some insurance policies and a four year old car owned by the husband. The wife is unhappy that the husband earns such a low salary as a doctor that the family is always strapped for cash. In addition because of his long working hours and other activities the husband spends no time with her and the children. The husband loves his children and wife. However, he is not happy that his wife, who is a qualified teacher, is involved in a gallery which makes an annual loss that has to be paid for by her father. Before proceeding with the divorce the parties agree to mediation.

The students are divided into groups of three: one to play the part of the husband, one to play the part of the wife, and one to be the mediator. All the students in the class are involved either as clients or mediators. The clients learn their scenarios while the mediators are taken aside and briefed on how to mediate. The mediators join their clients and commence their mediations. The mediations often last longer than 40 minutes - because simulated matrimonial matters, as in the real world, seem to take longer to settle than other forms of mediation. The students report back on the results of their negotiations and how the mediators handled the process.

²⁵³Devised by Richard A Salem and David McQuoid-Mason (1991). See Annexure H.

17.3 Conclusion

When teaching alternative dispute resolution skills such as negotiation and mediation it is necessary to engage the students in an active learning process. This is particularly true of law students and law graduates who tend to become encrusted with the objective, unemotional, and at times, somewhat cold, clinical approach to human problems that lawyers usually adopt. Part of the learning process, particularly in the mediation training, is to make them more empathic in the manner in which they deal with clients. This requires the students to drop their lawyers' masks and to demonstrate to the parties that they really care about their concerns. It also shows the students the importance of becoming good listeners.

Provided creative, interactive teaching methods are used, all the students can be given an opportunity to experience the type of behaviour modification that may be required to be a good negotiator or mediator. The feedback from the students who attend clinical alternative dispute resolution classes is always very positive.

PART IV: FUNDRAISING AND REPORT WRITING

CHAPTER 18: FUNDRAISING

Contents:

- 18.1 Defining 'fundraising'
- 18.2 Preparing a fundraising file
- 18.3 Stages in the fundraising process
- 18.4 Developing a fundraising proposal
- 18.5 Step by step guide to the fundraising process
- 18.6 Finding money for the proposed project
- 18.7 How to apply for funds from targeted organisations
- 18.8 Co-operating with funding organisations
- 18.9 Summary: A step by step guide to the fundraising process

Outcomes:

By the end of this chapter you will have an understanding of all aspects of the fundraising process and reporting requirements.

18.1 Defining fundraising

In this context, 'fundraising' means the designated office holders of the law clinic approaching large local and international aid agencies for financial support for the law clinic and its activities. What is outlined below are the basic steps that have to be taken for successful fundraising- detailed assistance is available on the web (of which the most useful sites for our purposes are the 'fundraising toolkit' at www.sangonet.org.za, and www.institute-of-fundraising.org.uk). If at all possible, it must be a priority of the law clinic to set up its own website.

18.2 Preparing a fundraising file

A permanent fundraising file, which must be regularly updated, must be prepared. It should contain the following documents:

- A brochure or printed page outlining a brief history of the law clinic; its objectives and policy statement; and its affiliation (for example, its link with a university).
- The law clinic's most recent annual report and audited financial statements.
- Documentary proof of its legal status (e.g., A corporation not for gain), and proof of its taxation status (exempt or subject to tax).
- An diagram of the management structure, indicating the names of all office-bearers and the relationship to the parent organization (if applicable).
- A short resume (curriculum vitae) of each member of the management.
- Any relevant letters (like letters of support or gratitude for services rendered), magazine and newspaper articles or other materials relevant to the law clinic.

18.3 Stages in the fundraising process²⁵⁴

These stages are not necessarily in chronological order as, some might (and probably will) overlap

1. Strategic Planning

- Understanding the context within which the project is placed
- Understanding the dimensions, root causes and symptoms of the problem
- Working out the overall objective or developmental goal
- Stating the specific objective/s
- Isolating the concrete results that are envisaged
- Listing the key activities that will be carried out to achieve the results
- Analyse the assumptions and risks on which these plan is based
- Determine those indicators that will assist in verifying your progress
- Develop a detailed implementation plan

2. Preparing a concept document

- Identify the key areas that the document will focus on based on the strategic planning process
- Structure those key areas in a logical manner
- Conduct additional research if necessary, including statistics and factual information upon which your conclusions are drawn
- Draft the document
- Review, edit and format the document

3. Preparing a budget

- Look at each activity and determine what you need to implement these activities
- Look at the line items used by donors and other budgets to assist you
- If possible obtain the assistance of a bookkeeper or accountant
- Conduct a costing exercise to estimate, for instance the cost of rent
- Organise the line items in a logical manner, distinguishing between administrative/overhead costs and costs for service delivery
- Check to ensure that you have not forgotten a line item, the estimates and the arithmetic are correct

4. Research into potential donors

- Understand their priorities and processes
- Compare with your organisational goals and assess whether there are potential areas of co-operation
- Develop a list in order of priority

²⁵⁴ Asha Ramgobin Fundraising towards self-sufficiency and sustainability (Conference paper; 2006)

- Identify relevant individuals within the donor agency for your programme area

5. Contacting potential donors

- Make initial contact with the individuals and try to set up a meeting
- Send the individual concerned your documentation in advance
- Prepare for and attend the meeting with a sense of self confidence and make your presentation.
- After the meeting, make an assessment with a rough idea as to the probabilities of co-operation.
- Follow-up the meeting with an email. Regardless of what your assessment is, keep in touch. For example, inform them about the progress of the organisation.
- They might come on board later. If there is a clear interest, make sure you understand what aspect of your work they are interested.

6. Applying for funding: the proposal²⁵⁵

- Prepare and lodge an application according to the requirements of the donor, paying specific attention to the areas they have expressed interest in, format they might require and a budget that is realistic for them.

7. After lodging application

- Respond to letters, emails and telephone calls promptly and professionally.

8. After concluding an agreement

- Once a co-operation agreement has been concluded, be clear about the terms and conditions.
- Ensure that you comply with the reporting requirements. Submit prompt narrative and financial reports.
- Submit other documentation showcasing your organisation's progress so they feel like they are part of a "winning team".

18.4 Developing a fundraising project proposal²⁵⁶

18.4.1 Developing a good idea into a draft project proposal

Here are the steps:

- 1) Someone suggests that there is a need for a certain project. The idea is discussed with all key

²⁵⁵ See Annexure R: Ford Foundation Guidelines on drafting a fundraising proposal, and see Hayes and van Ginneken, A Guide to Fundraising (2004) attached as Annexure BB

²⁵⁶ See How to Build a good small NGO in chapters 3 and 4 of Hoosen Agjee (2012) A Guide to the New Companies Act and Non-profit Organisations. Durban: Turning Point Consultants pg 190

- players – the NGO staff, the board, community members, other NGOs in the neighbourhood and in the same field.
- 2) A group is formed within the NGO to develop the idea into a concept paper.
 - 3) A possible location for the project is identified.
 - 4) A Needs Assessment is designed and carried out. This will make sure that the need is there and is more serious than other problems in the location.
 - 5) The group developing the project produce a project proposal and circulate it. It would include a rough budget.
 - 6) At this point, the Director and Board of Trustees would need to commit to the development of this project and finding the funds.
 - 7) If a fundraising committee already exists, it is now asked to start working to find the money for this particular project

18.5. The preliminary programme design

A preliminary programme design is made that answers the following essential questions: what? where? why? how? when? how much? The design describes why the project is needed, the goal, the objectives, its location, the beneficiaries, its duration, construction /renovation, expected results against a schedule of activities, job descriptions and reporting. The preliminary proposal is completed and edited. The completed proposal is given to all those involved, read and commented upon and the comments discussed.

18.6 Finding money for the proposed project

Draw up a list of possible funders, and research each funder's stated programme interests. Do not attempt a scatter approach, sending requests to a wide group of organisations. It can damage your organisation's credibility. You are trying to identify the few funders that have interests that are in line with your organisational and project objectives. If you do not qualify, do not apply. Many funding agencies now have web sites so look them up and see what they say.

Funder research is a two-step process. The first step aims to develop an initial 'prospect' list of some ten to fifteen funders who have general interests in the subject area of your organisation or project. The second step involves further research and refines this list to the three or four funders you may approach.

Sources for funding can be found within your country as well as abroad. As stated earlier, a choice for many small local contributors means that you are growing local roots and a local constituency; in return for contributions these people would wish for a voice in policy making. Funding from local organisations has a number of advantages. The procedures are often easier to follow. And international donors want to know that local sources have been tried first. When applying for funds from abroad, the national registration of your NGO and formal approval of your project by your government is often necessary.

Possible funding sources include:

- Voluntary funding organisations

These include missions, aid agencies and other groups, both religious and secular. Most of them are based in the North, in Europe, North America and Australia. Such groups are often interested in

supporting smaller-scale development and health projects. A list of names can be obtained from national and voluntary organisations and from embassies.

- **International Aid organisations.**

These include the United Nations Agencies such as WHO, UNICEF, UNDP, FAO, the European Commission (EC), the World Bank (WB), and Asian Development Bank (ADB). However, they do not often support small-scale projects directly. Funds from these sources are more likely to be available via national umbrella organisations. It is worth finding out what their contributions to the government and to bigger NGOs in your country are. This information will be available from your government (ministry) or from local UN and EC delegations etc.

- **Foreign Embassies.**

They often have funds available for small-scale projects. (For example, Dutch Embassies have special funding sources for so called KAP projects. From these sources they can give direct support to projects with sums up to \$20,000. Special procedures/criteria need to be followed).

18.7 How to apply for funds from targeted organisations

After selecting your targeted organisation, do as much research as possible about the organisation starting with its website. Identify the key people to approach you're your proposal. Write a letter using your personal title to the person dealing with funds. Introduce yourselves in the letter and give a brief explanation of your organisation, its objectives, and your intentions with respect to funds. Ask for the procedures you need to follow. Always make a copy of your letter to keep. If your source is local, give the person you addressed a phone call about one week after you mailed the letter and ask if it was received. This is not only to make sure that the post is working, but it is also an excuse for exchanging more information. Personal relationships are very important in fundraising. By making a phone call, you get a chance to find out the kind of person they are and to show your own involvement and motivation.

If you are approaching an international donor, follow your letter up with an e-mail message if possible, just to make sure that your application has been received and again to show your own motivation. Donors are in general more interested in project costs (implementation of activities) than in organisational costs (overhead costs – costs for telephone/fax, e-mail, postage, electricity bill, etc.). For that reason, always include an item line for overhead costs when submitting a project proposal. UNICEF admits to 14%, but 10% is more reasonable for a very small organisation. However some donors do not like paying much towards this line. In that case, find out the donor's policy on overheads and adjust the proposal accordingly.

18.8 Co-operating with funding organisations

Building a good, trusted relationship with your donor is very important. Often, co-operation is not easy. The donor asks for long and complex reports, and transfers of funds are often delayed. Communication problems are common due to misunderstandings on both sides and because of postal delays. Don't forget that donors are dependent on their own supporters, who in turn will expect reassurance that their money is being well spent.

Ways to improve co-operation are:

- After receiving funds, write a letter of acknowledgement and thanks.

- Send regular reports as requested by the donor.
- Prepare accurate budgets, and keep costs as low as possible.
- If two or more donors are supporting your project, then the area of support should be clearly defined and communicated.
- Encourage the donors to share a single global report and accept each others' tour reports to reduce the amount of time you spend on their requirements.
- Always give feedback to the donor on how the money was spent.
- Always stick clearly to the objectives of your NGO.
- If there are any major changes of plan, inform your donor.
- Welcome visitors from your donor agencies.
- Try to reply promptly to letters from your donor.²⁵⁷

18.9 A step by step guide to the fundraising process

18.9.1 Fundraising comprises the approaching of local and international aid agencies by designated staff of the clinic to appeal for financial and material support for the clinic and its project activities.

18.9.2 A successful fundraising process requires the development of information and documents in a series of stages as follows:

- (1) Prepare, and regularly update, a permanent fundraising file containing the following background information and documents:
 - Details of the clinic's history, current activities and past achievements.
 - Documentary proof of the clinic's legal status.
 - Copies of the clinic's governance and operational organograms. A short résumé of the members of the clinic's Board of Control and management.
 - Copies of the clinic's most recent annual report and audited financial statements.
 - Copies of any relevant letters of support or gratitude, magazine or newspaper articles and other relevant material.
 - The clinic's address, contact details and website address.
- (2) Strategic Planning
 - Understand the context of the project or other needs for which the funding is required.
 - Work out the overall objective or developmental goal for the requested funds.
 - State the specific objective/s of the project or needs.
 - Identify the key activities that will be carried out to achieve the intended results.
 - Analyse the assumptions and risks on which these plans are based.
 - Determine those indicators that will assist in verifying progress.
 - Develop a detailed implementation plan.
- (3) Prepare a concept document
 - Identify the key areas that the document will focus on based on the strategic planning process.
 - Structure those key areas in a logical manner.
 - Conduct additional research if necessary, including statistics and factual information upon which conclusions are drawn.
 - Draft the document.

²⁵⁷ See Hayes and van Ginneken, A Guide to fundraising (2004) attached as Annexure BB and see Fundraising from US Foundations- A short guide attached as Annexure CC.

- Review, edit and format the document.
- (4) Prepare a budget
- Examine each activity, determine what will be required to implement them and create line items according to these requirements.
 - Refer to the line items used by funders and in other budgets for guidance purposes.
 - Conduct a costing exercise to estimate the cost of individual line items.
 - Organise the line items in a logical manner, distinguishing between administrative/ overhead costs and costs for service delivery.
 - Check that no line items have been omitted, and that the estimates and the arithmetic are correct.
- (5) Research potential funders
- Understand their individual priorities and processes.
 - Compare these to your clinical goals and assets whether there are potential areas of co-operation.
 - Develop a list of potential donors in order of priority.
- (6) Contact potential funders
- Make initial contact with the relevant persons in the funder clinic and request a meeting to discuss the concept.
 - Send the persons concerned copies of the documentation.
 - Prepare for and attend the meeting.
 - Follow-up the meeting with a thank you and an undertaking to keep in touch.
- (7) Prepare a proposal for funding
- Prepare and lodge an application according to the requirements specified by the funder, paying specific attention to the areas they have expressed interest in, the proposal format they might require and a budget that is realistic for them.
- (8) Follow-up and conclude an agreement
- Respond to letters, e-mails and telephone calls promptly and professionally.
 - Interact with and assist the funder in the drawing up of a funding agreement.
 - Engage with the signatories mandated to legally bind the clinic.
 - When consensus has been achieved request that the signatories sign the funding agreement.
- 18.9.3 Once a fundraising agreement has been entered into it is critical that the clinic complies with its terms and conditions and is in regular contact with the funder in respect of the following:
- (1) The opening of a dedicated bank account if required.
 - (2) Acknowledging receipt of funding instalments.
 - (3) Complying promptly with all reporting requirements. These requirements will be for both narrative and financial reports as stipulated in the funding agreement.
 - (4) Ensuring that unexpended funds and any interest earned on the investment of the funds is accounted for in terms of the funding agreement.
- 18.9.4 Showcase the clinic's progress and successes and generally make the funder feel part of a "team effort".
- 18.9.5 It is important that good relationships be built with funders as these will assist the clinic in future fundraising initiatives.²⁵⁸

²⁵⁸ For further guidance see www.ngo.manager and fia.gov.au

CHAPTER 19: WRITING REPORTS FOR LAW CLINICS

Contents:

19.1 Writing a report

Outcomes:

1. An understanding of the importance of proper report writing
2. The ability to compile a structured and effective report.
3. An understanding of the contents of a narrative report.

19.1 Writing a report

Writing a report is the main means of formally communicating information, it is important that it be articulated and comprehensive. Law clinics produce various kinds of reports: fundraising reports; financial reports; progress reports; activity reports; reports for the annual general meeting (AGM), and reports for special projects²⁵⁹.

At the Annual General Meeting (AGM) of the Law Clinic the director of the clinic will present a narrative report of the clinic's activities for the year, together with a report of the clinic's financial situation (this report comprises a balance sheet and an income and expenditure statement for the year²⁶⁰). An example of the actual balance sheet and income and expenditure statement of a South Africa law clinic are attached as Annexure AA).

Internal reporting will mainly be to the organisation's management and Board of Control. External reporting will be to the organisation's stakeholders, funders and other third parties.

Writing effective reports is often a difficult task for many persons. There are a number of practical guidelines which, if followed, will almost certainly improve the quality and effectiveness of reports and enhance the written experience. These are the following:

Spend some time thinking about the report topic, its target recipients, what information it should convey and most importantly, what it should achieve. Making notes of these will assist during the following stages of the report writing process.

All reports must have the following three sections:

- An introduction; Provides background information and details of the matter to be reported on.
- A Body; Conveys the information relating to the issue being reported on and discusses this information in the context of its relevance to the report objective.
- A conclusion or Outcome; the information presented in the body of the report should be summarised and presented to support the conclusion or outcome.

Plan the report in detail according to its intended paragraph headings and the information required to

²⁵⁹ See attached an example of a final report for training in Malawi attached as Annexure Z.

²⁶⁰ See Income and Expenditure Statement and Balance Sheet attached as Annexure AA

be included in each paragraph. A report should be structured according to paragraph headings. Paragraphs should be sequentially numbered and each should focus on only one issue. Long sentences and paragraphs should be avoided.

Financial and other data should be presented in well-structured tables which may require that separate documents be prepared. These documents should be referenced and annexed to the main report.

The following guidelines are relevant to narrative and financial reports to funders:

1. The narrative report is a report explaining how the funds committed to the project have been spent, with reference to the contractual obligations of the recipient and the funder.
2. The narrative report should be accompanied by a financial report, setting out the expenditure on the approved project in a format required by the funder.
3. The funder's required format for the narrative and financial report must be strictly adhered to.
4. The financial statements that accompany the financial report are normally the income and expenditure statement, and the balance sheet of the organisation.

In summary, report writing is a developed skill which requires practice. If at all possible report writers should seek assistance and have their draft reports reviewed on mentorship basis by an experienced colleague.

PART V: RESOURCES- TEACHER TRAININGS AND MATERIALS DEVELOPMENT

CHAPTER 20: CLINICAL TEACHER TRAINING

Contents:

- 20.1 Agenda for Street law training workshop
- 20.2 Agenda for Clinical law training workshop

Outcomes:

At the end of this chapter you will be able to construct an agenda for a four day law clinicians' training workshop.

20.1 Agenda For A Street Law Clinicians Training Workshop

Outcomes:

At the end of this chapter you will be able to construct an agenda for a two day street law clinicians' training workshop.

The following agenda can be used for a two day Street law clinicians' training workshop. The model is based on that used in the Open Society Institute Justice Initiative and Institute of Professional Legal Training, University of KwaZulu-Natal, model:

AFRICAN CLINICIANS TRAINING OF STREET LAW TRAINERS WORKSHOP

Dates:

Place:

Outcomes:

At the end of the Programme participants will be able to:

1. Identify a variety of interactive teaching methods.
2. Explain the elements of a good Street law lesson.
3. Prepare a Street law lesson plan.
4. Present a Street law lesson.

Day 1

09h00-09h15	Introduction to street law
09h15-09h45	Methods of teaching street law
09h45-10h30	Small group work: Introducing human rights
10h30-10h45	Tea

10h45-11h00	Game: Why we need laws
11h00-11h45	Taking a stand: capital punishment
11h45-12h30	Triads: The case of the kidney patient
11h45-12h30	Role-play: Spouse abuse
12h30-13h30	lunch
13h30-14h30	Simulation: The case of the complaining accused
14h30-15h30	Jigsaw: Parliamentary committee hearing
15h30-15h45	Elements of a good lesson
15h45-16h00	Lesson plans
16h00-16h15	Tea
16h15-17h00	Choosing of topics and allocation of groups

[For teaching materials and lesson plans see Annexure T]

Day 2

08h30-10h30	Group lesson preparations
10h30-10h45	Tea
10h45-11h30	Group 1: Lesson presentation
11h30-11h45	Debrief
11h45-12h30	Group 2: Lesson presentation
12h30-12h45	Debrief
12h45-13h45	Lunch
13h45-14h30	Group 3: Lesson presentation
14h30-14h45	Debrief
14h45-15h30	Group 4: Lesson presentation

15h30-15h45	Debrief
15h45-16h00	Tea
16h00-16h45	Group 5: Lesson presentation
16h45-17h00	Debrief
17h00-17h30	Wrap up and closure

[NB: Participants will prepare and teach lessons in small groups of two to five teachers depending on numbers]

The following agenda can be used for a four day law clinicians' training workshop. The model is based on that used in the Open Society Institute Justice Initiative and Institute of Professional Legal Training, University of KwaZulu-Natal, model:

20.2 Agenda for clinical law training workshop

AFRICAN CLINICIANS TRAINING OF TRAINERS WORKSHOP

Dates:

Place:

15 Outcomes:

At the end of the Programme participants will be able to:

Identify the necessary lawyering skills required to work in a law clinic.

1. Understand the appropriate interactive teaching methods for transferring the lawyering skills necessary in the clinic environment.
2. Use the appropriate interactive teaching methods for transferring the lawyering skills necessary in the clinic environment.

16 DAY ONE:

Date: [Day coordinator:]

08h30-09h00 Registration

09h00-09h30 Welcome
[Facilitators:]

09h30-11h30 Session one: Brainstorming
[Facilitation:]

Identify the following:

1. Lawyering skills
2. Teaching methods
3. Assessment methods
4. Supervision techniques

11h30-11h45 Tea

11h45-12h30 Session two: Preparation for Programme
[Facilitator:]

Grouping participants
Explaining procedures
Introducing Case Studies
Preparing Lesson Plans

12h30-14h00 Lunch

14h00-15h30 Session three: Interviewing and Counselling
[Facilitator:]

Introducing the skill
Demonstrating the teaching of the skill

15h30-15h45 Tea

15h45-16h45 Session four: Group work on Interviewing and Counselling
[Facilitators:]

Designing your lesson plan which should cover:

1. Outcomes
2. Interactive teaching methods
3. Assessment methods

16h45-17h00 Wrap-up for the day
[Facilitator:]

DAY TWO:

Date: [Day coordinator:]

09h00-10h30 Session five: General Writing Skills
[Facilitator:]

Introducing the skill
Demonstrating the skill

11h00-11h15 Tea

11h15-12h15 Session six: Group work on General Writing Skills
[Facilitators:]

Designing your lesson plan which should cover:
Outcomes
Interactive teaching methods
Assessment methods

12h15-12h45 Session six: Specific Drafting and Writing Skills
[Facilitator:]

1. Introducing the skill

12h45-14h00 Lunch

14h00-15h00 Session seven: Specific Drafting and Writing Skills (continued)
[Facilitator:]

Demonstrating the skill

15h00-15h45 Tea

15h45-16h45 Session eight: Group Work on Specific Drafting and Writing Skills
[Facilitators:]

Designing your lesson plan which should cover:
Outcomes
Interactive teaching methods
Assessment methods

16h45-17h00 Wrap up for the day
[Facilitator:]

DAY THREE:

Date: [Day coordinator:]

09h00-10h30 Session nine: Alternative Dispute Resolution: Negotiation Skills
[Facilitator:]

1. Introducing the skill
2. Demonstrating the skill

10h30-11h15 Session ten: Alternative Dispute Resolution: Mediation Skills

[Facilitator:]

1. Introducing the skill
2. Demonstrating the skill

11h15-11h30 Tea

11h30-12h30 Session eleven: Group work on ADR Negotiation or Mediation Skills
[Facilitators:]

Designing your lesson plan which should cover:

1. Outcomes
2. Interactive teaching methods
3. Assessment methods

[Note: Three groups to prepare a Negotiation lesson and three groups to prepare a Mediation lesson]

12h30-14h00 Lunch

14h00-15h30 Session twelve: Case Analysis and Trial Planning
[Facilitator:]

1. Introducing the skill
2. Demonstrating the skill

15h30-15h45 Tea

15h45-16h45 Session thirteen: Group work on Case Analysis and Trial Planning
[Facilitators:]

Designing your lesson plan which should cover:

1. Outcomes
2. Interactive teaching methods
3. Assessment methods

16h45-17h15 Allocation of Lesson Presentations and wrap up for the day
[Facilitators:]

DAY FOUR:

Date: [Day coordinator]

09h00-09h45 Final Lesson Preparations
[Facilitators to liaise with the group teaching their topic]

09h45-10h30 Teaching Interviewing and Counselling
[Facilitators to debrief]

- First group presents lesson
Debrief and double debrief
- 10h30-11h15 Teaching Specific Drafting and Writing Skills
[Facilitators to debrief]
- Second group presents lesson
Debrief and double debrief
- 11h15-11h30 Tea
- 11h30-12h15 Teaching ADR: Negotiation Skills
[Facilitators to debrief]
- Third group presents lesson
Debrief and double debrief
- 12h15-13h00 Teaching ADR: Mediation Skills
[Facilitators to debrief]
- Fourth group presents lesson
Debrief and double debrief
- 13h00-14h00 Lunch
- 14h00-14h45 Teaching Case Analysis and Trial Planning
[Facilitators to debrief]
- Fifth group presents lesson
Debrief and double debrief
- 14h45-16h00 The Way Forward
[Facilitators:]
1. What we have learned
 2. What resources we have
 3. What resources we need
 4. What we plan to do in future
- 16h00-16h30 Evaluation and Closure

CHAPTER 21: MATERIALS DEVELOPMENT

Contents:

21.1 Agenda for materials development workshop

Outcomes:

At the end of this chapter you will be able to construct an agenda for a four day law clinicians' materials development workshop.

AFRICAN CLINICIANS MATERIALS DEVELOPMENT WORKSHOP

Dates:

Place:

Outcomes:

At the end of the workshop participants will be able to develop the necessary materials to teach a clinical law course.

DAY ONE:

Date:

09h00-10h00 Introduction to designing a clinical law training curriculum

10h00-10h30 Designing a clinical law training manual

10h30-10h45 Coffee break

10h45-11h30 Allocation of writing groups:

Group 1: Client interviewing and counselling

Group 2: General writing skills

Group 3: Specific writing skills

Group 4: Alternative dispute resolution

Group 5: Case analysis

Group 6: Trial preparation

11h30-12h30 Groups begin to prepare written outline of text and activities for inclusion in training manual

12h30-13h30 Lunch break

13h30-15h30 Groups continue to prepare written outline of text and activities for inclusion in training manual

15h30-15h45 Break

15h45-16h00 Groups continue to prepare written outline of text and activities for inclusion in training manual

16h00-17h30 Groups present brief summaries of written outlines prepared by them to the other participants for comments

17h30 Review and closure

DAY TWO:

Date:

17 09h00-10h00 Groups revise written outlines of text and activities in light of comments

18 10h00-11h00 Groups begin writing text and activities, together with instructor's manual

11h00-11h15 Break

19 11h15-12h30 Groups begin writing text and activities, together
20 with instructor's manual

21 12h30-13h30 Lunch break

22 13h30-15h30 Groups continue writing text and activities, together with instructor's manual

15h30-15h45 Break

23 15h45-16h00 Groups continue writing text and activities, together with instructor's manual

16h00-17h30 Groups report back on writing of text and activities, and instructor's manual

17h30 Review and closure

DAY THREE:

Date:

24 09h00-12h30 Groups continue writing text and activities, together
with instructor's manual

12h30-13h30 Lunch break

25 13h30-16h00 Groups continue writing text and activities, together
with instructor's manual

16h00-17h30 Groups report back on writing of text and activities,
and instructor's manual

17h30 Review and closure

DAY FOUR:

Date:

26 09h00-12h30 Groups continue writing text and activities, together
with instructor's manual

12h30-13h30 Lunch break

27 13h30-16h00 Groups continue writing text and activities, together
with instructor's manual

16h00-17h30 Groups report back on writing of text and activities,
and instructor's manual

17h30 Review and closure

DAY FIVE:

Date:

28 09h00-12h30 Groups continue writing text and activities, together

with instructor's manual

12h30-13h30 Lunch break

29 13h30-16h00 Groups continue writing text and activities, together
with instructor's manual

16h00-17h30 Groups report back on writing of text and activities,
and instructor's manual

17h30-18h30 Planning session for future writing of materials, field-testing and publication of training
manual

18h30 Closure and farewell

[Note:

1. Participants to bring and be provided with books, articles, statutes etc as resource materials for writing of texts.
2. Each group to be provided with access to a computer for writing and editing.
3. Flip charts and pens, overhead projectors and transparencies, and blue tack to be made available in plenary and breakaway venues]