

TEACHING LEGAL WRITING AT THE UNIVERSITY OF THE WITWATERSRAND LAW CLINIC

SHAHEDA MAHOMED* AND PHILIPPA KRUGER**

I. INTRODUCTION	106
II. THE UNIVERSITY OF THE WITWATERSRAND LAW CLINIC	
TEACHING MODEL	108
A. <i>History and Development</i>	108
B. <i>Current Model and Practices</i>	110
C. <i>Writing Skills Taught in the Practical Legal Skills Program</i>	114
1. <i>Client Statement</i>	116
2. <i>Letter Writing</i>	118
3. <i>File Notes</i>	120
4. <i>Pleadings</i>	121
5. <i>Briefs to Advocates</i>	122
6. <i>Opinions</i>	123
7. <i>File Reports</i>	123
8. <i>Case Assignment</i>	124
D. <i>Challenges</i>	124
1. <i>Assessment Criteria</i>	125
2. <i>Language Barriers</i>	125
3. <i>Specialization</i>	126

* Adjunct Professor, University of the Witwatersrand. (BA, LLB, LLM) Professor Mahomed is an admitted attorney and the Director of the Wits Law Clinic. She is presently researching and writing towards her Doctorate in Clinical Legal Education.

** Adjunct Professor, University of Stellenbosch. (BA, LLB) Professor Kruger is a practicing attorney, notary and conveyancer admitted to practice in 1981. She was the Co-Director at the Wits Law Clinic from 1993 to 1996 and the Director from 1996 to 1999. She is presently a clinician at the Wits Law Clinic.

106	<i>John Marshall Law Journal</i>	[Vol. III
	4. <i>Student Numbers</i>	126
III.	RECOMMENDATIONS	127
IV.	CONCLUSION.....	130

I. INTRODUCTION

The fact that studies have shown that traditional legal studies result in a “dulling of students [sic] motivation and altruistic values”¹ clearly indicates a need to “illuminate legal education.”² One method of doing this is to introduce clinical legal education methods and the interactive forms of learning associated with it when teaching substantive and procedural law to law students.³

In South Africa, a number of universities established clinical legal education programs⁴ in the 1970’s: first at the University of Cape Town and soon thereafter at the University of the Witwatersrand and University of Natal.⁵ These clinical programs were established to increase access to legal services for the poor and vulnerable as only limited state legal aid facilities were available at the time. As a result, “[i]n a developing country such as South Africa where there are vast economic and social differences between rich and poor, and where the majority of the population does not have access to

1. Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 114 (2002).

2. *Id.*

3. David McQuoid-Mason, Keynote Address at 8th Annual Learning in Law Initiative: Using Your Imagination to Light Up Knowledge, Skills and Values for LLB Students: Clinical Legal Education and Effective Lessons (pt. 1) (Jan. 5, 2006), available at <http://law.gsu.edu/ccunningham/LegalEd/SouthAfrica-McQuoid-Mason-LILI-Pt1.htm>.

4. Clinical legal education programs are also sometimes referred to as law clinics.

5. Willem De Klerk, *University Law Clinics in South Africa*, 122(4) SALJ 929, 930 (2005); Danny Wimpey & Shaheda Mahomed, *The Practice of Freedom-South African Experience 2* (2006) (unpublished manuscript, on file with authors).

proper legal services, law clinics take the form of legal aid clinics and deal predominantly with poverty law matters.”⁶

It was only in the late 1980s and early to mid-1990s that most clinical programs began to recognize the academic value of such programs. This realization was motivated by an increase in the development of state legal aid systems,⁷ the accreditation of law clinics according to the terms of the South African Law Society,⁸ funding received by universities from the Attorneys Fidelity Fund specifically for the educational development of clinical programs,⁹ and the establishment of the Association of University Legal Aid Institutes (“AULAI”) whose primary objective remains to promote clinical programs in South Africa.¹⁰

6. David McQuoid-Mason, *Teaching Social Justice to Law Students through Community Service: The South African Experience*, in TRANSFORMING S. AFR. U. 90-91 (P.F. Iya et al. eds., 2000); see also N. Franklin, *The Clinical Movement in American Legal Education*, 1(2) NULSR 61 (1986) (Clinical programs in the United States of America began in a similar way. In the 1960s, with an increase in anti-war demonstrations and an increase in poverty, students committed themselves towards changing the system.).

7. The obligation on the State to provide adequate access to justice was enforced by the enactment of the South African Constitution. S. AFR. CONST. 1996 §§ 28(1)(h), 35.

8. The South African Law Society is considered the governing body for all practicing attorneys. This Society prescribes rules and regulations about attorney conduct and practices. Law clinics are accredited according to the terms of sections 1 and 3(1)(f) of the Attorneys Act 53, 1979 and Rule 115A of the Rules of the Law Society of the Northern Provinces, which deals with accreditation and certification of legal aid clinics. Attorneys Act 53 of 1979 §§ 1, 3(1)(f); RULES OF THE LAW SOC’Y OF THE N. PROVINCES, R. 115A (2004), *available at* <http://www.northernlaw.co.za/content/view/105/128/#PART16>.

9. The Attorneys Fidelity Fund is a statutory body with the primary responsibility of protecting the public from theft of their trust funds by attorneys. Attorneys Fidelity Fund, http://www.fidfund.co.za/pages/nature_text2.htm (last visited Jul. 8, 2009). It also funds some practical programs at law schools. *Id.* at http://www.fidfund.co.za/pages/legal_edu_text2.htm (last visited Jul. 8, 2009). In 1988, the Attorneys Fidelity Fund agreed to provide funding to university law clinics affiliated with AULAI. Presently each university clinical program receives 210,000 rand per annum for the development of student skills. De Klerk, *supra* note 5, at 931.

10. De Klerk, *supra* note 5, at 930 (AULAI was formed in the mid 1980s

At present, nearly all universities in South Africa have established clinical legal education programs.¹¹ Clinical legal education programs are defined as “lawyer-client experience by law students under law school supervision for credit towards the law degree.”¹² These programs provide a platform for the teaching of various skills that lawyers require in order to practice law efficiently and effectively. These skills include, amongst many others, interviewing skills, statement taking, drafting of various legal documents, communication skills, trial advocacy and practice management skills.

The purpose of this article is to identify and discuss various types of legal writing skills that are taught at the University of the Witwatersrand Law Clinic (“Wits Law Clinic”). A reflection on the challenges that we experience whilst teaching these skills will be discussed and recommendations proposed.

II. THE UNIVERSITY OF THE WITWATERSRAND LAW CLINIC TEACHING MODEL¹³

A. *History and Development*

The clinical legal education program at the University of the Witwatersrand was initiated in 1969. Like all other clinical programs in South Africa it started as a response to the political and social circumstances of the country at the time. It was a dark time in the history of our country when the Apartheid Policy of the Nationalist led government was at its height. Black

for the purpose of representing and promoting law clinics in South Africa); see also Wimpey & Mahomed, *supra* note 5, at 1.

11. David McQuoid-Mason, *Law Clinics at African Universities: An Overview of the Service Delivery Component with Passing References to Experiences in South and South-East Asia*, 2 J. FOR JURID. SCI. 9 (2008) (special issue).

12. COUNCIL ON LEGAL EDUC. FOR PROF'L RESP. (“CLEPR”) (the leading clinical organization in the United States that was established in 1968); see also De Klerk, *supra* note 5, at 929; McQuoid-Mason, *supra* note 11, at 2. For the purpose of this paper, clinical legal education refers to the teaching of law students in a real-client environment, through simulation exercises and plenary lectures for credit towards a law degree.

13. Shaheda Mahomed, *United in Our Challenges – Should the Model Used in Clinical Legal Education be Reviewed*, 2008 J. FOR JURID. SCI. 58-59 (special edition).

and white people led vastly segregated lives. By and large, black people were poor, minimally educated and unable, and in many instances forbidden, to break from this disadvantaged state. They were voiceless and too poor to engage legal representation to assist them with life's challenges. As stated by De Klerk, "the establishment of the early clinics was generally inspired by a desire to serve the poor rather than the educational value of clinical programmes."¹⁴

Initially, students from the University offered legal aid assistance at the Johannesburg Legal Aid Bureau, one of very few non-governmental legal aid offices. They also ran their own legal aid clinic in a so called "colored"¹⁵ township, Riverlea, which is south of Johannesburg. These offices were advice offices rather than law offices. Students' assistance was voluntary, and there was limited professional supervision.¹⁶ The motivation for this experience was the promotion of access to justice rather than for any pedagogical purpose. The work undertaken by students was limited to paralegal work, such as advising clients and writing letters on a restricted basis. Students who participated in the clinical program received no credit towards any courses in their law degrees. In 1973, a law clinic was established on the University campus, and the clinical services offered by students were incorporated into a course called Practical Legal Training. This course was an elective, credit-bearing module. The Campus Law Clinic (as it was then known) continued to operate on a limited scale, mainly as an advice office.

In the very late 1980s and early 1990s, the Campus Law Clinic transformed itself from a paralegal advice office into a full fledged law office. Students in their final year, with the exception of a select few who were eligible to undertake a research report in its stead, were obliged to serve a year in the law clinic for which they would receive credit.

14. De Klerk, *supra* note 5, at 930; *see also* Wimpey & Mahomed, *supra* note 5, at 2.

15. In terms of the Population Registration Act 30 of 1950 § 1(3), a "colored" person means a person who is not a white person or a native. The Population Registration Act was one of the most extreme Acts of the Apartheid Era.

16. Ellison Khan, *A Review of South African Legal Education in LEGAL AID IN S. AFR.*, 147-148 (1974).

In the late 1990s, Practical Legal Studies (as it is now known) was promoted to a compulsory, credit-bearing course for all final year law students. The Wits Law Clinic (as it is now known) is a respected law office that has been involved in many precedent-setting cases now cited in our courts. Prior to 2000, the Wits Law Clinic operated as a general clinic. Within that model, each clinician¹⁷ would ensure that the student pairs would receive a variety of cases so that each student would be exposed to different facets of the law and the different skills involved with each facet. For example, each student would receive at least one labor matter, thus exposing the students to negotiation skills, and each pair would receive a family matter which ensured that students had drafting experience. However, this model posed several challenges, including the fact that clinicians often felt that they were inexperienced to deal with certain matters. In response to these challenges, specialized clinics were set up in January 2000.¹⁸ At present, we have the following units of specialization: family, labor, delict,¹⁹ urban evictions, refugee and a general unit which concentrates on consumer and contract law.

B. Current Model and Practices

Presently, Practical Legal Studies is taught using a combination of the real-client teaching model,²⁰ simulation exercises, tutorial sessions and plenary lectures. The real-client teaching model provides students an opportunity to learn through practice. Brayne best describes this model as one in which

“the clinic is based in the law school (hence ‘in-house’) and the unit is offered, monitored and controlled in-house too. The clients are real, with problems requiring actual solutions (hence ‘real-client’). The client base may be selected from

17. For the purpose of this paper, a clinician is an admitted, practicing attorney employed at the university to teach students practical skills in a clinical setting.

18. For further discussion on specialization at the Wits Law Clinic, see Willem De Klerk & Shaheda Mahomed, *Specialisation at a University Law Clinic: The Wits Experience*, 39(2) DE JURE 306 (2006).

19. Delict is also commonly referred to as the Law of Torts or Personal Injury claims.

20. Mahomed, *supra* note 13, at 53-70.

the general public at large or from a section of the public”²¹

Simulation exercises are problem exercises designed by clinicians to resemble real life situations. Students engaging in these exercises are required to act like lawyers and participate in role play. Such exercises are used when teaching trial advocacy and statement taking. Compulsory tutorial sessions are held on a weekly basis with the student pairs. During these tutorials, client files are discussed, and clinicians comment on students’ draft documents and assess the documents on a formative basis. During plenary lectures, the clinician teaches matters relating to the substantive law, the drafting of documents, professional management, ethics, numeracy skills, interviewing skills, statement taking, trial skills and social justice.

Practical Legal Studies is described as a credit-bearing, compulsory, in-house specialized program²² for all law students in their final year of study. To ameliorate the burden of large numbers of students for the clinician, students are paired with partners and work together in teams.²³ Student pairs are allocated to one of eight clinicians²⁴ and work closely with that clinician.²⁵ As all the clinicians have specialized knowledge in a particular area of law, students participate in the allocated units for the duration of the academic year. Clients are seen on a “first-come-first-served” basis on different days for each unit.²⁶ Individual clinicians are responsible for managing their

21. HUGH BRAYNE ET AL., *CLINICAL LEGAL EDUCATION: ACTIVE LEARNING IN YOUR LAW SCHOOL* 12 (1st ed. 1998).

22. See David McQuoid-Mason, *The Organisation, Administration and Funding of Legal Aid Clinics in South Africa*, 1(2) NULSR 189 (1986). It was proposed that developing specialized clinics may help reduce the volumes of cases. Initially, when the specialized units were introduced at the Wits Law Clinic, clinicians believed the same. However, over the years, the volume of cases continues to increase.

23. In 2008, there were 308 students registered for the course; in 2009, 232 students registered for the course.

24. Not all the clinicians at the Wits Law Clinic are permanent employees of the University as some are full-time grant-funded members of the staff.

25. The present ratio of student to clinician at the Wits Law Clinic is, on average, 30:1. This ratio is not ideal. See De Klerk & Mahomed, *supra* note 18, at 308.

26. Client appointments are not made for the initial consultation. Clients simply walk into the clinic and are screened accordingly. However, this has

weekly clinic intake sessions where students screen members of the public for suitable cases.²⁷ Case loads are allocated to each student pair, and all professional activities on the files are monitored closely during the weekly tutorial sessions.²⁸

Students are formatively assessed continuously during clinic sessions as well as during tutorials. A student's summative assessment is comprised of a written test on law and procedure,²⁹ a drafting test,³⁰ an oral exam,³¹ a written assignment,³² a portfolio assessment³³ and a trial advocacy assignment.³⁴ The portfolio consists of a collection of client

contributed to the large numbers of clients that are consulted with on a daily basis. Each clinic operates on a different day except the family and refugee clinics, which both operate on Mondays at different times. Clients for whom files are not opened are advised or referred elsewhere.

27. On average, the clinics screen between 30 to 50 people per working day including student vacations. Suitable cases will include matters that have merit. The client must also meet a means test as prescribed by the Law Society of South Africa. Attorneys Act 53 of 1979 §§ 1, 3(1)(f); RULES OF THE LAW SOC'Y OF THE N. PROVINCES, R. 115A (2004), *available at* <http://www.northernlaw.co.za/content/view/105/128/#PART16> (providing details on the means test).

28. As a result of the large number of clients that are screened, student case loads average between 5 and 10 files per student pair per year. Although 45 minutes have been allocated for weekly tutorials, the time spent with the students may vary depending on the complexity of the files.

29. This test was introduced in 2008. During the first teaching block, students learn substantive law and procedure specific to their unit of allocation. At a planning meeting held in November 2007, clinicians felt that this test was necessary to improve the students' level of knowledge in the specialized field of their unit.

30. This test seeks to assess students' ability to draft legal documents and their understanding of legal ethics.

31. Oral examinations are conducted once a year by two clinicians sitting together. Students are assessed on their portfolios and on the rules of ethics that govern professional practice.

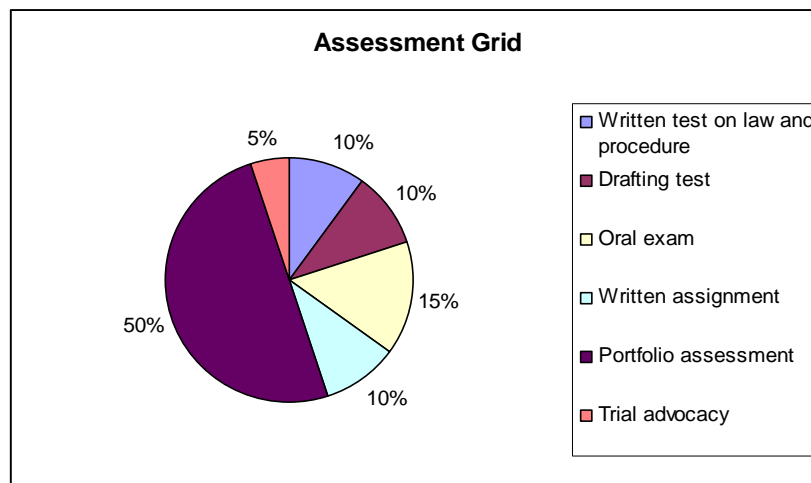
32. Students are required to attend any court proceeding, observe a case being conducted and, thereafter, write a report on the matter.

33. A file assessment or portfolio assessment entails the allocation of a grade based on the file work completed by the student over the course of the year.

34. The practical teaching of trial advocacy has always proven to be a challenging experience at the Wits Law Clinic. This is primarily due to the fact that we have large numbers of students with limited time and resources available. However, we have found that, should students be assessed on an

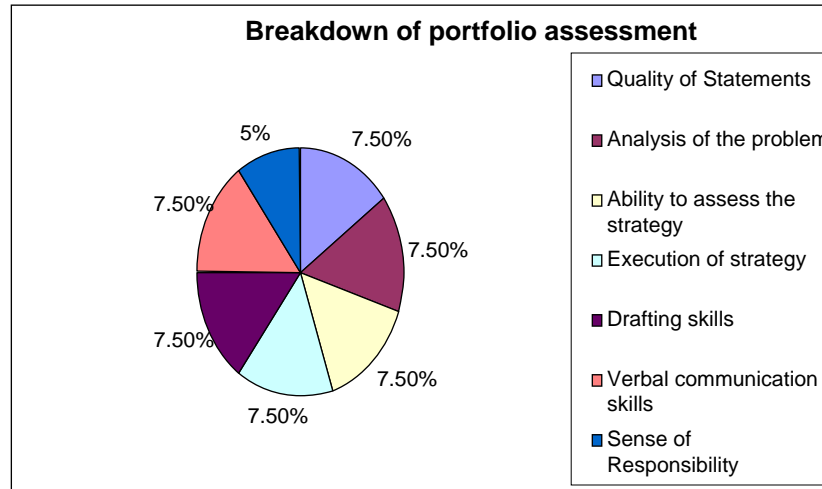
files with which the students are engaged. Each client's file generally is made up of sub-files that contain copies of client statements, file notes, pleadings, research material, copies of letters faxed or posted, draft copies of such letters and any other documents relevant to the matter. The portfolio assessment includes evaluations of the following: quality of statements, analysis of the problem, ability to assess and plan strategy, execution of strategy, drafting skills, verbal communication skills and student attendance and participation in the course. Most writing skills are assessed in terms of this component.

The pie charts below illustrate the summative assessment:



The portfolio assessment, worth 50% of the total assessment, is comprised of the following evaluation:

ad hoc basis, they do not apply themselves sufficiently. In 2009, it was decided that a summative grade would be allocated with the hope that students will take this task seriously.



C. Writing Skills Taught in the Practical Legal Skills Program

Students participating in Practical Legal Studies are taught a number of writing skills: the drafting of client statements, letters, file notes, case reports, briefs to counsel and legal opinions. Some of these skills are taught in a formal setting while many are learned incidentally, as the real-client case work unfolds.

When drafting any legal document, the author must be mindful of the purpose of the document. Is its purpose to inform or persuade the recipient or does it have another purpose? This is best noted by Palmer, Crocker and Kidd as

“when writing you have to be certain that you are able to express yourself unambiguously. Your watch word 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.”³⁵

Students often feel compelled to use language that is contrived and overly formalistic, especially if English is their second language. When reviewing student draft letters for example, it

35. ROBIN PALMER ET AL., BECOMING A LAWYER: FUNDAMENTAL SKILLS FOR LAW STUDENTS, 33 (2nd ed. 2006).

may be necessary to confront the student with the demand – “Tell me what you are trying to say.” Then, request that the student frame the letter in the same manner.

As mentioned, writing skills are assessed continuously as a part of the Wits Law Clinic model.³⁶ At every weekly tutorial, the clinician evaluates and comments on the written work of the students and makes suggestions for improvement. Often, the nature of the case demands attention that cannot wait for the allotted weekly tutorial. This may require drafting to be evaluated on an ad hoc basis. Also, the enthusiasm of the student may demand attention to her respective draft document outside of allocated tutorial times, and these requests generally are accommodated.

No standard approach to the method of formative assessment has developed, nor has there been much discussion about this aspect of assessment. Clinicians do not receive any training in this or any other regard. Each clinician has her own style that is informed by her own baggage in terms of her respective training, beliefs and personalities. For instance, one clinician would rewrite or dictate the corrected draft, whereas another would insist that the student capture the directed and discussed alterations in a redraft until correct. This type of assessment remains a challenge that we are seeking to address.

Students receive a summative grade³⁷ for the drafts included in the sub-file, such as the pleadings and letters drafted. They also receive a summative grade for the written drafting test. Each clinician is required to prepare a drafting skills question for the students participating in her respective unit. Clinicians generally require students to draft documents that students are exposed to on a regular basis; students in the family unit might

36. Franciscus Haupt & Shaheda Mahomed, *Some Thoughts on Assessment Methods Used in Clinical Legal Education Programmes at the University of Pretoria Law Clinic and the University of the Witwatersrand Law Clinic*, 41(2) DE JURE 7 (2008) (“Formative assessment is used during the learning experience to provide feedback to students so that they have the opportunity to improve.”).

37. *Id.* (“Summative assessment is used to measure the extent of learning and for grading purposes after completion of a piece of work or module.”).

be required to draft a Particulars of Claim,³⁸ while students in the refugee unit might be asked to draft a letter of appeal.³⁹ Clinicians in the respective units prepare their own criteria whilst assessing. Therefore, this method of assessment may not be considered uniform or objective, as each clinician could apply a different standard.

A further challenge that we experience is that some students may be asked to draft a document that is less complex by its very nature. For example, students in the family unit may find it easier to draft a Particulars of Claim compared with the letter of appeal in the refugee unit, where additional statutory requirements or research on conditions in different countries might be necessary. These challenges will be addressed later in this article.⁴⁰ There is little doubt that there is much work to be done to train the clinicians on the standardization of these assessment methods within our own clinic.

At the Wits Law Clinic, students are exposed to the drafting of many documents including client statements, letters, file notes, pleadings, briefs to Advocates, opinions, file reports and case assignments. Each of these drafting exercises is evaluated and discussed below.

1. Client Statement

Students participating in clinical legal programs that have adopted the real-client teaching model generally are required to draft client statements as they take on cases throughout the course of an academic year. A client statement is a document written on behalf of a client detailing the nature of their legal problem. Statements are written in the first person, as if the client were writing it and must contain all the essential information regarding the client, the facts of the case in chronological order, the names and addresses of all role players,

38. "Particulars of Claim" is a statement of claim in which the Plaintiff pleads the material facts relied on in her claim or claims.

39. A letter of appeal would be an appeal against a rejection of refugee status.

40. See discussion *infra* Parts II.D.1-4.

the jurisdiction of the court and the cause or causes of action, insofar as a theory of the case is developed at this early stage. Students must document the client's instructions, setting out the outcome desired. All details of any previous representation and copies of any documents already filed in court must be noted and obtained.

A comprehensive statement is fundamental to the successful conduct of a case. It is the source of a number of legal documents including a letter of demand, the Particulars of the Claim, the letter setting out the defense, the letter or formal notice regarding settlement and other documents that may be pertinent to the case. When drafting the statement, it is essential to visualize not only the documents to be drafted but also the actual trial or motion proceeding itself.⁴¹ One generally forms a preliminary theory of the case at this first consultation stage. The lawyer will then have in mind the facts that would need to be proven or disproven and the evidence required to do so.

At the Wits Law Clinic, statement taking skills are introduced to students at a plenary lecture early in the first teaching block. At this lecture, students are made aware of the following fundamentals relating to statement taking: effective communication with the client, identifying the legal problem and identifying exactly what the client's instructions are with regard to the matter. Students draft statements on behalf of clients whenever a file is opened. As students work in different units, the contents of the statements will depend on the nature of the matter. For example, students working in the labor unit dealing with a dismissal matter will need to ensure that they have all the relevant details of the client's employment situation, including the name of the employer, the reason for dismissal, whether there was a hearing preceding the dismissal,

41. For example, the taking of a comprehensive and probing statement could mean an asylum seeker from Zimbabwe who tells the student that he came across the border because "life is bad under Mugabe" is interpreted as being an "economic migrant" rather than a refugee who has fled from the tyranny of Mugabe's regime when, in reality, the asylum seeker has a well founded fear of persecution, which qualifies him as a refugee in terms of the Refugee Act 130 of 1998.

and so on. Students in the family law clinic consulting with a client who wishes to institute divorce proceedings will be required to obtain details of the client's family scenario relating to the type of marriage, the date of marriage, details of the minor children, and so forth.

The statement, or rather a draft thereof, is written by the student as described in the previous paragraph. This statement is read by or to⁴² the client for verification and then signed by the client. Students present the statements drafted to the clinician during tutorials. The draft of the statement is then commented upon and corrected if necessary. Clinicians generally comment on the usage of grammar and sentence construction. They also discuss the facts of the matter, preliminary theories of law and what evidence will be required to prove the client's case. The statements are then filed in the client's file.

As mentioned, students' statements are subject to formative assessment on a continuous basis. Students receive a summative grade worth 7.5% for the statements drafted under the auspices of the portfolio assessment. The criteria for the assessment are individually determined by the clinicians. The authors submit that this can be improved upon.⁴³ Students improve on the drafting of statements as the year progresses. Evidence of this is noted from the drafts that students file in the sub-files. Good, efficient statement taking is the *sine qua non* for the successful conclusion of the client's mandate.

2. Letter Writing

"Writing a letter is one of the most basic and essential lawyering skills and it is one which must be mastered by the young lawyer as soon as possible."⁴⁴ If a lawyer cannot communicate, she cannot practice efficiently. Lawyers write to

42. This is often done when clients experience language barriers or are illiterate.

43. See *infra* Part III.

44. PATRICK STILWELL ET AL., *CLINICAL LAW IN SOUTH AFRICA*, 91 (1st ed. 2004).

“persuade, inform, record, demand, enrage or calm the reader.”⁴⁵ Poorly written communication may have serious consequences and may prejudice the client’s case. For example, by failing to deny each allegation in a letter or plea received, the client may be taken to have admitted a specific allegation, and the case may be compromised.

There are as many different ways to write a letter as there are situations that demand it. No matter the content, there is a certain basic format that is acceptable by the private and public world at large.⁴⁶ The format of a letter should include the address of the sender, the name and address of the receiver, and the date. The manner of posting must be noted and highlighted. The letter should be addressed appropriately for the attention of the receiver. The letter must include the heading, the body and an appropriate conclusion to be submitted.

At the Wits Law Clinic, students are taught the theory of writing a basic letter at a plenary lecture. During this lecture, students are presented with a letter that has been very badly drafted and are asked to identify and correct the errors.⁴⁷ Students continue to learn how to draft appropriate letters throughout the course of the academic year. The client demand for legal services ensures that each student has the opportunity to draft any number of different letters that would serve different purposes. The clinician corrects and discusses each student-drafted letter during the weekly tutorial. Every draft, including any necessary redrafts, is kept in a sub-file in the client’s file.

The various clinic units require different approaches towards drafting letters. Students engaging clients in the delict unit write letters of demand that comply with the relevant legislation. Students in the refugee unit write letters on behalf of clients who are asylum seekers and who have interim status, informing members of the South African Police of their temporary status and directing that these clients’ should not be

45. *Id.*

46. *Id.* at 92.

47. See Appendix A for a copy of the letter used in this exercise.

harassed or arrested. The family unit might write a letter proposing settlement of the various disputes between the parties.

Letters drafted are assessed continuously for formative purposes. For summative purposes, students' draft letters are assessed under the auspices of the portfolio assessment. The Wits Law Clinic has not designed specific criteria by which these letters are assessed. Clinicians may consider the format, style, grammar and whether the letter achieves the purpose for which it is written.

A criteria reference grid is clearly essential. The authors of this paper have considered this a challenge and have designed such a grid which is included under our recommendations.⁴⁸

3. *File Notes*⁴⁹

“The file note is used to record everything that happens on the file, for instance, as telephone calls are made and received; correspondence sent and received; pleadings sent and received; research done; and expenses incurred. One should always remember to always record the date and nature of attendances as well as the time spent.”⁵⁰

At the Wits Law Clinic, in keeping with the established practice of proper file management, students are urged to note every attendance⁵¹ on the running sheet. The running sheet is a piece of paper that is attached to the front cover of the file, containing the name of the client, the nature of the matter, the file number allocated to it by the law clinic, the name of the writer and provision for the date and a description of the attendance. File notes may also be recorded on a separate page and kept in the client's file in a sub-file. In this event, the file note must be referred to on the running sheet. Not only may such a not be vital for the successful conduct of the case, but

48. *See infra* pp. 129-30.

49. STILWELL ET AL., *supra* note 44, at 66 (sometimes file notes are referred to as the note sheet, counter page or a file update sheet).

50. *Id.*

51. *Id.*

also critical when a file may be passed from a student in one year to another in the next year or from one candidate attorney to another as they move from unit to unit. The clinician must be able to pick up a file and know what its current status is from a quick perusal of the running sheet.

Students are introduced to the concept of file notes and their importance at a plenary lecture and this teaching is advanced during tutorial sessions. The actual drafting of the notes is illustrated by the clinician during tutorial sessions.⁵² For example, a student may not think it necessary to record that a telephone call was made to the opposing attorney and a message was left. This attempted communication may prove to be vital information in the later conduct of the case. Clinicians generally offer this example during tutorials to teach and reinforce an important lesson.

Student file notes are also continuously assessed for formative purposes. As file notes form part of the student's portfolio, a summative grade for these notes will be allocated. However, again, no formal criteria have been designed for the assessment of these notes, leaving clinicians to use their own discretion. The authors submit that this form of assessment is not acceptable and that a standard criteria reference grid must be designed and applied.

4. Pleadings

Students at the Wits Law Clinic work in pairs and are allocated to a specific unit of specialization. Students in each unit will have different experiences with regard to the nature and variety of the pleadings they will draft, and their experiences will differ even within a unit. For example, students in the family unit will draft a Particulars of Claim in a divorce matter. Students in the delict unit encounter matters such as civil claims for damages for unlawful unrest and

52. From experience, students need to be reminded continuously about the format of a file note. They have a tendency simply to scribble points of conversation with clients or other persons involved in the matter on any piece of paper.

detention, police brutality and medical negligence. Litigation is conducted in different fora, demanding not only the meticulous drafting of pleadings but also the requisite notices in preparation for trial, such as expert notices and summaries of expert evidence.

Student drafting of pleadings and notices are assessed continuously for formative purposes. A summative grade worth 10% is allocated for the drafting test. Individual clinicians, who are responsible for setting the test questions, determine the criteria against which students should be graded. Additionally, a 7.5% grade is allocated for documents drafted for the portfolios. Similarly, individual clinicians determine their own criteria when assessing students' drafts in their portfolios. Once again, the imminent danger that this system presents is that there is a lack of standardization or uniformity in assessment.

5. *Briefs to Advocates*⁵³

The General Council of the Bar⁵⁴ resolved that each member of the Bar is obliged to perform 20 hours of pro bono service per annum. With this in mind, it usually is not difficult to obtain the services of willing and able advocates. Advocates, also known as Counsel, are court specialists and are briefed by attorneys to appear in court and conduct the trial or motion proceeding, as the case may be, particularly in the High Court. This arrangement allows the students an opportunity to draft briefs for advocates. A brief is an instruction to Counsel and consists of a cover letter summarizing the client's case and the instruction to be carried out. It also includes copies of documents such as client statements, pleadings and, at times, a student's draft of a document that the advocates might be requested to settle, such as an affidavit.

It is critical that all the relevant information is given to Counsel in order to prosecute the case successfully, and the

53. STILWELL ET AL., *supra* note 44, at 16-19.

54. GENERAL COUNSEL OF THE BAR OF SOUTH AFRICA, UNIF. RULES OF PROF'L CONDUCT, § 5.12.4 (2007).

challenge for students is to collate the information effectively and comprehensively.

Not all students at the Wits Law Clinic are exposed to this form of drafting, as it is case specific. Students who draft briefs are assessed on a formative basis at the time the brief is collated. They receive a summative grade under the auspices of the portfolio assessment as the brief would form part of the client file. No specific criteria have been designed to assess the drafting of these documents as clinicians apply their own, individual criteria on a case by case base.

6. Opinions

Students are often requested to provide simple advice to clients. Under such circumstances, students are asked by clinicians to draft an opinion for clients. This is most often done if it appears, either after the first consultation or during further processing of the claim, that the client's claim has no merit and little prospect of success. A comprehensive opinion should contain a summary of the relevant facts, the outcomes the client would like, the applicable law, strategies that can be utilized to achieve the outcomes, the challenges and the prospects of success. Opinions are written in the form of a letter.

Students may also draft an opinion in a particular case in the form of an interoffice memorandum for their own benefit and that of their supervisor. Opinions drafted are assessed formatively and summatively on a case to case basis.

7. File Reports

Students are required to draft a file report in every file in which the client's mandate has not been completed by the time the student has completed the academic year. This document must contain a summary of the facts, the issues, the applicable law and the strategies that may be adopted to achieve the desired result. The file report is then placed in the file for easy reference for the clinician, candidate attorneys and future students who may take over the file. Not all students are

required to draft this document, as they may have finalized all their cases or the report is not prescribed by the clinician.

The authors are of the view that such a report should be compulsory on every file as it would force the students to apply their knowledge and skill to all the issues already addressed and those that may be outstanding.

8. *Case Assignment*⁵⁵

Each student is required to observe an actual case at any court⁵⁶ during the year and then draft a written assignment. Although students are not formally taught how to draft this document, a guideline is provided. The idea is to allow students the opportunity to write freely within specified boundaries.⁵⁷

This exercise obliges students to attend court in their own time, normally during their vacation. The benefit of this exercise is that each student is required to record, in writing, what he or she has observed in the actual court room.

This assignment is for summative purposes and constitutes 10% of the student's year mark. The criteria used whilst assessing the assignment is dictated by the student's compliance with the requirements as noted in Appendix B.

D. *Challenges*

Teaching legal writing skills has proven to be a very challenging experience. There are a number of problems that we have encountered over the years, the most pertinent of which include assessment of writing skills, language barriers, specialization and student numbers. Recommendations in respect to each of these challenges will be addressed below.⁵⁸

55. Haupt & Mahomed, *supra* note 36, at 27-28.

56. Although we allow students to write this assignment on any case observed, we do recommend a preference that students observe a criminal case. Students at the Wits Law Clinic do not receive any practical experience in criminal law for a number of reasons, including logistical challenges and the limitations in respect of skills learning. Therefore, we consider the drafting of the case note an attempt to address these challenges.

57. These boundaries are noted in Appendix B.

58. *See infra* Part III.

1. Assessment Criteria

Whilst we aspire to teach all our students drafting skills within the real-client, specialized environment, little if any attention has been cast on developing objective criteria for assessment. Since the introduction of specialization at the Wits Law Clinic, the development of criteria used to assess student writing skills has been the responsibility of individual clinicians. To date, little has been done to standardize this process.

2. Language Barriers

The clients who attend the Wits Law Clinic requiring advice are indigent. They are historically disadvantaged and, as a consequence, speak very little English. They are poorly educated and many of them are illiterate. South Africa has eleven official languages, and most of our clients prefer to converse in their mother tongue. In addition, many of our clients are asylum seekers from all over Africa, including Somalia, Sudan, the Democratic Republic of Congo and Zimbabwe, and they converse in languages unfamiliar to South Africans, such as French and Shona.

The challenge is to guide the student in asking the correct questions to illicit and identify the client's problem and advise the client of her rights and options in a language that the client understands. The majority of the students themselves do not speak English as their first language. Therefore, there is the double challenge for the clinicians to teach second language English speakers how to interpret and convey complex issues to clients in a foreign language in a manner that is simple enough for the clients to understand. Presently, the Wits Law Clinic does not formally address this problem. Indirectly, we request students and any other members of the staff who are multilingual to interpret on behalf of clients.

A further challenge that we experience is that once students arrive at the law clinic, they start using written language that, up to this point in their lives, they have never used. The language that lawyers use, both inside and outside the court room, often serves only to obscure issues even more. For some reason,

lawyers reinforce this obfuscation by using language that shades the meaning to the person on the street, in language that only they and their colleagues might understand. It seems that the temptation to use formalistic, pompous and archaic language is irresistible for most students. The problem is compounded when the recipients of the correspondence, our clients, are illiterate or semi-literate and where their own first language is not English.

This problem is not unique to our clinic and is addressed by teaching the students the importance of using simple language.

3. *Specialization*⁵⁹

The Wits Law Clinic operates within a real-client teaching model, which offers a rich and diverse source of drafting material. This method has its limitations as we are aware students in different units, and even students in the same unit, do not receive the same exposure to legal drafting. For example, students in the delict unit, eviction unit, labor unit and family unit receive intensive training in the drafting of documents required for litigation, whereas students in the refugee unit and consumer unit may not. We, therefore, run the risk that students will experience an imbalance in learning, with some students drafting substantial documents and others not.

4. *Student Numbers*⁶⁰

The large numbers of students also inevitably impact the quality of drafting we are able to teach, particularly in the plenary lectures. The large numbers also inhibit the handing out of further assignments, as marking would become challenging for already overburdened clinicians.

By and large the best way to teach drafting is during the one-on-one tutorial. It is very intensive and time-consuming. The clinicians generally follow an “open-door” policy and are willing to share skills on an ad hoc basis. This works well for the students but places clinicians under additional pressure.

59. De Klerk & Mahomed, *supra* note 18, at 306-318.

60. Mahomed, *supra* note 13, at 60.

III. RECOMMENDATIONS

In South Africa, most law degrees do not concentrate on the teaching of writing legal skills as this is considered to be the work of the profession. Clinical legal education programs have therefore become the “catch-net” program incorporating the teaching of these skills.⁶¹

However, as most clinical programs are not compulsory at South African universities, students’ exposure to writing skills is limited to only those that participate in the course. “[W]orse still, at nearly half of all law schools in South Africa, students can choose to avoid the experience altogether, thereby being allowed to enter the practice of law without ever having seen a client, been inside a courtroom or interviewed a witness.”⁶² Furthermore, as most clinical programs are only offered in the final year of study, one may question whether it is not a stage too late in the students’ academic career to be learning skills such as communication and writing skills.

Should the teaching of these skills not be introduced earlier in the curriculum as a compulsory course? It has been suggested that

“clinical programs should be split up and repacked into different teaching opportunities and spread over the four year degree. In this way, students early on in the law degree could start with limited exposure to actual clients, building up to the final year where students will be expected to engage in the full legal process. This scenario certainly would ease the congestion in the final year Practical Legal Studies course.”⁶³

It is recommended that the teaching of writing and other skills should not be limited to clinical legal education programs or courses like civil procedure, but rather, should be the

61. See generally Willem De Klerk, *Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model*, 39(2) DE JURE 244 (2006).

62. *Id.* at 244.

63. *Id.* at 247.

responsibility of all courses taught in the law degree.⁶⁴ For example, students studying Administrative Law could be required to draft legal opinions.

At the Wits Law Clinic, the real-client teaching model provides an ideal opportunity for students to learn a variety of writing skills as discussed above. However, this model is not without its challenges. As is noted by Mahomed,

“[t]he dynamic on assessing students objectively whilst using the real-client teaching model continues to be a challenge for many. Students consult with a wide range of clients with different cultural backgrounds, languages and literacy levels. Each client has their own set of complex or simple legal problems thus assessing tasks like interviewing and statement taking skills can prove to be a challenge.”⁶⁵

Considering the above limitations, how can we improve our writing skills program? We recommend that, over and above the training that the university offers to new lecturers, clinicians should undergo an induction program. Such a program would allow clinicians to receive specialized training with regard to teaching in a clinical environment that is diverse, multicultural and multi-ethnic. This program should be developed by experienced clinicians in conjunction with other programs offered at the university.

In an attempt to address the challenges relating to assessment and standardization of drafting skills, we propose that all clinicians develop a minimum list of documents that they would require their students to draft in their specialized unit. This list should be discussed with all other clinicians so as to create some sort of minimum standardized list of documents for all students. Furthermore, each clinician should develop a criteria reference grid for all documents that students would be required

64. *C.f.* Swanepoel et al., *Integrating Theory and Practice in the LLB Curriculum: Some Reflection*, 2008 J. FOR JURID. SCI. 110 (2008) (special edition) (“The question of whether law schools/faculties should have a primary duty to prepare law students as best as they can for practice, should be answered in the affirmative. What other reason could there be for the continued existence of law schools/faculties?”).

65. Mahomed, *supra* note 13, at 65.

No. 1]

Teaching Legal Writing

129

to draft. Again, clinicians should meet to discuss and unify the prescribed criteria allocated for the assessment of drafted documents. We submit that each clinician should keep a diary or record of the students drafting progress at each weekly tutorial. This exercise will ensure that clinicians will be able to identify the extent to which students have improved over the course of the academic year.

The authors therefore propose the following as a criteria reference grid for clinicians to assess letters at the Wits Law Clinic:

Criteria	5- Excellent	4- Very Good	3- Good	2- Satisfactory	1- Poor
Format of letter					
Grammar					
Content					
Does it achieve its purpose?					

The following criteria reference grid is proposed for clinicians whilst assessing file notes:

Criteria	5- Excellent	4- Very Good	3- Good	2- Satisfactory	1- Poor
Format including date and time and author					
Description of attendance					

Teaching writing skills to large numbers of students continues to be our challenge. It may be necessary to consider diluting the program by teaching in larger groups than in pairs as we do at present. We believe that this would be preferable to converting the course to an elective program, as students already receive very limited practical exposure during the rest of the legal curriculum.

IV. CONCLUSION

Whilst we consider the attempts we make to expose students to various forms of writing skills commendable, we recognize that there is much to be done to improve upon the Practical Legal Studies course. Our students, many of them from disadvantaged backgrounds, are able to learn better writing skills by drafting a range of different legal documents. Our students are allowed to practice their writing skills on real-client matters within a supervised environment. They are accommodated when mistakes are made, thus allowing them an opportunity to learn from such experiences. We have recorded some of the challenges we experience whilst teaching writing skills and have suggested some changes that we believe will enhance our teaching methods. We are committed to improving our methods and assessment processes.

No. 1] *Teaching Legal Writing*

131

Appendix A

Date: 6 March 2002

WITHOUT PREJUDICE

Mr. D. C. Xaba
House 3C
ORANGE FARM

For personal attention: Mr Xaba

Per Registered Post

Dear Mr. Xaba,

RE: YOUR MATTER

The consultation with you on 5 ultimo refers. I hereby wish to confirm that I will act on your behalf in your case.

You instruct us to do the following:

- (b) obtain a divorce for you, on the following grounds:
 - (i) that you want custody of the your children
 - (ii) that you will, inter alia, give your wife R100 per month for maintenance so that she will stop bothering you.

We would be most grateful if you would be so kind as to let us know whether you managed to obtain any further or other information about your wife, who, the Wits Law Clinic hereby confirms, seemed to have disappeared and left the children with you, which force us to have to apply to the Legal Aid Board for permission to apply to the court for substituted service.

Where service cannot be effected in any manner prescribed under Rule 17 of the Rules of Court, an application may be made to court for leave to effect service by publication in a newspaper. Such application may be heard in Chambers. A court order will then be sent to the applicant's (your) attorney.

You are hereby requested to kindly telephone the students, Mandy and Bradford, who deal with your case on a Monday between 8.00 am to make arrangements regarding the above. Do not even bother to phone at other times, we will not take messages and run after students, you know the names of your counsellors and their times, do not waste our time, the clinic is busy enough as it is.

We await to hear from you at your very earliest convenience.

Be assured of our best attention at all times.

Yours faithfully,

The University of the Witwatersrand Law Clinic

Appendix B

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

The report shall contain at least the following information:

1. The parties names and the names of the attorneys representing them;
2. The case number and court in which the matter is being heard;
3. The type of procedure adopted by the litigants (action or motion procedure or criminal trial);
4. A summary of the plaintiff's/applicant's cause of action (or the charge against the accused in a criminal matter) and the facts which the plaintiff intends to prove at trial;
5. A summary of the defendant's/respondent's defense and the facts which the defense intends to prove at the trial;
6. An analysis of the party's pleadings (or in a criminal trial, the statements in the criminal docket) which analysis reveals those issues that are common cause and those issues that are in dispute. A short discussion on who bears the onus of proof of those issues in dispute;
7. Set out the law on which the plaintiff relies for his cause of action;
8. Set out the law on which the defendant relies for his defense;
9. From your observation of the trial of the matter, give a short summary of which witnesses were called to testify and the thrust of their testimony;
10. Mention how these witnesses were cross examined and the thrust of this cross examination;
11. Set out in brief the closing argument of the respective attorneys or counsel;
12. What was the decision of the court and summarize the presiding officer's reasons for judgment;
13. Discuss briefly if you agree with the verdict/judgment, or not.

This report is a substantial piece of work and is worth 10% of your year mark. Start early to identify a case and make contact with the attorney representing the plaintiff to find out when the matter has been set down. Trials run in the High Court, Labor Court and Magistrate's Court nearly every day.

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

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

The report **MUST** be typed and shall not exceed 1,500 word. The report must be handed to Winifred by no later than Friday, 2 October 2009.