

DESIGNING A TRANSACTIONAL LAW CLINIC FOR LIFE-LONG  
LEARNING

by  
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## INTRODUCTION

“A more rational system *would emphasize the way to learn law rather than rules and skills rather than answers*. . . . [Then] students would also be radically more flexible in what they could do in practice.”<sup>1</sup>

As the quote above from Duncan Kennedy suggests, a “rational system” of legal education does not focus solely on teaching rules of law but teaches students how to learn *both* the rules and practice of law. This notion of “teaching how to learn” in a “designed, managed, and guided experience”<sup>2</sup> of a transactional law clinic is the focus of this Article. This Article serves two functions. First, it presents a manual of transactional clinic design. Second, it promotes “teaching how to learn” in transactional law clinics. It does this by offering a framework that fosters “learning how to learn” to encourage students to develop the habit of life-long learning through self-regulated learning techniques employed during clinical supervision meetings between faculty and student attorneys. This Article argues that the nature of the client work makes transactional law clinics particularly well suited for this task. Ultimately, this Article concludes that transactional law clinics offer the most optimal environments for teaching law students the self-regulated learning tools they need to develop to ensure their ongoing professional development as attorneys.

My experiences in transactional law clinics as a student, clinical teaching fellow, and fulltime faculty member have informed this proposal. I have been fortunate to have had several unique interactions with transactional law clinics. I was a student in the Community Law Clinic at Rutgers Law–Newark. This was one of the first transactional law clinics in the country. I was a clinical teaching fellow in the Community Development Clinic at the University of Baltimore School of Law. I have formed two transactional law clinics, the first at the University of Tulsa College of Law and the second at University of Denver Sturm College of Law. At Denver Law I teach a yearlong clinic in which I also mentor a clinical teaching fellow. Each of these experiences has contributed to my thoughts about clinic design, pedagogy, and supervision interactions.

This Article is divided into three parts. Part I outlines a typical description of transactional law clinics by presenting a brief overview of

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<sup>1</sup> Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 601 (1982) (emphasis added).

<sup>2</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 165 (2007).

their emergence and evolution. Part II discusses clinic design in general terms and identifies essential elements of transactional clinic design. Part III presents a framework for employing self-regulated learning techniques during clinic supervision.

### I: WHAT IS A TRANSACTIONAL LAW CLINIC?

Law school curricula have historically failed to accurately reflect the realities of law practice by basing instruction almost entirely on litigation practice to the exclusion of business law and transactional practice.<sup>3</sup> This was true for doctrinal, skills-based, and later emerging clinical courses. The combined effect of increased student demand for different types of transactional experiential opportunities and the publication of two very influential reports, the 1992 ABA MacCrate Report<sup>4</sup> and the 2007 Carnegie Foundation Report,<sup>5</sup> challenged law schools to begin providing more exposure to transactional practice and interdisciplinary work.

In its infancy, clinical legal education existed largely because of the efforts of law school students.<sup>6</sup> The earliest legal clinics were created by law school students to “serve a social justice mission by providing legal assistance to those unable to hire attorneys,”<sup>7</sup> in direct opposition to the casebook method of law teaching.<sup>8</sup> Then, the 1960s ushered in a more developed methodology of clinical legal education, based on “student demands for [social] relevance in the law school curriculum.”<sup>9</sup> Clinics transitioned from being volunteer placements for law school students to academic classes in which students are assessed for their learning and the performance of lawyering skills in the provision of pro bono legal services.<sup>10</sup>

In the 1970s and 1980s, a deeper concerted effort was made to identify and articulate the goals of clinical teaching and “what clinical teach-

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<sup>3</sup> See, e.g., Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 447–50 (2009) (discussing the dearth of transactional pedagogy in law schools and the teaching of employment law as a way to address the gap in transactional law education in law schools).

<sup>4</sup> TASK FORCE ON LAW SCH. & THE PROFESSION, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 4, 6 (July 1992).

<sup>5</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7–14 (2007).

<sup>6</sup> See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 6 (2000) (“[L]aw students at several law schools in the late 1890[']s and early 1900[']s established volunteer, non-credit ‘legal dispensaries’ or legal aid bureaus to provide hands-on opportunities to learn and practice lawyering skills and legal analysis . . .”).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 16.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at 16–18. Although some clinics charge administrative or intake fees, these fees are still far below market-rate legal fees.

ers were and should be doing”<sup>11</sup> for both students and clients. Several scholars have articulated the tension between quantifying the societal impact of the legal services provided by law clinics and prioritizing student learning.<sup>12</sup> While “[t]he proper balance between meeting educational objectives and serving clients has been discussed since the earliest days of clinical education,”<sup>13</sup> as Praveen Kosuri documents, the advent of transactional law clinics followed a different trajectory from litigation and other types of clinical programs.<sup>14</sup> The proliferation has been slow but steady.

Although conceptually well established, transactional law clinics are still considered a somewhat newer kid on the clinical block with developing clinical pedagogies and scholarship of their own. The first transactional law clinics were community economic development (CED) clinics providing transactional legal services to nonprofit organizations on affordable housing development matters.<sup>15</sup> Working with community groups and nonprofit organizations in underserved communities, the work of these clinics was directly linked to the social justice origins of clinical legal education. The 1990s saw the development of the modern iteration of transactional law clinics, which are more intentional about representing small business clients, perhaps exclusively, than traditional CED clinics. There is an impressive amount of diversity in the types of transactional clinics that exist. Today, the range of transactional law clinics includes, but is not limited to, those that focus on interdisciplinary projects,<sup>16</sup> CED,<sup>17</sup> community lawyering,<sup>18</sup> poverty law,<sup>19</sup> social enterpris-

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<sup>11</sup> See *id.* at 16.

<sup>12</sup> See, e.g., Praveen Kosuri, “Impact” in *3D—Maximizing Impact Through Transactional Clinics*, 18 *CLINICAL L. REV.* 1, 2 (2011).

<sup>13</sup> Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 *TENN. L. REV.* 939, 950 (1997).

<sup>14</sup> Kosuri, *supra* note 12, at 8.

<sup>15</sup> See Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 *WASH. U. J.L. & POL’Y* 85, 87 (2013).

<sup>16</sup> See, e.g., Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 *CLINICAL L. REV.* 39, 40 (2013) (discussing how to maximize student learning and ownership of client work through project-based clinical programs); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 *WASH. U. J.L. & POL’Y* 195, 195 (2003) (describing benefits that an interdisciplinary transactional law clinic provides for both clients and students).

<sup>17</sup> See, e.g., Kosuri, *supra* note 12, at 3–4 (discussing the role of transactional clinics in impact work in the context of CED clinics); Ann Southworth, *Representing Agents of Community Economic Development: A Comment on Recent Trends*, 8 *J. SMALL & EMERGING BUS. L.* 261 (2004) (discussing expanding role of transactional lawyers and transactional clinics in CED).

<sup>18</sup> See, e.g., Susan D. Bennett, Discussion and Response, *On Long-Haul Lawyering*, 25 *FORDHAM URB. L.J.* 771, 773 (1998) (discussing community lawyering in the context of long-term community projects as client work).

es,<sup>20</sup> nonprofit organizations,<sup>21</sup> and international transactional matters.<sup>22</sup> Given the strong historic ties between the origins of clinical legal education and social justice movements and considering the breadth of legal services being provided, there is a perennial question chasing transactional law clinics: whether transactional law clinics are truly grounded in public service, social justice goals, and service delivery. Through the evolution of transactional law clinics, the concepts of “social injustice” and “underserved clients” have evolved to include the provision of free transactional legal services to small business owners and individuals who do not have the disposable income to afford market-rate legal services. As small business development became linked with anti-poverty efforts, the scope of services provided by transactional law clinics expanded to include assisting new client groups such as low-income entrepreneurs and new practice areas such as intellectual property. As Susan Jones points out quite elegantly in several articles, transactional law clinics advance social justice causes by providing legal services to client groups who have otherwise encountered racial or gender barriers to business development, including barriers to financing.<sup>23</sup>

“Clinical pedagogy” is a method of approaching law as a whole rather than a section of either its substantive or procedural aspects,<sup>24</sup> and the advent of transactional law clinics merged the “substantive law learning and skills”<sup>25</sup> of transactional practice. When transactional law clinics first appeared on the scene, however, “transactional” practice was not as readily accessible a concept as “litigation.” This was true for both law

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<sup>19</sup> See, e.g., Alicia Alvarez, Essay, *Community Development Clinics: What Does Poverty Have to Do with Them?*, 34 FORDHAM URB. L.J. 1269 (2007) (advocating for a more direct link between CED clinics and anti-poverty strategies).

<sup>20</sup> See, e.g., Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 218 (2013).

<sup>21</sup> Jay A. Mitchell & Michelle Sonu, *Food Banks and Investment Banks: Clinic Design for Corporate Practice*, 19 LEWIS & CLARK L. REV. 267 (2015).

<sup>22</sup> Deborah Burand, *Crossing Borders to Create Value: Integrating International LL.Ms into a Transactional Clinic*, 19 LEWIS & CLARK L. REV. 441 (2015).

<sup>23</sup> See, e.g., Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249–55 (2004); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 199–202 (1997); see also Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487 (1995) (discussing the importance of business ownership in the black community to address income inequalities between blacks and whites). It is beyond the scope of this article to provide quantitative data detailing how many transactional clinicians describe their legal services as social justice work. I merely point out that even non-CED clinics are capable of being agents of social justice.

<sup>24</sup> Blaze, *supra* note 13, at 946.

<sup>25</sup> See Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten “Dirt Lawyer,”* 62 U. PITT. L. REV. 335, 337 (2000).

school students and faculty, but is less true today.<sup>26</sup> Nonetheless, it is helpful to set forth a common understanding of transactional practice in a clinical setting. The core of transactional practice is value creation.<sup>27</sup> According to Alicia Alvarez and Paul Tremblay, “transactional work represents lawyering activity in which parties come together voluntarily to create something that will generate value—usually economic, but also social or relational.”<sup>28</sup> Professor Ronald Gilson explains that business lawyers add value “only if the transaction on which the lawyer works is more valuable as a result” of the lawyer’s work.<sup>29</sup> As such, transactional law and practice implicates two distinct value conversations: (1) value produced from the outcome of the transaction for the parties (or at least one of the parties) involved—the reason why they did the deal, and (2) value saved or otherwise generated for a client by the work of the lawyer on the outcome (generally an economic or monetary value). Regarding the latter, Professor Steven Schwarcz has identified six behaviors by which transactional lawyers create value for their clients: “(1) minimizing the potential for ex post litigation; (2) reducing transaction costs; (3) reducing regulatory costs; (4) acting as reputational intermediaries; (5) providing client privilege and confidentiality; and (6) creating economies of scope.”<sup>30</sup> While the definition of “value” may be in the eye of the proverbial beholder, it is generally accepted that the creation of new “value” (however defined) is inherent in transactional practice.

As a function of value creation, transactional lawyering is also preventive law.<sup>31</sup> This means that transactional lawyers set client and, when appropriate, other party expectations for performance. They do this by creating communications and documents that are designed to preclude (1) any misunderstandings between parties, and (2) a party’s nonperformance from being interpreted as anything other than an intentional breach or some other form of purposeful action (or inaction) to deviate from the parties’ agreed-upon behavior. In addition to preventive lawyering, transactional lawyers plan and negotiate transactions, form business

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<sup>26</sup> “Are transactional lawyers real lawyers?” I was asked this question by the very first student I who visited me in my office to discuss the CED clinic I was forming at Denver Law.

<sup>27</sup> See Ronald J. Gilson, *Lawyers as Transaction Cost Engineers*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 508, 509 (Peter Newman ed., 1998); ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE I (2013).

<sup>28</sup> See ALVAREZ & TREMBLAY, *supra* note 27, at 1.

<sup>29</sup> See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 244 (1984).

<sup>30</sup> Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 491 (2007) (footnote omitted); see also Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 240–41 (2011/12).

<sup>31</sup> See ALVAREZ & TREMBLAY, *supra* note 27, at 5; see also Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1126.

entities, draft legal documents (such as contracts and leases), problem spot and problem solve,<sup>32</sup> and advise and counsel clients about items in this list and a host of substantive law issues such as worker classification, intellectual property rights, and regulatory compliance.<sup>33</sup> This is the type of practice for which transactional clinics are designed to prepare law students, and, like transactional lawyers in full-time practice, students in transactional law clinics add value to their client matters.<sup>34</sup>

Having reviewed the nature of transactional practice and the breadth of transactional law clinics, the next section presents essentials for transactional clinic design.

## II: TRANSACTIONAL LAW CLINIC DESIGN PRINCIPLES

The clinical design principles outlined below are important considerations for creating and teaching transactional clinics. While the cannon of clinical scholarship naturally serves as a foundation, transactional pedagogy and transactional clinic pedagogy are developing areas of scholarship. There are, however, some fundamental differences between litigation clinics and transactional clinics. The examples below are not exhaustive, but these examples provide some context for the distinctions between the two types of clinics. First, transactional clinics have client matters or projects, not cases. Second, indicative of the collaborative nature of transactional work, transactional lawyers generally have client meetings instead of client interviews. The term “interview” is typically reserved for the first meeting that a transactional lawyer has with a potential client to determine whether or not to represent that client and speaks against the nature of collaboration and partnership between the client and lawyer in the achievement of the client’s goals. Along the same lines, the concept of “problem-solving” is more expansive in a transactional clinic. The issue is not “how do I win this for my client” nor is the representation paced by meeting filing dates. In transactional law clinics, problem-solving is managed holistically—in consideration of the client’s overall goals and not to solve a singular problem.<sup>35</sup> Also, the delivery of the

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<sup>32</sup> Debra Poggrund Stark, *See Jane Graduate. Why Can't Jane Negotiate a Business Transaction?*, 73 ST. JOHN'S L. REV. 477, 481 (1999).

<sup>33</sup> See Alfred Dennis Mathewson, *Commercial and Corporate Lawyers 'N the Hood*, 21 U. ARK. LITTLE ROCK L. REV. 769, 772–73 (1999); Jones & Lainez, *supra* note 15, at 101–02 (citing Professor Lisa Penland’s four core skills of transactional or “deal” lawyers: (1) “understand the advantages and disadvantages of each entity based on the transaction,” (2) “investigate the facts of the case, research the law, and undertake due diligence,” (3) “negotiate and draft contacts,” and (4) “understand how to identify transactional ethical issues”).

<sup>34</sup> As articulated by Jones & Lainez, transactional law clinic students add value to their client matters by (1) reducing the client’s liability; (2) reducing costs; (3) reducing regulatory costs; (4) acting as a reputational intermediary or resource builder; (5) providing protections by virtue of the practice; and (6) providing nonlegal benefits. See Jones & Lainez, *supra* note 15, at 104.

<sup>35</sup> The purpose of this statement is to draw a distinction between transactional

most basic transactional legal services is practically impossible without considering the broader business, social, political, or economic context in which the client is operating.<sup>36</sup> Lastly, in transactional practice, dates and deadlines are largely determined by the parties to the transaction and the majority of the planning is done in the absence of third party deadlines (meaning there are no court or agency hearing dates to plan around). This last distinction is significant because it clearly demonstrates the need for students to develop a particular type of time-management skills designed around their ability to self-motivate and, more generally, self-regulate learning habits.

The Carnegie Report identifies experiential learning opportunities supporting students' development of their professional identities as priorities in legal education. Students must not only have opportunities to participate in experiential education but such opportunities must be framed to enable students to develop a sense of their own professional identities. It is, therefore, important that students in the CED Clinic complete the class understanding that lawyering is a sophisticated enterprise designed around service to clients and collaborations with colleagues. This goal is reflective of the following teaching objectives: (1) the value of intellectual curiosity; (2) the value of diligence; (3) the value of ethical behavior; (4) the value of ethical lawyering; (5) the value of professional development; and (6) the values of self-regulated learning and self-reflection.<sup>37</sup> Collectively, these values form the foundation of my supervision interactions. What follows in a loose stepwise order<sup>38</sup> is a list of design principles for a transactional law clinic that teaches fundamental transactional practice skills to students—skills transferable to a variety of different types of transactional practice.<sup>39</sup>

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work and traditional litigation strategies and not to make a general statement about the breadth of litigation-based advocacy. I am aware of several non-transactional clinics that have integrated approaches to their advocacy efforts to provide comprehensive services to their clients.

<sup>36</sup> This is to be distinguished from “client-centered representation.” This hallmark of clinical pedagogy contemplates approaching client work from the perspective of clients while considering both legal and nonlegal concerns related to the representation and recognizing that (i) collaborating with clients yields more efficient problem-solving and (ii) clients are normally best suited to make important decisions about their lives. See ALVAREZ & TREMBLAY, *supra* note 27, at 26–28. Client-centered lawyering speaks to a mindset, a choice that the lawyer makes about her approach to the representation. The point I wish to make here is a technical one related to a lawyer's ethical duty to provide competent representation.

<sup>37</sup> See *infra* Part III.

<sup>38</sup> It is difficult to dictate a precise order of steps in forming a clinic because so many aspects of clinic design are connected to each other.

<sup>39</sup> This is what Tina Stark calls “foundation training.” See Tina L. Stark, *Training Junior Transactional Associates—First and Second Years*, ALL-ABA INSIDER, vol. 17, Winter-Spring 2003. Foundation training consists of the following categories: tasks and skills; context; and substantive law. The following design principles are not presented in strict chronological order or by order of priority because a transactional clinician might find herself working of many aspects of clinic design simultaneously.



A. *Deciding What Type of Transactional Legal Services to Provide: Faculty and Feasibility Studies*

Two of the earliest decisions to make when forming a new transactional law clinic are who will teach it and what will be taught.

1. *Faculty*

The push to form a transactional law clinic at any given school can come from several constituent groups within a law school community, including students,<sup>40</sup> faculty, clinical faculty, alumni, and the local community. Once the decision is made and a faculty member is in place to start the clinic, that person must take a series of steps to determine what type of transactional legal services to provide, steps which are discussed below. There are, however, five key factors that may be out of the hands of the clinician but will shape the clinician's perspective and form the foundation of the clinic.

i. *Faculty Supervision*: How will the clinic be staffed in terms of the number of faculty members teaching in the clinic and their status (*e.g.*, a single faculty member, a clinical teaching fellow, tenure track, 405(c) long-term contract, or adjunct)?

ii. *Length of the Clinic*: Will it be a year-long clinic or a semester-long clinic? Will the clinic be offered during the summer?

iii. *Number of Credits*: The number of credits impacts the type of client work selected.

iv. *Enrollment*: How many students will be allowed to enroll in each new iteration of the clinic? Are advanced students allowed to enroll, and, if so, under what circumstances? Are students admitted by lottery or through an application and interview process? Will the clinic be particularly accessible for evening students who typically are not able to enroll in clinics because of the incompatibility of work schedules and court dates.

v. *Allotted Time for Clinic Set-Up*: How much time will the faculty have to form the clinic infrastructure and recruit students and clients before representing clients?

2. *Feasibility Study*

Once the preliminary matters discussed above are resolved, the clinician should conduct a feasibility study (also called a community needs assessment) to determine which transactional legal services to provide. A feasibility study will help (1) determine who else is providing pro bono, low-bono, or sliding scale transactional legal services to provide some insight into the existing demand for transactional legal services and identi-

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<sup>40</sup> Students at Denver Law were very influential in the decision to form a transactional clinic. The clinical program at Denver Law recently celebrated its 110th anniversary. The CED Clinic is its first transactional clinic; the clinic started representing clients in the fall of 2011. See *Corporate and Commercial Law Program*, STURM COLLEGE OF LAW (2014), <http://www.law.du.edu/index.php/corporate-and-commercial-law-program>.

fy gaps in service; (2) provide a canvass of faculty (both clinical and non-clinical) to ascertain faculty expertise and any community networks that might facilitate client recruitment; (3) provide a canvass of existing clinicians to see if they have a sense from their respective client bases where transactional legal needs lie; (4) identify complimentary programs in either the law school or other university departments;<sup>41</sup> and (5) identify and survey key community stakeholders, where “community” has the broadest connotation from geographic neighborhoods to professional communities (*e.g.*, local chambers of commerce and bar associations). This feasibility study will help reveal any tensions between the type of clients to receive services and what is pedagogically appropriate for student learning.<sup>42</sup>

To ensure that I designed the clinic around fundamentals of transactional practice, during the feasibility study I conducted at Denver Law, I met with or solicited feedback from practicing attorneys in a range of transactional practice settings<sup>43</sup> to ascertain the skill set future employers would expect a first-year attorney to demonstrate immediately upon hire. This generated a list of the transactional competencies.<sup>44</sup>

- Oral and Written Communication Skills (includes board presentations, community education workshops, and management of client meetings)
- Contract and other Document Drafting
- Understanding the Fundamentals of Corporate and Nonprofit Governance
- Due Diligence
- Strategic Planning and Project Management
- Client Counseling and Advice
- Professionalism (includes time management and file maintenance)

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<sup>41</sup> Denver Law has a Corporate and Commercial Law Certificate Program, and the CED Clinic is one way that students can satisfy the experiential learning requirement of the program. See *Corporate and Commercial Law Program*, *supra* note 40. In addition to partnerships within the law school, I have reached out to collaborate with the University of Denver’s graduate programs in business and social work. MBA students could possibly assist clients with accounting questions, business plans, and marketing plans. Graduate social work students could possibly provide assistance to the CED Clinic’s nonprofit clients participating in community organizing and social movement efforts. Deans typically support these sorts of collaborations and it is worth investigating whether there are funding opportunities to incentivize these sorts of collaborations. For example, the CED Clinic received a small Community Engaged Learning Grant from DU’s Center for Community Engagement & Service Learning. See <http://www.du.edu/cces/>.

<sup>42</sup> And hopefully make it easy to select a name for the clinic, which can be a surprisingly arduous task.

<sup>43</sup> This included meeting with local lawyers, posting a survey on the ELAW listserv, and the Lewis & Clark Fall Business Law Forum.

<sup>44</sup> These appear in broad categories in no particular order.

- Ethical Lawyering
- Business and Financial Competencies
- Creativity
- Critical Thinking
- Knowing to Look for Power Dynamics in Relationships
- Appreciating the broader Social, Political, and Economic context applicable to their Clients' Matters
- Working with Community Groups<sup>45</sup>
- Cross-Cultural Lawyering

One of my goals with clinic design is for my students to encounter each of these skills distinctly through either the client work, simulations, or the class seminar.

### *B. Student Recruitment*

There is a hunger on law school campuses for experiential transactional opportunities. Regardless of the amount of allotted start-up period, students can be very helpful in all aspects of clinic start-up—from assisting with a feasibility study to drafting administrative forms (such as clinic applications for potential clients). Generally speaking, student recruitment is a fairly straightforward exercise that involves certain types of networking appearances.

1. Student Group Presentations: Present at related student group meetings (*e.g.*, the business law and public interest law student groups).
2. Open Houses and Information Sessions: Hold open houses and information Sessions for interested students and schedule special sessions for evening students, both jointly with other clinics and individually.
3. Class Presentations: Make brief presentations to classes discussing related subject matters (such as corporations, intellectual property, and social justice and public interest lawyering).

### *C. Client Recruitment, Selection, and Management*

After completing a feasibility study to determine what type of services to offer, it is time to implement client recruitment strategies. Here, again, there may be a tension between what type of client to serve and what is pedagogically appropriate for student learning. Client selection is designed to provide diversity of client work for each student and to foster the development of transferable skills. Effective client recruitment re-

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<sup>45</sup> See, *e.g.*, Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 356 (2008); Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45, 48 (2002); Paul R. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389, 391 (2010).

quires the creation and implementation of both a proper infrastructure for client intake, assessment, and management, as well as strong and creative networking efforts to establish strong referral networks.

### *1. Identify Complimentary Service Providers*

Given the interdisciplinary nature of transactional law, to facilitate client recruitment it is important to find entities that provide other services to potential and existing clinic clients (*e.g.*, business planning or marketing services). These entities present great opportunities for collaboration and cross-referrals. Some, like small business development centers (SBDCs) are affiliated with the SBA and are part of networks that partner with institutions of higher education.<sup>46</sup> Others are nonprofit or for-profit technical service providers, providing counseling about lending or growth strategies; or small business advocacy groups providing services not to small businesses directly but to small business technical service providers.<sup>47</sup> Examples include the following types of service providers:

- SBDCs
- Business consultants for women and/or minority business owners
- SCORE (Service Corps of Retired Executives)
- State and local offices of economic development
- State and local bar associations
- Chambers of commerce
- Small business incubators
- Local housing authorities
- Churches and other faith-based organizations
- State-wide nonprofit associations
- Local transactional attorneys looking for pro bono projects
- Accountants
- Financial institutions
- Libraries

### *2. Request for Legal Services Form*

To become clients of the CED Clinic at Denver Law, potential clients must submit a Request for Legal Services Form by visiting <http://www.law.du.edu/clinics/cedc>. There are three different forms, one each for nonprofit corporations, for-profit entities, and artists. The form requests background information about the potential matter, including the ownership structure and financial information. Potential clients can submit the appropriate form online, via fax, or by U.S. mail. De-

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<sup>46</sup> See, *e.g.*, AMERICA'S SBDC, <http://americassbdc.org/>.

<sup>47</sup> See, *e.g.*, DENVER SMALL BUS.SUPPORT COALITION, <http://www.denversmallbiz.org/>.

pending on the nature of the request, CEDC faculty will meet with the potential client for vetting to determine if the proposed matter(s) are pedagogically appropriate for CEDC student attorney representation. Priority is given to projects that: (i) do not have access to discretionary funds for legal advice; (ii) are community-based, serve low-wealth communities, or are owned/operated by women, minorities, or economically disadvantaged individuals; (iii) have a written business or strategic plan or can otherwise demonstrate the capacity for ongoing operations; (iv) are located within the Denver metropolitan area; and (v) complement the CED Clinic's educational goals (which include exposure to the transactional competencies listed earlier).

3. *Methods for Introducing and Marketing a New Transactional Clinic*

- Create a brochure and other collateral materials<sup>48</sup>
- Send letters of introduction to key community and local government stakeholders involved in projects in which you are interested and request meetings
- Table at events sponsored by complimentary service providers
- Read local papers and invite yourself to events and open houses conducted by complimentary service providers
- Find media outlets in which to announce the opening of the clinic (such as your institution's alumni magazine and local business journals)
- Contact complimentary service providers and, if possible, give presentations to their general memberships
- Announce in main university publications and newsletters

D. *Representative Clients*

I select client matters in accordance with the transactional competencies and selection criteria previously discussed. CEDC client matters involve a range of transactional projects. Broad categories of CEDC client work include: entity formation; ownership agreements; governance audits; advice; workshops; licenses; permits; worker classification distinctions; contracts; memoranda of understanding; form contracts and other form documents (including purchase orders and form subleases); leases; license agreements; applications for recognition of tax-exempt status; advice about for-profit activities undertaken by nonprofit corporations; employee handbooks; and regulatory interpretation and advice. Below is a sampling of matters on which students in the CED Clinic have worked since its inception.

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<sup>48</sup> For the CED Clinic brochure see [www.law.du.edu/clinics/cedc](http://www.law.du.edu/clinics/cedc).

1. *Marginalized/Undercapitalized Communities and Community-Based Revitalization*

- A community-based nonprofit neighborhood association in a heavily immigrant, Latino, and African-American community, dedicated to advocating for greater resident participation in a redevelopment project, seeking assistance with board and membership governance counseling; plain language translations of redevelopment documents; obtaining community input to create and communicate a “list of concerns” to the neighborhood’s city councilmember and the entire City Council; and drafting public comments for residents and the neighborhood city councilmember to deliver at a public hearing.
- A 501(c)(3) nonprofit corporation, dedicated to leadership development in Colorado’s Latino community, seeking assistance with governance, contracting, and review of its employee and board policy and procedures manuals.
- A 501(c)(3) nonprofit corporation, dedicated to policy and organizing work on behalf of working families, seeking assistance with the formation and operation of resident-owned housing cooperatives and legislation protecting manufactured home communities.
- A 501(c)(3) nonprofit corporation focused on providing coaching and mentoring to small business owners in an historically underserved by rapidly gentrifying commercial corridor.

2. *Microfinance/Social Enterprise*

- A 501(c)(3) nonprofit microfinance lender seeking assistance with forming a strategic partnership with a high school investment club, advice regarding crowdfunding securities regulations, drafting state and federal non-action letters, and revising form loan documents (including borrower application, promissory note, security agreement, and guaranty agreement) and providing a related staff training.
- A community development corporation serving the Latino community and its nonprofit affiliate seeking assistance with the creation and start-up of a small business incubator, including research regarding best practices for business incubators; drafting a form sublease, services agreement, and building rules and regulations; intellectual property advice; and governance counseling.
- A 501(c)(3) nonprofit, dedicated to improving the economic self-sufficiency and life-skills training of developmentally-disabled persons, seeking assistance with the creation of a new model of small businesses co-owned

and governed by its program participants (including entity formation, establishing an ownership structure that avoids personal income conflicts with the receipt of government benefits, and governance counseling).

- A nonprofit corporation focused on reproductive justice seeking to separate its legal services from its advocacy work and to form a public benefit corporation.

### 3. *Children and Youth*

- A 501(c)(3) nonprofit, dedicated to providing outdoor experiential education (such as rafting) and leadership training for youth from underserved communities, seeking assistance with drafting an intellectual property transfer agreement revising its contract terms and conditions, drafting bylaws and an employee manual, and creating a board manual.
- A 501(c)(3) nonprofit corporation, dedicated to youth empowerment through entrepreneurship development, seeking assistance with the creation of a small business development kit for its participants, intellectual property advice, and governance advice.
- A 501(c)(3) nonprofit corporation, dedicated to providing a range of art education and job training to youth in underserved communities, seeking assistance with drafting a form license agreement, drafting a form purchase agreement, and drafting a memorandum of understanding to use with community partners.

### 4. *Women/Minority-Owned Businesses*

- A furniture designer and manufacturer seeking assistance with worker classification distinctions, OSHA compliance, drafting both form a consignment agreement and purchase order, drafting a sublease, and negotiating an annual license fee for a national oil company to enter client's property to conduct environmental compliance tests.
- A local video game retailer with multiple locations seeking assistance with a corporate restructure and transitioning from working with independent contractors to hiring employees.
- A sushi chef and food cart owner seeking assistance with entity formation, hiring employees, compliance with FDA regulations (including food safety and advertising), and negotiating a lease.
- A for-profit art consulting firm seeking assistance with drafting an ownership agreement, drafting cooperation agreement, drafting a form client agreement, and worker classification advice.

- A paleo baker seeking assistance with a form nondisclosure agreement, intellectual property, and a form manufacturing agreement.

5. *Immigrant Communities*

- A nonprofit, with a mission of supporting economic development opportunities for African immigrants in Colorado, seeking assistance with entity formation; governance counseling; applying for state and federal tax-exempt status; and best practices related to its relocation and adjustment, networking, education, and job training.
- A chamber of commerce seeking assistance with entity formation, governance counseling, applying for recognition of 501(c)(6) tax-exempt status, and advice regarding both best practices related to the operation of chambers and its mission to support African immigrant small business owners in Colorado by encouraging and fostering economic development and trade with African counterparts (focusing on West and North Africa).

6. *Environmental Missions*

- A 501(c)(3) nonprofit, dedicated to environmental justice in underserved communities, seeking assistance with the development of an urban community-supported agriculture greenhouse and related youth job training program (which may be replicated by its affiliates across the country).
- A national 501(c)(3) nonprofit youth organization, dedicated to grassroots environmental organizing and leadership training, seeking assistance with drafting an MOU to govern disbursements of federal grant funds to strategic partners, drafting employee manual, workers' compensation compliance, governance counseling, compliance with state fundraising regulations, and contracting with professional fundraisers.
- An environmental consulting company seeking assistance with drafting a form consulting agreement and form independent contractor agreement.

E. Administrative Concerns

A law clinic is a law firm, and, as such, there are a host of administrative details to address. Many of these are identical to the administrative issues that arise in non-transactional clinics, but there are a few that are unique to transactional practice. These include malpractice insurance, understanding how the state student practice rule governing law students' representation of clients under faculty supervision applies to transactional law clinics, client management software, and conflicts checks.



### III: TEACHING THE TRANSACTIONAL LAW CLINIC AND SELF-REGULATED LEARNING

Because learning in practice happens informally, it is important that clinic students develop good lawyering habits during their clinic experience to capitalize on those future learning opportunities.<sup>49</sup> To develop good lawyering habits during a clinic experience, student attorneys must appreciate both the substance of what they are learning as well as why and how they are learning it. Just as students must be intentional about their learning, we as their teachers, must be intentional about how and what we teach. The following Section offers some suggestions for designing a transactional clinic to meet those goals.

#### A. *Teaching the Transactional Law Clinic Seminar*

As explained below, the clinic seminar is comprised of substantive law classes, firm meetings, and simulations. The classroom is the space where students (1) are exposed to substantive law issues that impact their clients; (2) practice their oral presentation skills and identify, articulate, and defend their rationales for client advice; (3) learn to appreciate the value of knowledge and knowing how to ask for help by learning how to view their colleagues as resources during firm meetings; and (4) learn by engaging in simulations.

- (i) Notes about the syllabus. The CED Clinic is a year-long clinic. During the fall semester, the syllabus is tailored to substantive law topics that may generally affect clinic clients, such as selecting the appropriate legal entity for a business and the IRS tax-exemption application process. This includes a class entitled Legal Research and Writing in Transactional Practice that is taught by a law librarian with a corporate law background. During the spring semester, the syllabus is tailored to community economic development practice, including a focus on federal, state, and local government economic development programs. The classroom component is organized as a discussion, and the syllabus reflects a diverse range of reading materials, including law review articles, practice materials, local media, and readings from other disciplines, to give students an appreciation for the various frameworks that shape the legal issues that challenge their clients.<sup>50</sup>

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<sup>49</sup> See, e.g., Barry J. Zimmerman, *Becoming a Self-Regulated Learner: An Overview*, 41:2 *Theory into Practice*, 64, 66 (2002). “The most vital materials of preventive law reside unrecorded in law office practice rather than in the recorded litigated case.” Louis M. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. PA. L. REV. 940, 950 (1956). This, however, is not ideal because “[a]n organized body of knowledge of preventive law practice can hardly be expected to develop . . . experiences found in law office archives.” See *id.* 950–51.

<sup>50</sup> The officially assigned text is ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRO-

- (ii) Firm Meetings. Firm meetings are my transactional analog to the signature pedagogy of case rounds.<sup>51</sup> During firm meetings, students present their client matters and have the opportunity to discuss questions, strategy, or outcomes concerning their client work. In addition, to get the benefit of their colleagues' feedback, students use this setting to moot client presentations and client counseling scenarios. While firm meeting topics are grounded in the client work, using specific topics has been useful for getting the students to engage with their client work on a different level. Such topics include "Pitching the Client to the Firm's Pro Bono Committee" and "Law Teaching and Teaching CLEs." With these unifying topics, the students can more easily ascertain similarities and differences between their client matters. Firm meetings ensure the broadest exposure possible to the clinic's various client matters, and the student learning experience is enriched from both hearing about their colleagues' various experiences and brainstorming about challenges with client work.
- (iii) Simulations and Client Profiles. Simulations are conducted throughout the course of the year and are based on lawyering skills that are fundamental to transactional practice, such as contract drafting, client counseling and communications, and negotiation. Very early in the year we begin to discuss the counseling role of transactional lawyers and the amorphous distinction that frequently exists between providing clients with legal advice and business advice. Therefore, prior to meeting with any client, student attorneys must draft a Client Profile Memorandum. The simulation is designed to demonstrate to students the importance of planning for client meetings while giving them the opportunity to experience their respective approaches to collaboration before meeting with an actual clinic client. Moreover, students begin to appreciate the art of planning and running meeting agendas and, very importantly, how to tell a client "I don't know." This document is not for the client's use. Rather, it serves to help the student attorneys prepare for the representation by requiring them to learn their client's current state of operations, industry, market, the nature of goods and/or services provided, and mission (as applicable to either for-profit or nonprofit clients). From this exercise, students learn (1) transactional lawyers cannot effectively represent

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DUCTION TO TRANSACTIONAL LAWYERING PRACTICE (2013).

<sup>51</sup> See Susan Bryant & Elliott Milstein, *Rounds: A 'Signature Pedagogy' for Clinical Education?*, 14 CLINICAL. L. REV. 195 (2007) (presenting a framework for structuring case rounds discussions in litigation clinics).

their clients without having a substantive understanding of how their business operates—how they provide their goods and/or services, (2) that clients appreciate it when their lawyers actually know the nature of their business and/or mission, and that this builds rapport, particularly during the first client meeting, and (3) that clients must navigate social, political, and economic systems that could impact their goals. Client Profile Memorandums<sup>52</sup> should contain answers to each of the questions below as well as any other important information that the student determines is important to complete the profile.

1. Clearly describe your client's operations. What does your client do, and when and where does it conduct its operations?
2. Who is your client contact?
3. What is your client's ownership structure? What is your client's governance structure?
4. What is your client's current financial condition?
5. Does your client rely on a certain population or demographic for its customers and/or constituents?
6. Who are your client's competitors?
7. What regulatory agencies commonly oversee your client's activities?
8. How is your client situated in community economic development practice, if at all?
9. What political and/or social systems are implicated by the client matters?
10. Begin researching your client's industry or constituency. Identify *at least* 3 non-legal resources that will help prepare your team for the initial client meeting and the representation (*e.g.*, trade or industry association publications, marketing materials, or educational materials).

### *B. Orientation*

We begin the year with a two-day Orientation that occurs before the first day of class at the law school. Day one serves as an introduction to CED and transactional practice, and the focus is on ethical rules unique to transactional practice, the role of the student attorney, and transac-

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<sup>52</sup> The questions in this assignment are inspired by DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS, A CLIENT-CENTERED APPROACH* (2004). This assignment is analogous to company profile documents and students receive sample documents drafted for for-profit and nonprofit clients.

tional lawyering in the public interest, including a viewing and discussion of the documentary *So Goes a Nation*.<sup>53</sup>

On day two we (1) tour two of Denver's historically underserved neighborhoods and (2) meet with an existing clinic client at its place of business. The first tour is conducted by a private developer who offers the students a pro-development perspective on a gentrifying neighborhood. The second tour is conducted by a representative from the Denver Housing Authority ("DHA") who walks us through one of the agency's transit-oriented development projects. This tour includes a discussion of the community's participation in the planning process. During our client-site visit, a clinic client speaks with the students about their experience with working with student attorneys so that the students can begin to develop their professional identities and appreciate the extent to which clients rely on their counsel. Orientation is designed to introduce the students to both the sophistication of actual practice as well as the nature of the underserved communities in Denver that the clinic was designed to assist. Both students and faculty get a sense of each other's personalities and the students begin to bond during the two-day orientation as they begin to consider their co-counsel.

### C. *Supervising Student Attorneys in a Transactional Legal Clinic*

While it is true that client work and the clinic seminar are the two bookends of clinic design, supervision is the hallmark method by which both the teaching and client work are accomplished.<sup>54</sup> Supervision is the nature of interactions between student attorneys and faculty to advance client work. It is the space where the facts of the students' client work are blended with what is discussed in the classroom, facilitating student learning through the advancement of their client representations. It is also the space in which to tease out each student's particular arch of professional development, touching on subjects such as time management, improving writing skills, and professionalism. Supervision occurs in a variety of different interactions. The most formal supervision is the regularly scheduled (usually weekly) interaction between a student and a clinician. However, supervision is not limited to regularly scheduled meetings. Supervision happens each time a student and faculty engage over a client matter—whether formally during a regularly scheduled meeting, or informally during an unscheduled "drop by" office visit, or by other means including email. Much of the scholarship concerning supervision has focused on the directive–nondirective continuum.<sup>55</sup> In other words, how much direct instruction should a clinical faculty member be

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<sup>53</sup> SO GOES A NATION: LAWYERS AND COMMUNITIES (Jacob Bender et al., 1998), available at <http://law.fordham.edu/louis-stein-center-for-law-and-ethics/32007.htm>.

<sup>54</sup> See Barry et al., *supra* note 6, at 17–18.

<sup>55</sup> See, e.g., James H. Stark, Jon Bauer, & James Papillo, *Directiveness in Clinical Supervision*, 3 Pub. Interest L. J. 35 (1993).

when interacting with a student about client work and what are the appropriate points of faculty intervention in any given client matter? There is a range of schools of thought on this topic, and this is not the focus of this article. This article engages with the topic of supervision by introducing the idea of how supervision can be a space for teaching self-regulated learning. Self-regulated learning is “an ordered mental process—a sequenced *routine* practiced automatically by experts and seasoned learners”<sup>56</sup> that fits particularly well with the structure of transactional practice. It offers a strategy for employing techniques to engage students in self-regulated learning during supervision. Specifically, the article suggests that explicitly using a self-regulated learning framework in civil practice may help students develop the habit of being life-long learners—which is essential crucial to their future success as attorneys, regardless of the nature of their practice.

### 1. *Supervising Co-Counsel*

To mirror the collaboration required for successful transactional practice, clinic students work in teams of two.<sup>57</sup> They select their co-counsel at the beginning of the academic year. Students quickly learn the benefits and challenges of working with co-counsel. The perspective of “benefit” and “challenge” is, of course, unique to the perspective of each student. Working as co-counsel prepares the students for practice by providing the opportunity to work with someone of a different gender, sexual orientation, race, economic class, parental status, or other difference. Similarly, it forces the students to think about whether or not they want to co-counsel with a best friend. Scheduling a time for our weekly supervision meetings is one of the pair’s first tasks, and the students begin to learn to coordinate schedules and navigate each other’s personality. In addition, their collaboration eases their collective transition from the mindset of a student to that of a student-attorney.

### 2. *The Weekly (or Otherwise Regularly Scheduled) Meeting*

I meet with my students for formal (scheduled) supervision meetings once a week for 90 minutes to 2 hours to discuss and assess their learning and the progress of their client work. The students are responsible for preparing (1) a supervision agenda that must be submitted twenty-four hours in advance of supervision and (2) action plans that must be submitted within 24 hours after the meeting to ensure that we are all on the same page about the plan for the representation. I employ teaching strategies that range from nondirective to directive, depending on the sophistication of the matter and the capabilities of the student. My goals are to meet students where they are at when they enroll in the clinic and to set high expectations for their advancement in practice and their professional development while becoming active participants in their own

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<sup>56</sup> See LINDA B. NILSON, CREATING SELF-REGULATED LEARNERS 9 (2013).

<sup>57</sup> After a team advances its shared client matter, each student will receive an additional client matter to manage individually.

leaning. This means that my supervision meetings are not Socratic report-out sessions, but interactions during which I brainstorm with and ask questions of my students about their client work to develop their critical thinking skills and help them find their own answers. In addition to the formal weekly supervision schedule, I meet with students on an ad hoc basis throughout the week. I know that supervision is going well when I ask a question during supervision and, before the student answers the question, she or he exclaims, “I knew that you were going to ask that!” In teaching my students to be self-regulated learners, my goal is to increase the frequency of that anticipatory response.<sup>58</sup>

### 3. *Teaching Self-Regulated Learning*

Self-regulated learning is not about learning substantive law but learning a personal process of how to assess one’s progress and work product and be actively engaged in one’s own learning. Naturally, self-regulated learning requires a demonstration of initiative.<sup>59</sup> After achieving mastery of the technique, self-regulated learners are “capable of articulating a learning task, motivating themselves through completion of the task, and of simultaneously monitoring their learning as they are learning to assess their comprehension of the material.”<sup>60</sup> “Teaching students to be self-regulated learners improves both motivation and performance.”<sup>61</sup> More specifically, the goal of teaching self-regulated learning is to enhance students “control over their own learning and ‘to help students see learning in a proactive way rather than as a covert event that happens to them in reaction to teaching.’”<sup>62</sup> Given the demands of many forms of law practice, these are key aspects of development for students to learn how to manage before graduation, thus, making self-regulated learning the most transferable skill of all.<sup>63</sup> The ability of students to develop self-regulated learning techniques is equally important to both their development as lawyers and their development as citizens of the world.<sup>64</sup> “[A] good lawyer must be able to counsel clients and serve their interests beyond the confines of his technical expertise—to integrate legal considerations with the business, personal, political, and other nonle-

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<sup>58</sup> See, e.g., Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 316 (2013).

<sup>59</sup> “The initiative which lawyers should exercise deserves serious study. When and how should it be employed? How often is initiative now employed and in what ways?” See Brown, *supra* note 49, at 951.

<sup>60</sup> NILSON, *supra* note 56, at 3–5.

<sup>61</sup> See Bloom, *supra* note 58, at 322.

<sup>62</sup> *Id.* at 318.

<sup>63</sup> The idea of self-regulated learning is not alien to firm practice. Consultants who train transactional associates identify two goals for the training: (1) “to teach the new associates the knowledge and skills” necessary to make them productive in as little time as possible; and (2) “to provide associates with the foundation for later learning and more sophisticated work.” See Stark, *supra* note 39, at 1.

<sup>64</sup> See *infra* note 70 and accompanying text.

gal aspects of the matter.”<sup>65</sup> Self-regulated learning puts students on this path to good lawyering.

The previously mentioned Carnegie Report identified three apprenticeships for law study and the development of future lawyers: cognitive apprenticeship, apprenticeship of skills and practice, and apprenticeship of professional development and values.<sup>66</sup> The Carnegie Report’s inquiry determined whether legal education was effectively engaged with each apprenticeship throughout the curriculum. As explained below, as a general matter, legal education excels at the first apprenticeship but is under engaged with the second and third apprenticeships. Clinics, however, by definition, automatically meet the expectations of the second and third apprenticeships. Moreover, as explained below, with some modifications to the case-dialogue method and the implementation of self-regulated learning techniques, clinics, transactional clinics in particular, meet the expectations of the first apprenticeship.

The second apprenticeship, the “apprenticeship of skills and practice” refers to the engagement of law students with the practice of lawyering before they graduate. Students learn to do—to engage with the law and problem solve for their clients—and not to just think. Although the Carnegie Report deemed law school progress unremarkable, it did determine that law schools have generally, but incrementally and modestly, addressed the advancement of this apprenticeship through the growth of clinical programs.<sup>67</sup>

The third apprenticeship, the “apprenticeship of professional identity and values,” refers to a law student’s identity within the profession. More than the other two apprenticeships, the achievement of this apprenticeship can “link all parts of legal education and . . . provide a meaningful opportunity to engage in professional formation—a formation that integrates the full range of ‘apprenticeships’ in helping students appreciate their roles as professionals upon graduation.”<sup>68</sup> Like the apprenticeship of skills and practice, clinics, by definition, meet the requirements of this apprenticeship. Also like the second apprenticeship, the Carnegie Report determined that law schools were making unremarkable progress in the fulfillment of this apprenticeship because there were not enough academically rigorous routes outside of professional responsibility classes, pro bono projects, and clinics in which students could explore their professional identities.<sup>69</sup>

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<sup>65</sup> Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 5–8 (proposing advanced courses designed to integrate the fundamental lawyering skills of counseling, problem solving, and negotiation with interdisciplinary insights).

<sup>66</sup> SULLIVAN ET AL., *supra* note 5, at 27–28.

<sup>67</sup> *Id.* at 16.

<sup>68</sup> *Id.* at 20.

<sup>69</sup> *Id.* at 19–20.

The first apprenticeship, the “cognitive apprenticeship” is seemingly the most antithetical to clinical pedagogy. It refers to the “case-dialogue” method, the teaching method most commonly associated with and demonstrated in law school classrooms. The “case-dialogue method” teaches students to “think like lawyers”<sup>70</sup> and develops this thinking skill “in the specific context of legal materials and law-related content” so that students learn “what kind of knowledge ‘counts’ and how to construct knowledge for themselves within this particular field.” There is no experiential component to the case-dialogue method as currently taught in non-clinical courses. “The power of the case-dialogue method . . . lies in its pervasive repetition and routine, resulting in habits of mind that can be employed, almost automatically, when engaged in complex problem solving.”<sup>71</sup> Critiques of the case-dialogue method, however, hold that (1) it does not facilitate the development of (i) practice-oriented skills, (ii) professional identity and values, or (iii) engaging in conversations about social justice; (2) it may not engage law students after the first year because they become accustomed to the format; (3) it is ineffective in small classes, seminars, and clinics; and (4) it is not connected to how law students learn.<sup>72</sup>

As a methodology, the case-dialogue method would seem to foreclose its application as a clinical pedagogy because of its dependence on the review and analysis of judicial appellate opinions—which have practically no utility in clinic client work, transactional or other.<sup>73</sup> The implementation of self-regulated teaching techniques, however, could possibly counteract these critiques. It may seem like minor matter of nomenclature, however, using self-regulated learning lens to reconceptualize the case-dialogue method in clinical supervision as a “client-dialogue” method can broaden the effectiveness of this signature pedagogy in law teaching. For the analogy to hold true, of course, we have to alter the commonly understood definition of “case-dialogue” method to fit the clinical setting. So, instead of analyzing judicial appellate decisions, we are dialoguing about actual client facts. Because transactional clients tend to come to clinics with numerous matters, the client is always the constant in the client-dialogue method.

The analogy goes something like this. The case-dialogue method requires a law student (or students) to recite the facts of a specific case, state the holding, and give some commentary on the court’s analysis. Learning from the case-dialogue method occurs when this process occurs over a period of time with several cases so that students identify distinc-

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<sup>70</sup> See Judith Welch Wegner, *The Carnegie Foundation’s Educating Lawyers: Four Questions for Bar Examiners*, BAR EXAMINER, June 2011, at 11, 15.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> It is, of course, not impossible for an appellate court case to have some application in a litigation clinic, but certainly not as a general rule.



tions between facts and analysis offered by the courts regarding the application of blackletter law.

In the transactional law clinic client-dialogue method the facts remain the same—these are the client’s true motives for the transaction. These will remain constant unless changed by the client. Thus, instead of a case, we are discussing a transaction. For example, let’s work with an individual who wants to open a coffee shop. Among other projects, she needs assistance with choosing the appropriate legal structure for the business; formation of the selected business entity, including drafting the appropriate ownership and governance documents; a lease agreement for the location; counsel about trademarks and copyright registration for the name of the coffee shop and logo. The abbreviated discussion below introduces an approach to teaching self-regulated learning through clinical supervision by employing a client dialogue method.

Self-regulated learning processes provide a useful framework for supervision in transactional law clinics. Just as with any pedagogical framework, it is important to be explicit with students about the nature of process, the steps in process, and faculty expectations of their participation in the process. In addition, being explicit about the intent to implement self-regulated learning may ease some of the anxiety that students feel during their initial immersion into clinic practice while providing a more concrete framework by which they can assess their learning (as opposed to framing supervision in terms of directive and nondirective). As explained below, these concepts mirror elements of clinic pedagogy and are linked to the fundamentals of transactional practice. The self-regulated learning literature generally sums up the process as planning, monitoring, and evaluation, or, stated differently, as “forethought, performance, and reflection.”<sup>74</sup> As explained below, these concepts mirror elements of clinic pedagogy and are linked to the fundamentals of transactional practice.

Planning and Forethought. This phase refers to “processes and beliefs that occur before efforts to learn.”<sup>75</sup> “Good transactional lawyers learn to read contracts as checklists, and carefully acquire the documents, and put out the fires, described in the contract. This calls for organizational skill and a sense of *ownership* of the transaction.”<sup>76</sup> As stated earlier, transactional practice is a preventive law practice.<sup>77</sup> “Among other things, [preventive] foresight requires a careful evaluation of extra-legal as well as legal consideration.”<sup>78</sup> Elements of preventive lawyering include prediction and forecasting, the exercise of initiative, and planning.<sup>79</sup> El-

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<sup>74</sup> See Bloom, *supra* note 58, at 318. See, e.g., Michael Hunter Schwartz, Teaching law Students to be Self Regulated Learners, 2003 MICH ST. DCL L. REV. 447.

<sup>75</sup> See Zimmerman, *supra* note 49, at 67.

<sup>76</sup> See Bogart, *supra* note 25, at 353 (emphasis in original).

<sup>77</sup> See Southworth, *supra* note 31, at 1126.

<sup>78</sup> *Id.* at 950.

<sup>79</sup> See e.g. Southworth, *supra* note 17, at 263; Brown, *supra* note 49, at 950.

ements of effective project planning, which is particularly unique to transactional practice, include gathering information, predicting, planning affairs, and drafting.<sup>80</sup> Teaching self-regulated learning in this context means teaching students to appreciate and undertake the arts of planning and project management by having explicit conversations around their plan design and project benchmarks.

**Performance and Monitoring.** This phase refers to what the student will do in accordance with his or her prepared plan.<sup>81</sup> Self-control and self-observation are what will motivate the student.<sup>82</sup> In this context, employing a self-regulated learning lens in supervision would have students make honest assessments about their progress on client matters by separating substantive law or other challenges to the plan from those related to everyday student life (such as midterms).

**Evaluation and Reflection.** This phase follows each “learning effort,”<sup>83</sup> and is discussed below in more detail in the next section. Here a traditional nondirective approach may be enhanced by providing students with a concrete framework for navigating their client work. Throughout supervision students must engage with the facts of their client matters in various legal and nonlegal contexts. Like the case-dialogue method, a client-dialogue method would force students to consider the same types of information (the client’s goals) in various transactional contexts when there are changed circumstances or new information is provided by either the client or revealed during the course of the representation (as opposed to analyzing different cases with similar issues to appreciate black letter law distinctions). Employing this sort of framework could enhance the nondirective approach by providing a framework in which students constantly, intentionally, and explicitly assess their own learning throughout their clinical experience. This is not intended to suggest that this is not what is already occurring during supervision but to consider implementing a specific framework for how it might occur and be perceived by the students. For example, in the context of the coffee shop owner, self-regulated planning and forethought could manifest as the identification and prioritization of the client matters (previously identified). Specifically, students could develop a calendar of deadlines for submitting drafts to faculty and, once approved by faculty, to the client. If the client’s timeline changes, then the student must adjust her timeline accordingly, considering the reason for the changed timeline (e.g. a lack of financing or location). Performance and monitoring forces students to assess their work through the lens of lens

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<sup>80</sup> See Brown, *supra* note 49, at 944–46; see also Southworth, *supra* note 31, at 1134 (identifying nonadversarial planning and counseling projects as the “most significant subset of nonlitigation matters”); Stark, *supra* note 32, at 481 (describing the skills necessary to represent clients in transactional affairs).

<sup>81</sup> See Zimmerman, *supra* note 49, at 68.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* at 67.

of their own work plan. A student must ask herself if she is diligently executing her plan as dictated by the priorities she identified and not view the planning process as a separate matter within the representation. In other words, the student must understand that a project timeline is not merely a deliverable of the representation (such as formation documents that have a specific purpose or a document delivered solely for the purpose of satisfying faculty preferences). In addition, the student must process whether and how the work plan is being accomplished by monitoring how the various projects are completed. For example, if the coffee shop owner is considering the formation of a legal entity by which to do conduct business, the student must create a research plan, consider how she will present the information to the client, and consider how she will counsel the client regarding any recommendation of a particular entity that she might make. Finally, evaluation and assessment forces the student to think in advance of the conclusion of the representation to identify markers of success (however that should be defined) before projects are completed. Again, these are certainly conversations that are currently taking place during clinical supervision. The suggestions here, however, are that those conversations might be more focused through a certain framework, specifically a client-dialogue framework employing what has already been deemed successful as the first Carnegie apprenticeship and that transactional law clinics are uniquely designed to implement that framework.

#### *D. Assessment*

##### *1. Student Attorney Self-Assessments*

Through formal and informal self-evaluations, students consistently reflect upon their student learning throughout their tenure in the CED Clinic. At the end of the fall semester, students complete a mid-year self-evaluation. I meet with each student individually to discuss the self-assessment and provide my own assessment in the form of a “soft” grade.<sup>84</sup> While students receive feedback throughout the course of the academic year, this mid-year self-reflection provides students with the opportunity to critically reflect on their experience in the CED, to assess their learning, and to develop goals to shape their experience for the following semester.

##### *2. Faculty Assessments: Client Meetings and Feedback*

The students’ process of self-reflection is as important as the feedback that I provide, and I seek to create an atmosphere where the value

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<sup>84</sup> My thanks to Laura Rovner, our Clinic Director, for sharing her Unguided Writing Instructions for student self-evaluations. Students in the CED Clinic are graded on the following criteria: development of attorney-client relationship, client matter development and planning, time and client matter management; oral and written communication, professionalism, seminar participation, and self-evaluation. A more detailed discussion about grading is beyond the scope of this essay.

of both is evident. Students receive feedback (written, oral, or both) on all aspects of the work in the clinic. I strive to pair feedback with self-reflection as a way to underscore the importance of their self-regulated learning. Client meetings provide many of these opportunities. I've specifically designed the CED to provide students with a tremendous amount of client contact, and every client interaction is debriefed. On most occasions, clinic students meet with their clients at Denver Law's Student Law Office. As such, I coordinated installation of video equipment with the Educational Technology department so that CED Clinic students can record client meetings to enhance their learning and for faculty review. All client meetings are recorded and reviewed by me and/or the Whiting Clinical Fellow. As we inform all of our potential clients, we do this for the following reasons: (1) to give students feedback on their interactions with their clients and their performance during the meeting; (2) to be able to directly respond to the students' assessment of their performance; and (3) given the self-directed nature of much of our client work, to ensure the parameters and effectiveness of the representation. Students use the videos to reflect on and assess their conduct during the meeting. While the majority of students who enter transactional practice immediately after graduation may not have nearly as much direct client contact, I believe these interactions are essential to my students' development as transactional attorneys for the following reasons: (1) students take ownership of their client matters; (2) students learn how to properly prepare for and conduct client meetings (which transfers to the proper preparation for meeting with future supervisors or other parties); (3) students learn how to take accurate notes while interacting with clients (or other parties); (4) students learn how to write sufficient but timely memoranda to file about client interactions and other matters in their client representations; (5) students learn how to design questions for obtaining information from their clients or third parties on behalf of their clients; and (6) Students can become self-regulated learners.

### CONCLUSION

Every law school should have a least one transactional law clinic. Not only because both students and potential employers are calling for transactional experiential opportunities, but because transactional law clinics present one of the purest paths for teaching law students about professional development and identity. The implementation of self-regulated lawyering techniques during clinical supervision meetings fits naturally with transactional work. Self-regulated learners are resilient and known for their personal initiative, perseverance, adoptive skill, resiliency, and skill at "recognizing when they need help and asking for it."<sup>85</sup> And these are the lawyers that we want to graduate.

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<sup>85</sup> See Bloom, *supra*, note 58, at 322.