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DOWN BUT NOT OUT! HOW LAW SCHOOL CLINICS CAN HELP BRIDGE THE SMALL CLAIMS COURT ACCESS TO JUSTICE GAP

REBECCA NIEMAN*

INTRODUCTION

As the numbers of law school applicants dwindle, the number of law students asking for more clinical legal education has increased, as has pressure from the American Bar Association, local bars and state bars, on law schools to offer more experiential learning courses. In 1983, the ABA's Task Force on Professional Competence recommended that the ABA make enhanced law school training in lawyering skills a top priority.¹ A decade later, the 1992 ABA Report of the Task Force on Law Schools and the Profession (the MacCrate Report) focused on the value to law students from practice-oriented instruction in courses such as law clinics, externships, and simulations.² Besides the ABA, the 2007 Carnegie Foun-

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¹ AM. BAR ASS'N, FINAL REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON PROFESSIONAL COMPETENCE 11-12 (1983).

² SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 260-61, 328 (1992) [hereinafter MACCRATE REPORT];

dation report on legal education stressed the need for law schools to engage in an “apprenticeship of practice” while in law school....³

Students are increasingly seeing the need for clinical training. A 2012 Law School Admission Council (LSAC) survey found that when applicants were asked what factors were most important in influencing them to apply to particular schools they listed “[c]linics/internships” third, behind only location and employment of recent graduates, and as important as bar success.⁴ When admitted applicants were later asked to identify the factors that ended up being the most important in their decision to enroll at a particular school, they listed clinics/internships second, behind only location.⁵

As the need and desire for clinical programs increases, it creates an opportunity for law schools to create clinical programs that address the access to justice gap that unfortunately does not appear to be decreasing. By creating clinical programs that represent underrepresented and underserved populations, further work will be had in addressing the access to justice gap that is so often discussed in clinical settings. But where to begin? One can find this gap in virtually every area of the law. For purposes of this article, I will focus on small claims court. In California more than 168,000 cases were filed in small claims court between 2012 and 2013.⁶ However, since that time period access to attorneys and court assistance for small claims court has greatly dwindled.⁷ In this article I propose that law schools add small claims clinical programs to their array of experiential learning opportunities. Not only will such a clinic provide the

Robert Kuehn, *Pricing Clinical Legal Education*, 92 DENV. U. L. REV. 1, 13 (2014).

³ William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 99 (2007); Kuhn, *supra* note 2, at 14.

⁴ LAW SCHOOL ADMISSION COUNCIL, LAW SCHOOL APPLICANT STUDY 9 (2012).

⁵ *Id.* at 46.

⁶ Court Statistics Report, Statewide Caseload Trends, 2003-2004 through 2012-2013, Judicial Council of California, xi (2014), <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf>.

⁷ Interview with Jay Sacks, former Supervising Attorney, California Small Claims Advisor, in San Diego, Cal. (Feb. 24, 2016).

practical legal skills both employers and students desire, but it serves the overwhelming needs of underserved communities.

Part I will provide a brief overview of access to justice, and how it is an underlying theme when creating new clinical programs. Part II will focus on the small claims court system, why it was created and what assistance is currently being provided litigants to access the small claims court. It will address the self-help, mediation and small claims advisor programs that were created to further increase access to the small claims court system, and how those programs have been both helpful and lacking in addressing litigants' needs. Part III will address the idea of increased small claims clinical programs in law schools and analyze how legal skill development is best taught through a small claims clinical program. Part IV will discuss the overall external and internal advantages to a law school in creating a small claims clinical program.

I. ACCESS TO JUSTICE

Access to Justice is a broad concept with numerous definitions. More importantly, how it is addressed varies in response just as broadly. A common definition, however, seems to address accessing justice in courts most utilized by underserved and under-represented populations: family, housing and small claims. The term “‘equal access to justice’... is a modern formulation ... that describes piecemeal assistance to handle the personal legal problems of disconnected individual clients who cannot afford lawyers...”⁸ “We are talking about empowering the poor and downtrodden, not in order to start legal quarrels with neighbors, but to give them tools and weapons against the high and mighty: corporations, government agencies, big landlords, and chain stores.”⁹

At times, when individuals talk about access to justice, they are thinking of a person, or an organization, with some sort of

⁸ Gary Smith, *Poverty Warriors: A Historical Perspective on the Mission of Legal Services*, 45 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 34, 36 (2011).

⁹ Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 1, 8 (2009).

legitimate claim or complaint.¹⁰ The question is whether there is a realistic and practical way of turning this claim into reality, and of pursuing this complaint.¹¹ Another way to think about access to justice is access to information.¹² Are all litigants fairly and adequately obtaining the same access to legal information? Justice can also mean not an institution or a process, but a concrete result—that is, “justice” in the sense of a fair outcome, or getting one’s due.¹³ Access to justice can be seen in many different lights: procedural or institutional, substantive, informational or even economical.¹⁴

State courts are transforming themselves from being just “case deciding” institutions to institutions with a broader access to justice missions.¹⁵ They are moving from a focus on the number of decisions and the quality of those individual decisions in the context of the information placed before them, to a focus on the extent to which, as institutions they are accessible to those seeking justice.¹⁶ States have created Access to Justice Commissions to respond to the problems of those without access to legal representation. A revitalized movement seeking to establish a civil right to counsel has emerged, pressing for the expansion of the availability of counsel to the poor.¹⁷ In the recent past, California created a pilot project¹⁸ wherein the courts partnered with legal service providers in expanding the scope of legal representation in family law and unlawful detainer cases. At its peak, lawyers were assigned to full

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Richard Zorza, *Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative Law System*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 63, 64 (2009).

¹⁶ *Id.*

¹⁷ Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 38 (2010).

¹⁸ Sargent Shriver Civil Counsel Act, <http://www.courts.ca.gov/15583.ht> (last visited May 19, 2016).

representation of litigants throughout the court process, up to and including the court hearing.¹⁹

Unrepresented litigants in the courts is nothing new. Legal needs studies consistently show that 70 to 90% of the legal needs of the poor go unaddressed.²⁰ Many unmet legal needs involve housing, family, and consumer issues.²¹ Legal services offices only represent a fraction of eligible clients seeking assistance.²² Further, it is a well-documented fact that only half of those seeking assistance from federally funded legal aid programs can be served, and fewer than one in five low-income individuals get the help they need.²³ In California, more than 4.3 million court users are self-represented.²⁴ Further, unrepresented litigants often fare poorly in the courts.²⁵

In 2008, Chief Justice John Broderick of the New Hampshire Supreme Court stated at a gathering of Chairs of Access to Justice Commissions that: “The single biggest challenge confronting the state courts in America ... is the rising number of self-represented litigants. ... The self-represented are no longer just the poor, but their ranks now include more members of the middle-class and a rising number of small businesses.”²⁶

¹⁹ *Id.*

²⁰ Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 1, 9-13 (2005), <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGapInAmerica2009.authcheckdam.pdf>.

²¹ *Id.*

²² Alan W. Houseman, *The Future of Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 43-46 (2007).

²³ Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low Income Americans*, 1, 2-3 (2009), <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGapInAmerica2009.authcheckdam.pdf>.

²⁴ *Statewide Action Plan for Serving Self Represented Litigants*, Task Force on Self Represented Litigants, Judicial Council of California, <http://www.courts.ca.gov/documents/selfreplitsrept.pdf>.

²⁵ *Supra* note 17, at 41.

²⁶ John Broderick, Chief Justice of New Hampshire Supreme Court, Remarks at a gathering of Chairs of Access to Justice Commissions (May 9, 2008) (transcript

Access to justice issues can also vary depending on who the author of proposed changes to these issues is. Legal services attorneys often focus on the issue of access to justice particularly of marginalized groups. Academics tend to look at these same issues through the lens of student involvement and the ability to merge community issues with student learning. One such alternative, expanding law school clinic offerings by increasing legal clinics, particularly those clinics that work with populations who do not have alternatives, and whose services are continuously being cut by the court, will further address the access to justice issues that continue to swirl around the notion of underserved populations getting their day in court.

Therefore, I propose in this article the expansion of law school small claims clinics as a means to further access to justice initiatives, while also providing rich practical skills opportunities for law students.

II. SMALL CLAIMS COURT SYSTEM

The first small claims court in the United States was established in Cleveland, Ohio, in 1913, and was called the Conciliation Branch of the Municipal Court.²⁷ The origin of small claims courts can be traced to England, where in 1606 the Debtor's court was established to provide "speedy, informal, and inexpensive disposition of small claims through simple proceedings."²⁸

Small claims courts are deserving of attention not only because of their voluminous use,²⁹ but also because of their importance to individuals and businesses alike.³⁰ In addition to providing a

available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/Broderick_ATJ_Speech.authcheckdam.pdf).

²⁷ Reginald H. Smith, *Justice and the Poor* 1, 48 (1919).

²⁸ Comment, *Small Claims Courts*, 34 COLUM. L. REV. 932, 933 n.7 (1934).

²⁹ 2014 Court Statistics Report, *Statewide Caseload Trends, 2003-2004 through 2012-2013*, Judicial Council of California, xi (2014), <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf> (stating in 2015 in California, more than 155,000 small claims petitions were filed).

³⁰ Susan Raitt et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. DISP. RESOL. 55, 57 (1993).

forum for claims by individuals, these courts are a “relatively expeditious and inexpensive means” for both small and large businesses to compel debtors to fulfill their contractual obligations.³¹ However, as the court developed a foothold, the original goals of speed and low cost were achieved to a certain degree, but fundamental problems with the courts existed.³² In particular, critics accused small claims courts of being inaccessible to the average citizen and an ineffective means of resolving minor disputes.³³ Lack of knowledge and experience not only represented a barrier to access for potential claimants, it also disadvantaged litigants who actually used the court.³⁴ Even today, plaintiffs, hesitant to pursue a small claim matter because of complicated procedures and unfamiliarity with the law, may choose not to file.³⁵ Defendants may choose to default rather than go to court because they fail to understand the plaintiff’s claim or because they concede defeat, unaware of possible defenses.³⁶

The barriers to small claims courts’ access, critics charged, did not affect all persons equally, a problem that may account for the significant disparity in utilization of the small claims court between businesses and individuals.³⁷ Not surprisingly, the courts began to determine which types of reforms and strategies could best address these ongoing disparities. Small claims reforms specifically aimed at improving accessibility to the courts have included scheduling small claims trials and small claims clerks’ office hours during some evenings and weekends, development of public information programs to increase awareness of the courts, improved small claims clerk, assistance, and education programs and improved informational

³¹ John A. Goerdt, *State Justice Institute, Small Claims and Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes*, in 12 URBAN JURISDICTIONS xi (1992).

³² Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 440–41 (1990).

³³ *Id.* at 441.

³⁴ *Id.* at 442.

³⁵ *Id.* at 443.

³⁶ *Id.*

³⁷ *Id.*

materials to instruction litigants on how to use the small claims procedure.³⁸

As the years progressed additional assistance was created to assist small claims litigants. Currently, there are various types of programs that are available for small claims litigants. For purposes of this article I will focus on: small claims court advisors, self-help clinics and mediation programs.

A. Small Claims Court Advisors

California is unique, in that it has created in its Code of Civil Procedure, the requirement that small claims court advisors be available to small claims participants, to answer questions on small claims cases, ranging from proper documents to file, as well as post judgment questions. However, implementation of this requirement has varied over the decades.

California Code of Civil Procedure Section 116.260 requires that small claims advisors be available to serve members of the public. The law allows for much latitude as to how these advisory services are administered. Each county is able to determine, based on local needs and conditions, how their advisory services are administered.³⁹ However, the law does require that each advisory service provide “individual personal advisory services, in person or by telephone, and by any other means reasonably calculated to provide timely and appropriate assistance.”⁴⁰

The law does allow for some variance: “... (2) recorded telephone messages may be used to supplement the individual personal advisory services, but shall not be the sole means of providing advice available in the county; and (3) adjacent counties, superior courts in adjacent counties, or any combination thereof, may provide advisory services jointly.”⁴¹ Further, “small claims advisors may be volunteers, and shall be members of the State Bar, law students,

³⁸ *Supra* note 32, at 446-47.

³⁹ Cal. Civ. Proc. Code § 116.940(a) (West 2014).

⁴⁰ Civ Pro § 116.940(b)(1).

⁴¹ Civ Pro § 116.940(b)(2)(3).

paralegals, or persons experienced in resolving minor disputes, and shall be familiar with small claims court rules and procedures.”⁴²

At its peak in San Diego, this included a full-time small claims advisor in each of the four main courthouses in the county.⁴³ This also included numerous law student workers, paid by the court, in each location as well.⁴⁴ During this height of funding, most advisors were licensed members of the California Bar.⁴⁵ Advisors were available Monday through Friday, from 8:30am to 4:30pm.⁴⁶ Members of the public were assisted, on a first-come, first served basis, with both completion of small claims forms, but also legal education on how the small claims process worked.⁴⁷ As the California court budget began to erode, cuts naturally began to take place within the Small Claims Advisors office.⁴⁸ However, since that time, all physical small claims advisors offices have closed in San Diego, and currently, there is only a telephone hotline available for those individuals seeking assistance as they prepare for small claims court.⁴⁹

Why does this decrease in assistance have such a large impact? The numbers tell the story. In 2015 in California, more than 155,000 small claims petitions were filed.⁵⁰ During the height of the San Diego small claims advisor office, approximately 135 individuals utilized the “walk in” service at the small claims advisor offices throughout the county each day.⁵¹ Further, approximately

⁴² Civ Pro § 116.940(f).

⁴³ *Supra* note 7.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Court Statistics Report, Statewide Caseload Trends, 2004-2005 through 2013-2014*, Judicial Council of California, xv (2015), <http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf>.

⁵¹ *Supra* note 7 (the small claims advisor’s office was opened Monday through Friday, 8:30am-4:30pm).

120 individuals used the hotline service at the small claims advisor office each day.⁵²

On the opposite end of the spectrum is the New York Small Claims court system. If assistance is needed with small claims issues, there are both Help Center Court Attorneys, who are actual employees of the New York Court and Volunteer Lawyers who are members of the local bar. The main difference between the two are that the Help Center Court Attorneys do not provide legal advice, whereas the Volunteer Lawyers are allowed to do so. Further, neither go to court to represent the litigant.⁵³

Some may argue that these are small claims cases, they do not have a significant impact and because of the purposefully simple nature of the filings and hearings, attorneys and legal assistance are truly not needed. However as the former supervising attorney for the San Diego County small claims advisor's office has stated, "Small claims court is oftentimes the only interaction people in society have with the court system. We want it to be a favorable introduction. After all, the legal system so often has a negative connotation in the minds of the public. If we can make people an effective lawyer for a day in small claims court, it can greatly shape the public's view of the legal system."⁵⁴ The California court has recognized that small claims courts were created because ordinary litigation fails to bring practical justice when the disputed claim is small.⁵⁵

Additionally, small claims legal needs have not been met by members of the bar. Most attorneys find it cost in-effective to represent a claimant whose potential damages are less than \$20,000.⁵⁶

Given that in the state of California, small claims courts cannot hear cases where damages exceed \$10,000 for that of an

⁵² *Id.*

⁵³ New York State Unified Court System, *Volunteer Lawyers Program Unrepresented Litigants*, <https://www.nycourts.gov/courts/nyc/smallclaims/vlpselfrep.shtml>.

⁵⁴ Interview with Jay Sacks, *supra* note 7.

⁵⁵ *Pace v. Hillcrest Motor*, 101 Cal. App. 2d 476, 478 (1980).

⁵⁶ Tal Finney & Joel Yanovich, *Expanding Social Justice Through the "People's Court"*, 39 LOY. L.A. L. REV. 769, 772 (2006).

individual, and \$5,000 for claims brought by businesses,⁵⁷ small claims litigants will have difficulty finding an attorney to assist with their legal needs. If a case is only worth \$10,000 at most, what would a litigant be willing to spend on attorney fees? A representative of a pro self-legal assistance help-line stated, “we have never seen anyone who has the money or resources choose to go pro se. The only time they come to us is when they can’t afford the high cost of the law.”⁵⁸ Further, in California, attorneys are not allowed to represent a litigant at the small claims hearing.⁵⁹ However, some of the other larger states do allow for small claims litigants to be represented by attorneys,⁶⁰ but finding an attorney may still be difficult based on the cost analysis above.

This has created a vacuum where tens of thousands of small claims participants literally have nowhere to turn. Legal service providers are unable to assist, as funding is always limited and issues such as domestic violence, family, unlawful detainers and consumer issues are more pressing.⁶¹ In the interim, it appears that the need is being addressed, in a small way, through self-help programs and continuing small claims mediation services.

⁵⁷ The Judicial Branch of California, California Courts, *Self-Help Basics*, <http://www.courts.ca.gov/1256.htm>.

⁵⁸ Finney & Joel Yanovich, *supra* note 56, at 774.

⁵⁹ The Judicial Branch of California, *supra* note 57.

⁶⁰ Texas, New York and Florida allows litigants, both individuals and corporations, to be represented by attorneys in their Justice Court. See *How to Sue in Justice Court*, http://www.tyla.org/tyla/assets/File/HowToSueInJusticeCourt-SB0119E-1013_Web.pdf; *NY State Courts, Your Guide to Small Claims & Commercial Small Claims*, <http://www.ag.ny.gov/sites/default/files/pdfs/publications/smallclaims.pdf>; Florida Courts, *Small Claims*, <http://www.flcourts.org/resources-and-services/family-courts/family-law-self-help-information/small-claims.stml>.

⁶¹ Legal Services Corporation, *LSC-2013 At a Glance*, <http://www.lsc.gov/media-center/publications/2013-lsc-numbers#bftoc-client-services>.

B. Self-Help Programs

In California, a few law schools have tried to fill the need through offering small claims self-help programs.⁶² Self Help programs were started to supplement both the legal services assistance at various courthouses as well as the full-representation clinics that law schools provided.⁶³ These programs are meant to provide a discreet service, that is, a one-time, brief consultation with an attorney in order to obtain guidance on a specific legal need. It became clear that because of both court budget cuts as well as funding constraints at law schools for full-representation clinics, an alternative needed to be implemented in order to address the access to justice issue. Self-help programs have stepped in to try to fill that gap.

At Thomas Jefferson School of Law, there is a small claims self-help program that takes places twice per month. Participants must call in first to obtain an appointment. At the self-help program, at least one volunteer attorney is present, along with volunteer law students. The volunteer law students assist by completing intake with the participant. This may include completing an intake form and asking detailed questions to determine the type of legal issue involved. Upon completion of intake, the student provides a brief synopsis of the legal issue so as to better prepare the attorney before they meet with the participant and provide legal information. The one-on-one meetings with the attorney and participant usually last between 30 and 45 minutes.⁶⁴

⁶² This information was obtained by looking at each ABA accredited law school in the state of California through a website search.

⁶³ The Judicial Branch of California, *California Courts, Self-Help, Free and Low-Cost Self Help*, <http://www.courts.ca.gov/selfhelp-lowcosthelp.htm>.

⁶⁴ Interview with Rebeca Valenzuela and Brittney Bookout, volunteer attorneys with Thomas Jefferson School of Law Small Claims Self Help Clinic, in San Diego, Cal. (April 19, 2016).

i. Benefits from Self-Help Programs

Given the severe cutback in small claims advisors offices,⁶⁵ having a program available to participants in the community, no matter how limited, provides at least a minimal amount of assistance needed to fill the justice gap created by the closures of the small claims advisors offices.

Other advantages include: contribution to addressing the resource allocation problem, experiencing ethical challenges, evaluating client results, exposure to alternative attorney-client models, and development of essential lawyering skills.⁶⁶

Bonnie Hough, a Managing Attorney with the Administrative Office of the Courts, is one of the leaders in the national movement to expand initiatives involving self-representation.⁶⁷ Hough's 2005 assessment concludes that: "(1) self-help centers are heavily used; (2) they increase access to justice but are far from filling the gap; (3) customer satisfaction is extremely high; and (4) self-help programs help the court become more efficient and effective."⁶⁸ Further, reports from self-help centers and hotlines suggest that limited assistance is most effective where the assistance needed primarily involved help completing forms to obtain access to the court process.⁶⁹

ii. Negatives from Self-Help Programs

Many have been critical of self-help programs because they don't go far enough. As if obvious from the construct of the self-help program, participants only obtain about a half hour of an

⁶⁵ Interview with Jay Sacks, *supra* note 7.

⁶⁶ Mary Helen McNeal, *Unbundling and Law School Clinics: Where's the Pedagogy?* 7 CLINICAL L. REV. 341, 374-77 (2001).

⁶⁷ Engler, *supra* note 17, at 73.

⁶⁸ Engler, *supra* note 17, at 73 n. 158.

⁶⁹ *Id.* at 75-76.

attorney's time.⁷⁰ Further, because of the limited time, in-depth analysis and preparation is simply impossible. Many of the participants seek assistance with completing their initial filing paperwork or post judgment paperwork, some of which can take in-depth discussion and planning to complete.⁷¹ Additionally, as the participant moves closer to their hearing date, more questions arise and further preparation is needed. Because of the time between self-help program meetings, participants may not have the time to come back to ask follow up questions. Further, there may not be space available at the self-help program for them.⁷² Because of this, are self-help programs a Band-Aid on a bigger issue, namely, that of access to justice?

Additionally, self-help programs are at times seen as too basic, and not an effective way to provide legal services to a community or train law students. For instance, students are only obtaining limited skill development given these clinics are normally focused on a singular subject in a compressed time frame.⁷³ Further, it arguably trains students to set a dual standard of representation.⁷⁴ Students may come out of the self-help experience thinking it is acceptable to only provide limited scope representation to the poor and that model, in and of itself, is sufficient.⁷⁵

Though there are ardent proponents and opponents of self-help programs, the programs are clearly here to stay. As is evident, they are seen as an important part of the overall access to justice movement.

⁷⁰ *Small Claims Self-Help Clinic*, Thomas Jefferson School of Law (2016), <https://www.tjsl.edu/clinics/small-claims-clinic>.

⁷¹ Interview with Jay Sacks, *supra* note 7.

⁷² Currently, there is a 2-month waitlist for members of the public to receive services at the Thomas Jefferson School of Law Small Claims Self-Help clinic.

⁷³ McNeal, *supra* note 66, at 361-74.

⁷⁴ *Id.*

⁷⁵ *Id.*

C. Small Claims Mediation Programs

There are many reasons why small claims mediation programs are popular and have actually increased over the decades.⁷⁶ First, there are cost savings for the courts themselves.⁷⁷ Mediators reduce the amount of time a judge has to spend on a case.⁷⁸ Most of the time, mediation programs use volunteer mediators, resulting in cost-effective alternatives to judges, commissioners or pro-tems.⁷⁹ Second, mediation benefits the disputants.⁸⁰ Disputants feel more relaxed and able to express their feelings with a neutral third party and feel a better ability to explain their side of the case.⁸¹ Third, the process may provide a more satisfactory settlement than what could be obtained in court.⁸²

These mediation programs are held at the courthouse, other facilities (like a mediation center) or even at law schools.⁸³ At Thomas Jefferson School of Law, Professor Ellen Waldman operates the small claims court mediation program. It is a semester long course. There is a seminar component, where Professor Waldman and her students meet each week for 110 minutes. The students are at court for a 2 to 3 hour period each week, and if the parties elect to pursue mediation, then the students mediate or co-mediate with an experienced mediator. Disputants are encouraged to pursue mediation by the small claims judge. The mediations take place the same day as trial.⁸⁴

Mediation programs appear to be quite successful in settling a substantial number of cases, and this has been true for some

⁷⁶ Folberg & Raitt, *supra* note 30, at 61.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 62.

⁸³ *Id.* at 63.

⁸⁴ Interview with Ellen Waldman, Professor of Law, Thomas Jefferson School of Law, in San Diego, CA (March 31, 2016).

decades.⁸⁵ In California, while the rate at which responding ADR programs resolve the cases brought before them varies from twenty-five percent to ninety-five percent, it is generally about eighty percent.⁸⁶

Research done in 2010 noted that at least 35 law schools nationwide offer mediation clinical courses, which provide supervised experience in mediation.⁸⁷ That number is presumably much more as practice ready experience is increasingly encouraged and clinical programs continue to increase.

Though beneficial and integral to the small claims court process, the mediation programs do not go far enough in addressing the access to justice issues that are present in small claims court. Further, the position of a mediator could essentially, in the minds of the litigants, simply be a substitution for that of a judge and thus another person in a power position relative to their case. The dominant view in literature supports the purpose of mediation to be that of solving problems and promoting settlements; many skills texts provide mediators with persuasion and argumentation strategies to accomplish these goals.⁸⁸ Further, litigants may feel intimidated sitting in a mediation setting across from someone they believe violated their trust or a law, and the process itself can be intimidating. In addition, litigants still are not prepared nor understand the process of filing their plaintiff's claim or defendant's claim, let alone knowing how to prepare for their trial. Granted, mediation can assist in hopefully preventing an actual trial by allowing the parties to come to a mutual agreement. But what happens if that's not possible? Will the parties be adequately prepared to represent their interests in front of a judge? The real reasons why mediation programs can't solve the access to justice problem are: (1) Many litigants won't agree to mediate; (2) Those that do, are still uninformed about their rights and thus are waiving rights that they

⁸⁵ Folberg & Raitt, *supra* note 30, at 80.

⁸⁶ *Id.* at 85.

⁸⁷ Cynthia Savage, *Recommendations Regarding Establishment of a Mediation Clinic*, 11 CARDOZO J. CONFLICT RESOL. 511, 512 (2010).

⁸⁸ James Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 484 (1996).

might retain if they knew their actual entitlement; and (3) Some cases in inappropriate for mediation-cases where serious imbalance exists and where the judge ought to issue a judgment because any form of compromise is inappropriate.⁸⁹

The issue then becomes: if small claims advisor offices are being severely diminished statewide, and self-help programs are only providing surface support, where can the help come from? Small claims mediation programs are central and helpful to the process, but do not go far enough in providing full access to justice for the litigants. We know the need is there. After all, we've seen based on the numbers there is a pressing need for assistance. The answer may need to come from increasing the number of small claims full representation clinical programs at law schools.

III. HELPING TO SOLVE THE SMALL CLAIMS ACCESS TO JUSTICE ISSUE THROUGH LAW SCHOOL CLINICAL PROGRAMS

Law school clinical programs have been the mainstay in legal education for providing practice ready opportunities for students. Law school clinics allow students to grapple with the real life demands of a lawyer.⁹⁰ Law students are able to practice law and represent clients through clinical programs because every jurisdiction in the United States has adopted a student practice rule.⁹¹ Once admitted, according to the relevant student practice rule, a law student working under the close supervision of a faculty member is able to perform all of the work of a licensed attorney.⁹² For example, students in clinical programs often meet with clients and witnesses to gather information, analyze client problems and provide legal

⁸⁹ Interview with Ellen Waldman, *supra* note 84.

⁹⁰ Peter Joy, *The Cost of Clinical Legal Education*, 32 B.C. J. L. & SOC. JUST. 309, 320 (2012).

⁹¹ *Id.*

⁹² *Id.*

advice, review and prepare legal documents, ... negotiate with opposing parties or their lawyers, and represent clients in ... court.⁹³

In addition to the above, perhaps a more relevant world view would be in creating students who not only are practice-ready, but also have an overall understanding of justice. Clinical professors can also teach about justice and fairness in the legal system and many truly believe this is part of the clinical pedagogy.⁹⁴

Law students as well have been asking for more practical experience.⁹⁵ Students have questions such as: “How do attorneys spend their days? How and where do I file a pleading?”⁹⁶ There appears to be this veil between the theoretical concepts being taught in law schools, and the day-to-day practice of an attorney. The clinical programs at law schools serve to pull back this veil and make the practice of law more attainable and de-coded for law students. The importance of real-world practice has been of such import, the Center for the Study of Applied Legal Education in its 2013-2014 Survey of Applied Legal Education found that student demand has typically exceeded the number of available positions in 58.5% of law clinics.⁹⁷ Further, 5 law schools currently require students participate in at least 15 experiential learning units during the course of their law school career.⁹⁸

Small claims clinics seem obvious, so why aren't more schools on a national level supporting them (putting aside the financial obligations)? In California, only one ABA law school has a Small Claims Clinic, that is, a clinic fully devoted to only small

⁹³ *Id.*

⁹⁴ Wallace Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 138-39.

⁹⁵ Aliza Kaplan, *How to Build a Public Interest Lawyer (and Help All Law Students Along the Way)*, 15 LOY. J. PUB. INT'L L. 153, 171 (2012).

⁹⁶ *Id.*

⁹⁷ Robert Kuehn & David Santacroce, *2013-2014 Survey of Applied Legal Education*, Center for the Study of Applied Legal Education 18, 18.

⁹⁸ California Western School of Law, *California Western 1 of 5 Law Schools in Nation to Exceed ABA Requirement for Experiential Education*, Campus News (April 27, 2016, 9:15 AM), <https://www.cwsl.edu/news/newsroom/campus-news/2016/04/27/one-of-five-law-schools-in-nation-to-exceed-aba-requirement-for-experiential-education>.

claims issues and litigants.⁹⁹ Unfortunately, this clinic will not be offered in the fall 2016, unless demand increases.¹⁰⁰ No, these are not nationally acclaimed cases nor will the advocacy by the law professors and students be recognized by prominent media outlets, but hundreds and perhaps thousands of low and middle-Americans will feel their legal needs were heard. They will feel they received fair access to the justice system. Jay Sacks, former Supervising Attorney of the San Diego small claims advisors office has noted that this may be the only time these individuals will ever access the US court system.¹⁰¹ Don't we want it to be fair? Accessible?

There is additional insight as to why small claims clinics are not prominent in law schools on a national level. Margaret Dalton, Professor of Law and Faculty Director of Clinical and Placement Education, at the University of San Diego School of Law noted: "Until students participate as interns in a small claims clinic, they do not see the connection between how small claims work intersects with real practice. Students do not realize that these clinics are excellent training for case preparation, from client intake to drafting briefs and preparing evidence. They don't see it as a means to get a job, which is their primary concern."¹⁰² As identified below, those assumptions by students are unfounded and small claims clinical programs can provide all of the essential lawyering skills necessary for being an effective lawyer, regardless of whether that student ends up representing a small claims litigant in their practice.

By creating small claims clinical programs, which will provide full representation to litigants, not only will the notion of access to justice be further supported, but teaching practical legal skills to students be put into practice. Further, an increased synergy with

⁹⁹ University of San Diego School of Law, *Legal Clinic*, <http://www.sandiego.edu/law/academics/advocacy-practical-training/clinical-education/clinics/small-claims.php>.

¹⁰⁰ Interview with Margaret Dalton, Professor of Law, University of San Diego, in San Diego, CA (April 11, 2016).

¹⁰¹ Interview with Jay Sacks, *supra* note 7.

¹⁰² Interview with Margaret Dalton, *supra* note 100.

currently existing small claims mediation programs, and increased collaborations with local courts can also take place.

A. Overview of Small Claims Clinic Functions

Before delving into the specifics as to how legal skills training is supported by a small claims clinical program, I want to first briefly encapsulate what such a program would look like. As with many clinical programs, a function of the clinic would be to provide both a fieldwork and seminar opportunity for students. Students would be required to take part in a weekly seminar, where substantive legal issues would be discussed, as well as practice topics relating to client interviewing, legal ethics and law office management. Further, a fieldwork component would require the students to work for a set number of hours actually working on client work. This may include client interviews, drafting documents, preparing a client for trial, drafting client letters, and legal research and writing. The goal would be for students to work with a range of clients. Realistically, given the timing constraints of a law school clinic (breaks between semesters, spring break, etc.) not all clients will walk through the door on the first day of the semester with a 2-month build up period to trial. There may be some new clients, but there may be individuals who are only 2 weeks away from trial.

As law school clinics generally cater to those individual from underserved and underrepresented backgrounds, each potential client will fill out a request for services form, requiring them to provide basic information about their case and their economic situation. Some clinics require clients to be below 200% of federal poverty guidelines. Others may look at the profit and loss statement of an existing business and require profits to be less than a certain amount. The same may be true for the balance sheet of a nonprofit. Supervising attorneys and their students will review such applications to determine which potential clients qualify, and then assign students potential clients based on the students' ability and availability.

Supervising attorneys and students will then meet with the potential client to conduct an intake meeting, at which time students will further delve into the legal issues the potential client may have.

Supervising attorneys will be present during those intake meetings as required by the various state bar certified student rules. Upon completion of the meeting, supervising attorney and student will discuss whether the potential client should be retained, and what the next steps in the representation might include. Student will then be tasked with drafting an engagement letter and following up with the potential client.

Upon finalization and signature of engagement letter by all parties, students will then be tasked with moving forward with representation. Depending on the type of small claims case, students may need to investigate the facts further, research the relevant law, or draft a trial brief. The small claims clinic will allow students to develop their critical thinking skills and learn to look at a case through multiple lenses. Further, because of the relative speed in which small claims cases go to trial, students will also learn to better prepare in an efficient manner, glean information quickly, and learn how to prioritize in an effective manner. Students may organize evidence for the client, prepare a trial binder and even assist in witness preparation.

Though some small claims courts do not allow attorney representation,¹⁰³ many larger states such as New York, Florida and Texas do allow representation.¹⁰⁴ Consequently, in many small claims clinics, students will have the opportunity to prepare for trial and present the client's case in court. Though a particular state may

¹⁰³ The Judicial Branch of California, *supra* note 57.

¹⁰⁴ Texas, New York and Florida allows litigants, both individuals and corporations, to be represented by attorneys in their Justice Court (equivalent of Small Claims court) http://www.tyla.org/tyla/assets/File/HowToSueInJusticeCourt-SB0119E-1013_Web.pdf; <http://www.ag.ny.gov/sites/default/files/pdfs/publications/smallclaims.pdf>; <http://www.flcourts.org/resources-and-services/family-courts/family-law-self-help-information/small-claims.stml>. Further, all three states allow law students to practice in any state court under the supervision of a licensed attorney in that state (https://www.texasbar.com/AM/Template.cfm?Section=Law_Student_Info1&Template=/CM/ContentDisplay.cfm&ContentID=30272; New York Judiciary Law section 478, 484; [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/7D2109F923DFB91385256B29004BEC33/\\$FILE/RTFB%20Chapter%2011.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/7D2109F923DFB91385256B29004BEC33/$FILE/RTFB%20Chapter%2011.pdf?OpenElement)).

not allow for attorney representation at trial, the pre-trial work up is arguably just as important for students to prepare them for trial practice.

Additionally, an often overlooked area of potential small claims clinical work is in the appellate phase and post judgment collection. These two areas are often the most complicated and where litigants most need attorney assistance. Again, potential clients coming into the small claims clinic do not need to be individuals only at the beginning phases of litigation. Rather, those who present with post judgment issues, as well as appeals of small claims decisions, will further round out the student work and allow for deeper, all around understanding of small claims court practice, as well as take the trial practice to a more involved and complicated level.

B. Practical Skills Development

One of the more popular events that took place that brought renewed focus and attention to the need for clinical education came from the publishing of the ABA's *MacCrate Report* in 1992.¹⁰⁵ The *MacCrate Report* identified lawyering skills and professional values necessary for the ethical, effective practice of law, and called for clinical programs to be the vehicle for teaching them in law school.¹⁰⁶ Responding to the MacCrate Report, the ABA amended its accreditation standards in 1996 to require every accredited law school to offer "live-client or other real-life practice experiences...."¹⁰⁷ Law schools may satisfy the requirement through offering

¹⁰⁵ SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR. ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATION CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSIONS: NARROWING THE GAP 56, 128 (1992).

¹⁰⁶ *Id.* at 138-40. The MacCrate Report identified ten fundamental lawyering skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas.

¹⁰⁷ American Bar Association, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2011-2012 Standard 302(b)(1), at 20 (2011).

“clinics or [externship] field placements,” but they need to offer these programs to all students wishing to enroll.¹⁰⁸

In recent years, the ABA again amended its accreditation standards and now requires law schools to offer “one or more experiential course(s) totaling at least six credit hours.”¹⁰⁹ Some states are looking to increase this experiential course requirement at law schools, and currently 5 law schools require students participate in at least 15 experiential learning units during the course of their law school career.¹¹⁰

In 2007, the Carnegie Foundation for the Advancement of Teaching once again examined legal education and published a book commonly referred to as the Carnegie Report.¹¹¹ The Carnegie Report found a need for the “integration of student learning of theoretical and practical legal knowledge and professional identity.”¹¹² Examining legal education in the twenty-first century, the report posited that “clinics can be a key setting for integrating all the elements of legal education, as students draw on and develop their doctrinal reasoning, lawyering skills, and ethical engagement, extending to contextual issues such as the policy environment.”¹¹³ The Carnegie Report’s ultimate conclusion is that clinical legal education can play a key role in preparing students for the practice of law.¹¹⁴

During that same year, the book *Best Practices for Legal Education* emphasized a need for students to engage in the supervised practice of law as part of their legal education.¹¹⁵ The book notes, “it is only in the clinics and some externships where students’

¹⁰⁸ *Id.* at Interpretation 302-5, at 21.

¹⁰⁹ American Bar Association, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2011-2012 Standard 303(a), at 22 (2011).

¹¹⁰ *Supra* note 98.

¹¹¹ William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Carnegie Foundation for the Advancement of Teaching, 2007).

¹¹² *Id.* at 13.

¹¹³ *Id.* at 121.

¹¹⁴ *Id.* at 197-98.

¹¹⁵ Roy Stuckey et al., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 151 (University Publications, 2007).

decisions and actions can have real consequences and where students' values and practical wisdom can be tested and shaped before they begin law practice."¹¹⁶ Upon graduation, "students will become fully licensed to practice law as soon as they pass a bar examination without any requirement that their work be supervised until they demonstrate competence."¹¹⁷

These reports demonstrate the continuing and critical need for clinical legal education. Taking the lawyering skills listed in the *MacCrate Report*, I will discuss how the critical lawyering skills are met and further supported within a small claims law school clinic. Further, I will demonstrate how students' lack of connection between small claims work and the practical experience of law are unfounded.

i. Problem Solving

In essence, the small claims court in California is a general civil litigation court where the maximum demand is less than \$10,000.¹¹⁸ Consequently, the types of cases filed are as varied as the individuals accessing the court. A small claims legal clinic would therefore have the diversity of cases that will support and allow students to work on their problem solving skills. For example, a prospective client may seek services relating to a breach of contract claim where a landlord failed to fix a broken heater for a period of months. Another prospective client may present with old debt that is being pursued by a creditor. Each case presents various difficulties in how to effectively address the issue and prepare for the hearing. Oftentimes in a clinical setting, students are given more than one case to work on in a particular semester. Because of that, students may be working on a debt case, and breach of contract case at the same time, requiring them to identify and diagnose the legal issue, generate alternative solutions and strategies, develop a plan of

¹¹⁶ *Id.* at 114.

¹¹⁷ *Id.*

¹¹⁸ *Supra* note 103.

action, implement the plan and maintain an openness to new ideas and strategies as the case develops.¹¹⁹

ii. Legal Analysis and Reasoning

Legal analysis and reasoning is at the core of lawyering. Small claims clinics provide an excellent opportunity to work through this skill. They allow students to identify and formulate issues, formulate relevant legal theories, elaborate on their legal theory, evaluate their legal theory and criticize it.¹²⁰ Though small claims cases may be seen as involving less rigor in exercising the legal analysis skills, the opposite is often true. Small claims individuals may have numerous other life events taking place at the same time, and it's important for students to understand how the ultimate legal conclusion that is desired may affect those life events. To many in the clinic world, we refer to it as client-centered lawyering.¹²¹ It is during the legal analysis phase that a focus on the client is just as important to determine whether the legal issues and theories formulated will result in a real world answer that actually ends up hurting the client overall based on related life events. A classic example, used by David Binder in *Teacher's Manual to Accompany Lawyers as Counselors A Client-Centered Approach*, in many clinical seminars is the following:

FACTS:

Your rich aunt dies and leaves a will making you one of several beneficiaries: The gift is \$18,000 cash.

A will contest has been filed by other relatives not mentioned in the will and the case is due for trial in two years. If the will

¹¹⁹ *Supra* note 106, at 138.

¹²⁰ *Id.*

¹²¹ David A. Binder et al., *TEACHER'S MANUAL TO ACCOMPANY LAWYERS AS COUNSELORS A CLIENT CENTERED APPROACH* 27 (2d ed. 2005).

contest is successful you get \$0 (an earlier will stands in which you are not mentioned).

You have received a settlement offer of \$5,000 to be paid next month (assume attorney's fees have already been paid).

Your lawyer says you have a good chance the will contest will be defeated and you will get a net of \$10,000 (after attorney's fees) in two years after a trial. The lawyer has also told you that she believes the case will proceed to trial if this settlement doesn't work.

INSTRUCTIONS:

Write down whether you would accept the settlement or try the case. List the reasons for your decision.¹²²

You can either situate the hypo in your own family or imagine a different family situation. Use your own values regarding money, risk, and value preference.

As is evidenced by this example, in the legal analysis phase, students have a greater opportunity to think more broadly about the impact of the legal theories they are creating and legal decisions they are hoping to achieve for their client.

iii. Legal Research

I find that most often students are surprised once immersing themselves in the clinic, by the amount of legal research they are required to do. Many are under the assumption that they would simply begin working in the clinic, meet with their client, and the next day start drafting an in- depth legal document.¹²³ I often have a conversation about the importance of taking the time to conduct legal research. I inform the students that in modern day law, it's oftentimes easy to simply find a form contract to copy or Google their answer or sample documents. However, part of our duty as attorneys is to exercise due diligence. This includes making sure the

¹²² *Id.*

¹²³ I am making specific reference to the Thomas Jefferson School of Law Small Business Law Center Community Economic Development Clinic where students take part in business contract drafting.

law has not changed, which is true even when drafting a contract. By practicing their legal research skills in the clinical setting, they are more adept at doing so once they are licensed attorneys. In small claims court, the litigants rarely reference a law or statute to support their oral argument. With representation through a clinical program, those same litigants will be provided in-depth legal research which they can then utilize to frame their argument in court. So often the small claims judge is looking to make a decision based on sound law or statute, rather than emotional arguments such as “he said/she said.”

iv. Factual Investigation

Fact investigation is seemingly easy on its face, but after observing students in the clinical setting, is actually one of the more difficult skills to master. Oftentimes I attribute this to the fact that if one is not experienced in a certain area of law, then the logical questions to ask are not so obvious. If a prospective client is being interviewed by an inexperienced clinical student and the issues that present are related to a breach of a commercial lease, the student may not know what questions to ask. However, as I have instructed students so many times, you don’t have to be an expert to obtain facts from a client. It is oftentimes a matter of common sense. Further, my clinical students often tell me that they are embarrassed or feel uncomfortable asking in depth questions because they don’t want the client to feel pressured or that their privacy is being invaded. My response is that if the prospective client wants to retain us, we need to be fully aware of all aspects of the case.

As the McCrate report summarizes, factual investigation involves determining the need, planning and implementing the factual investigation.¹²⁴ It is not simply sitting down and asking the prospective client a bunch of questions. There is strategy involved. The clinical setting is a perfect place in which to teach that strategy because students are supported by their supervising attorney and

¹²⁴ *Supra* note 119.

allowed the time to really grapple with this portion of client representation.

With small claims issues, there is rarely a clean set of facts around a particular case. There are many ancillary facts that weigh on the litigants claim. However, as opposed to an unlimited civil filing or even a class action, the facts are still discrete enough that it allows the clinical students to work through the factual investigation, without feeling completely lost.

v. Communication

In California, the number one complaint to the state bar about attorneys is the lack of communication.¹²⁵ Clients oftentimes feel that the attorney, after the initial retainer agreement is signed, disappears and doesn't reappear until money is needed. Consequently, it's a wonderful opportunity in the clinical setting to have students work on this skill. Because small claims cases proceed at a much greater speed than others, the communication between the student and client needs to be just as engaging. There's factual investigation, legal reasoning and trial preparation that needs to take place within a relatively short period of time. Because of the increased need for communication, it helps students get used to the idea of continuously speaking with their client, with the hopes of this translating into real practice upon obtaining their license.

vi. Counseling

Counseling is another way in which to teach students client-centered lawyering skills.¹²⁶ This step is arguably where the problem solving, legal analysis, legal research and factual investigation all come together. At this stage, the student will sit down with the client and analyze the decision to be made and ultimately determine the consequences and how to implement that decision. This is an

¹²⁵ Ed Poll, *Six Things That Drive Clients Crazy (And What You Can Do to Avoid Them)*, LAW PRACTICE TODAY, May 2004.

¹²⁶ *Supra* note 121.

opportunity for students to have clients take an active role in the decision making process.

Small claims cases, just like other types of litigation, require the same analysis and gathering of information. Because a small claims clinic provides a controlled setting and narrower issues, it is a good way in which to introduce students to the lawyering skills the clinical seeks to impart.

vii. Negotiation

In the negotiation phase, the small claims clinic provides an excellent opportunity to partner with many of the small claims mediation programs that law schools have. As mentioned above, small claims mediation is encouraged¹²⁷ and through the use of mediation programs, is often helpful in resolving disputes before trial. If both a small claims mediation program and small claims clinic were located at the same law school, the opportunities for collaboration, cross-teaching and analysis abound. Further, it teaches students how to work with others in their field and think more broadly about how litigation is not always necessary to resolve disputes. It provides a more holistic approach to lawyering as well, as opposed to a narrow litigation takes all mindset. Because small claims court encourages mediation,¹²⁸ and the nature of small claims cases is more discreet and narrow than other types of cases, the ability to use mediation and negotiation is greater. Therefore, the opportunity to use mediation and negotiation skills, and at the least partner with mediation programs, further teaches the negotiation skills central in legal skills development.

¹²⁷ *Mediation*, California Courts: The Judicial Branch of California, <http://www.courts.ca.gov/1011.htm> (last visited Jan. 8, 2017).

¹²⁸ *Id.*

viii. Litigation and Alternative-Dispute Resolution Procedures

What is so interesting about the eighth skill the MacCrate report suggests,¹²⁹ is that by its very nature, small claims court cases embody both litigation and ADR procedures. As mentioned above, small claims court highly encourages resolution by mediation.¹³⁰ The options of litigation and alternative dispute resolution are at the forefront and it allows a rich opportunity for students, their supervising attorney and clients to discuss the pros and cons of proceeding with each and ultimately the recourse for choosing one over the other.

Further, small claims clinical work can involve the appellate side of practice. For example, in California, small claims defendants who lose can appeal their case to the superior court in the county in which they defended the suit.¹³¹ A plaintiff is not allowed to appeal unless a counter claim was filed by the defendant.¹³² The appeal is considered a “new trial,” thus allowing the parties to present their case all over again.¹³³ This process teaches students how to preserve the record and file the appropriate appellate documents. Further, during this appellate phase, litigants are allowed to be represented by an attorney during the hearing.¹³⁴

ix. Organization and Management of Legal Work

Though seemingly logical and obvious to the skilled attorney, organizing and managing legal work is not as natural for someone just learning the practice of law. The skill of balancing multiple cases and prioritizing takes some time for students to grasp

¹²⁹ *Supra* note 119, at 139.

¹³⁰ *Supra* note 127.

¹³¹ *Appeals*, California Courts: The Judicial Branch of California, <http://www.courts.ca.gov/1016.htm> (last visited Jan. 8, 2017).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

during their clinical experience. Not surprisingly, it is a fundamental lawyering skill.¹³⁵

In the small claims clinic, because of the rapid nature of the cases and opportunity for students to handle numerous cases at once, students will be forced to grapple with organizing and managing their legal work. It will allow for teaching opportunities to discuss how to create and develop systems and procedures to make sure time is allocated efficiently.¹³⁶ One of the important tenets of this skill includes developing systems and procedures for running a law office.¹³⁷ The law clinic requires students to learn case management and document storing procedures, as well as duties pertaining to calendaring and even the simplistic nature of mailing documents to clients. Students are also assigned intake hours, wherein they are required to sit at the front desk in the clinical lobby and answer the phone and respond to questions from the public who seek the clinic's legal services. Further, they must also respond to members of the public who come into the clinic lobby requesting services.¹³⁸ It allows the students to understand on a broader level how a law office works and what non-attorneys in the office may be required to do. After all, as licensed attorneys they will be responsible not only for themselves, but also their legal staff and knowing how that staff runs their law office is part of their ethical duties.¹³⁹

x. Recognizing and Resolving Ethical Dilemmas

Ethical dilemmas are discussed in professional responsibility courses, but when it comes to putting those concepts to practice, there oftentimes appears to be a disconnect between the two.

¹³⁵ *Supra* note 119, at 140.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ This example of a clinical model specifically references the Small Business Law Center at the Thomas Jefferson School of Law.

¹³⁹ American Bar Association, ABA Model Rules of Professional Conduct, Rule 5.3. (2016).

For example, in the clinic, students rarely remember to inquire about conflict of interest issues. A new client comes through the door and thoughts turn to what the legal issue is, but not necessarily to a potential conflict of interest.

The small claims clinic will allow for a robust discussion and practice of dealing with ethical dilemmas. For example, because of the high number of individuals accessing the small claims court,¹⁴⁰ and the speed in which such cases are heard,¹⁴¹ there will be times where parties from both sides will seek assistance from the clinic. This will allow for students to consider whether representation of both parties is allowed, why or why not, and actually delve into their state's professional responsibility rules as well as the Model Rules of Professional Conduct.

At times, students will be presented with a case that may be a matter of two parties who simply dislike each other, without there being a true legal claim. Additionally, there may be times where a client may not have support for their allegation, or may desire to stretch the truth. Learning to deal with these matters is crucial to an overall understanding of practicing law.

IV. FURTHER ADVANTAGES, BOTH EXTERNAL AND INTERNAL, TO SMALL CLAIMS CLINICS

As mentioned in the preceding section, the small claims clinic provides numerous legal practice opportunities and law office management skills to students that may not easily be obtained elsewhere during one's law school career. However, it bears mentioning that small claims clinics can create unique opportunities both external and internal to the law school as well.

¹⁴⁰ Judicial Council of California, 2014 Court Statistics Report Statewide Caseload Trends 2003-2004 through 2012-2013, 40 (California Courts, 2014).

¹⁴¹ *Supra* note 103.

A. Expanded Collaborations with Current Mediation Programs

As mentioned previously in the discussion of small claims mediation programs, there is a logical synergy that flows between a small claims legal clinic and the law school mediation program, particularly those focused on small claim courts.

The opportunity for cross-teaching between students in the clinical seminar and mediation seminar provides rich opportunities for learning about the practice of law. Being able to learn not only about litigation and substantive issues in the small claims legal clinic seminar and fieldwork, but also understanding the role mediation can play as well, helps round out the understanding of how the two can go hand in hand in real world practice. It further allows students to explore alternative methods to resolving disputes that don't have to center on litigation with a judicial decision. This in turn, will allow students to take those expanded ideas of dispute resolution to their future practice, potentially utilizing the concepts in cases larger than those in small claims.

B. Helping the Community

As mentioned above, small claims advisor offices have been significantly curtailed in recent years due to court budget cuts, effectively cutting off assistance to small claims participants.¹⁴² Further, given that thousands of small claims participants were assisted annually by the small claims advisors during its strong years,¹⁴³ it is clear that those individuals are now looking for other means of legal assistance. These small claims clinics will work to fill the void. Private attorneys are not willing to work on matters that are so insignificant and do not generate any large monetary awards.¹⁴⁴ Additionally, these clinics will add to and support the work of existing small claims self-help centers, which can't provide

¹⁴² *Supra* note 7.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

as much in-depth legal assistance. Finally, legal service providers generally assist with legal issues not generally found in small claims court; that is, domestic violence, unlawful detainer, consumer issues and family law.¹⁴⁵ Because of the above, the clinics will greatly serve the community by providing a service that is currently lacking.

Providing legal representation through a small claims clinic imparts power to litigants. Simply put, legal representation provides a source of power.¹⁴⁶ The variables that provide advantages to some parties and disadvantages to others can be understood as sources of power, or lack of power.¹⁴⁷ Further, litigants themselves arrive at the court with varying degrees of power.¹⁴⁸ Without question, there is valued importance of knowledge and expertise in the legal arena.¹⁴⁹

Whether we have set up these constructs ourselves or not is left to further debate. The point remains, however, regardless of how we got here, the current system rewards those who have knowledge and expertise as they navigate through the court system.¹⁵⁰ The small claims clinical programs not only help empower small claims litigants, but also provide knowledge and expertise through legal representation, as students and their supervisors guide litigants through the system.

C. Creates Court Synergies

In San Diego County, the superior courts have created dynamic, long-standing relationships with local legal service providers. These legal services providers provide free self-help clinics throughout all four San Diego County Superior Courthouses in the areas of: domestic violence restraining orders, civil harassment restraining

¹⁴⁵ Legal Services Corporation, *2013 LSC by the Numbers* (2013), <http://www.lsc.gov/media-center/publications/2013-lsc-numbers#bfrtoc-client-services>.

¹⁴⁶ *Supra* note 17, at 78.

¹⁴⁷ *Id.* at 73.

¹⁴⁸ *Id.* at 73.

¹⁴⁹ *Id.* at 79.

¹⁵⁰ *Id.* at 79.

orders, and unlawful detainers.¹⁵¹ These partnerships came about as a result of both the court's desire to increase access to justice for court participants, but also as a means to relieve the strain on court clerks and business filing clerks who were overwhelmed with legal questions from the public, much of which they could not assist with because it was considered legal advice.¹⁵² What can be extrapolated from this, is that because the small claims advisors no longer have a physical presence at the courthouse, the court clerks and business filing office clerks are once again overwhelmed with small claims questions by members of the public, and the small claims hotline simply cannot accommodate the growing need. By creating small claims clinical programs, courts will once again have the strain put on its court clerks relieved, and an alternative referral source available.

Another way in which the small claims clinics will help the local courts, is that it will allow litigants to be better prepared and thus eliminate the time in front of the judge. Litigants who are prepared are able to concisely argue their case and even present a trial brief, which in turn allows the judge to better understand the intricacies of the legal issue and make a decision. Briefs also prepare the client for trial, not to mention a source for client's to reference as they give their oral argument.

Many small claims cases are vacant or abandoned. This further clogs the filing system and takes up valuable clerk time in determining the status of such a case. However, if litigants are better informed and educated on the law, and even receive legal assistance with their cases, they are better able to know how to proceed with their case and whether to move forward or withdraw their matter, as opposed to having it languish.

By creating small claims clinics, the ability to create further synergies with the local courts are increased. These close relation-

¹⁵¹ San Diego County Superior Court, *Services Provided to Self-Represented Litigants at Courthouses in San Diego County* (2016), http://www.sdcourt.ca.gov/portal/page?_pageid=55,1665745&_dad=portal&_schema=PORTAL.

¹⁵² This information came about during my tenure at the Legal Aid Society of San Diego, Inc. while serving as the Pro Bono Program Manager.

ships with the court are invaluable. As the former manager of the Pro Bono Program at Legal Aid Society of San Diego, Inc., I was involved for many years in supervising the self-help clinics provided to members of the public at the local courthouses. These clinics allowed our organization to develop deeper relationships with the court, which in turn allowed us to move more adeptly and respond when the court would find new legal needs in which the public needed assistance. This symbiosis in turn helped the public access the courts in a more reasonable and timely manner, which overall addressed the access to justice need. Small claim clinical programs can allow program representatives to partner with courts to respond to litigant needs.

D. Increased Funding for Clinics Because of Court and Legal Service Provider Participation

It is true that clinical courses are more expensive than higher enrollment doctrinal courses.¹⁵³ But are the costs really that debilitating to a law school? A study of instructional costs at American University determined that the tuition income generated by law clinic courses came very close to meeting the actual instructional costs to the school, concluding that although clinical education was not a “financial cash cow” like large classes, it is “far more financially feasible than some make it out to be.”¹⁵⁴ The topic of clinic expansion is ever more on the forefront given the American Bar Association requirement of at least 6 units of experiential learning for law students during their legal studies.¹⁵⁵ Additionally, some schools have independently chosen to approve a 15 unit experiential

¹⁵³ Del Swords et al., *Cost Aspects of Clinical Education*, in CLINICAL LEGAL EDUCATION; REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 133, 184-85 (1980).

¹⁵⁴ David F. Chavkin, *Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 3, 13-14 (2009).

¹⁵⁵ *Supra* note 109.

learning requirement for its students, separate and apart from ABA and state bar requirements.¹⁵⁶

There may be a more effective and economical ways to start and maintain a small claims law school legal clinic. The answer is based on the fact that the courts see these new clinics as actual branches of the small claims advisor office. Though the courts may not have enough money to pay for numerous attorneys (and the ancillary benefits package), the courts can more readily justify a much lower amount to support outside small claims clinics through individual grants. In California, the law does not preclude a court or county from contracting with a third party to provide small claims advisory services.¹⁵⁷

CONCLUSION

Interspersed throughout the article, mention is made of access to justice and how small claims clinical programs can make a dent in the overall access problem. Sadly, there does not appear to be at this time, any solution that will whole-heartedly solve the access to justice problem we have in the United States. Currently, there are piecemeal solutions being put in place all of the time. As mentioned above, self-help programs in recent years have gained a foothold in attempting to address this issue. The goal in creating more small claims clinics is to add yet another building block in the arsenal of ways to address the issue in total. Though more small claims legal clinics will in no way solve the problem, it does move the discussion in the right direction.

Further, there is a continuous need to balance the needs of the community with those of the students. With small claims clinics, both of these competing needs are addressed using one mechanism—the clinic. As mentioned previously, students increasingly desire more experiential offerings while at the same time the needs of those who are underserved and underrepresented continue to grow. If we

¹⁵⁶ *Supra* note 98.

¹⁵⁷ Cal. Civ. Proc. Code § 116.940(g) (West 2016).

can attempt to meet both of those needs in a creative and community building way, it does put us one step forward in addressing the access to justice gap.

Being creative in exploring and finding solutions for access to justice issues is naturally at the forefront of clinical professors' and legal service attorneys' focus. However, in clinical education, teaching our students these important lessons are a tangible part of their law school experience. Through this article, I have shown that an existing but ever present need for services in the small claims court can provide a valid learning opportunity for law students, while also addressing an access to justice issue.

As court costs increasingly are used to cut back on systems currently in place to assist those who cannot access justice, educators need to look at ways we can fill these gaps in both a meaningful way for the community, as well as in a pedagogically significant effect on law students. Further, working closely with already functioning advisor offices, self-help programs and mediation programs can further round out the offerings to members of the public who seek to access the courts.