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FORUM

Boalt Hall's Employment Discrimination Clinic: A Model for Law School/Government Cooperation In Integrating Substance and Practice

David Benjamin Oppenheimer†

Clinical legal education programs which place students in actual litigation settings are marred by the uncertainties in timing common to litigation and are costly. This Article describes a clinic developed at Boalt Hall which addresses these problems and could be replicated at other law schools. The model requires joint sponsorship by the law school and an administrative agency engaged in administrative prosecutions. The Boalt clinic is co-sponsored by California's civil rights enforcement agency.

The growth of clinical legal education¹ over the past decade has been one of the most significant changes in legal education. Clinical programs not only permit students to engage in the actual practice of law but, at their best, integrate the practice of law with its study in the classroom. Most American law schools now have some kind of clinical program. The growth of such programs, however, is impeded by a number of factors: the cost,² the difficulty of fully integrating clinics with the regular curriculum, and the uncertainties in scheduling which are endemic to litigation.³ This Article describes a model clinic,⁴ now complet-

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1. As used herein the term "clinical" is limited to programs in which students engage in the actual practice of law, using actual cases. The term is frequently applied to skills training using simulated cases. See CLINICAL LEGAL EDUCATION, REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 12 (1980). The problems addressed herein are unique to the narrower definition of clinical education.

2. *Id.* at 133-90.

3. Lawyers in practice soon learn that trial dates, deposition dates, interrogatory due dates, settlement conference dates, etc. are subject to frequent last minute continuances. As a result, in most clinical programs students cannot rely on a scheduled event occurring during the semester they are enrolled in the clinic.

4. The Boalt Hall Employment Discrimination Clinic, a project of the University of Califor-

ing its third year at Boalt Hall,⁵ which addresses these problems and could easily be replicated at other schools.

The Boalt Hall Employment Discrimination Clinic is jointly sponsored by the University of California, Berkeley, School of Law (Boalt Hall) and the State of California's civil rights enforcement agency, the Department of Fair Employment and Housing.⁶ Through their joint sponsorship, the school can operate the clinic at an attractively low cost while the agency can increase its efficiency in prosecuting civil rights violations. The agency's major contribution is a full-time staff attorney, selected by both the agency and the law school, who has set up a satellite law office at the law school. He is assigned a case load which is roughly 50 percent larger than the agency average, which he handles with the students enrolled in the Clinic. The law school contributes office space for the attorney, who serves as a lecturer in law and director of the Clinic, an office for the Clinic students, overhead costs such as phones, mail and photocopying, and a \$12,000 annual budget to cover the cost of 1/3 time secretary/administrator and reimbursement for the students' travel expenses.⁷

The Clinic admits eight second or third year students each semester. The students enroll concurrently in three classes.⁸ The first is a substantive course in employment discrimination law. It is open both to Clinic students and to other second and third year students. The second is a course in trial advocacy, open only to the Clinic students, and taught by the Clinic director. The third is the Clinic itself.⁹

Students in the Clinic are paired (or "teamed"), with each team assigned to three cases for the semester. All are cases being prosecuted by the agency before the California Fair Employment and Housing Commission, a quasi-judicial administrative agency.¹⁰ Typically, two of the

nia, Berkeley, School of Law (Boalt Hall) and the California Department of Fair Employment and Housing.

5. The clinic enrolled its first class of students in August 1982.

6. CAL. GOV'T CODE § 12901 (Deering 1982). The Department receives, investigates, conciliates, and prosecutes complaints, *id.* § 12930, under the California Fair Employment and Housing Act, *id.* §§ 12900-12996, alleging discrimination in employment, *id.* §§ 12940-12947, public accommodations, *id.* § 12948, and housing, *id.* § 12955, or alleging discrimination by business entities, *id.* § 12948, or violence based on certain prohibited bases. *Id.* § 12948.

7. These expenses can be considerable because the Clinic is committed to handling cases throughout Northern California. Of the sixteen cases tried by the Clinic to date, ten were heard more than fifty miles away from Berkeley, including six heard more than 150 miles away. *See infra* note 17.

8. Students who have not previously taken evidence must take it concurrently with the Clinic.

9. The substantive course in employment discrimination law is a three semester hour course. The advocacy workshop and the Clinic itself are each two semester hour courses. Thus, the clinical package is offered for seven semester hours for those who have already taken evidence, and ten to twelve semester hours for those taking evidence concurrently.

10. *See* CAL. GOV'T CODE §§ 12903, 12935, 12967-12972 (Deering 1982).

cases are set for administrative hearings to be heard during the semester of enrollment. The third is either a case being prepared for hearing in the following semester, which will be passed on to another team, or a case heard in the prior semester in which post-hearing briefing has been requested.

The cases provide sufficient variety in the area of employment discrimination to illustrate most of the problems addressed in the substantive course. The Clinic director informs the professor¹¹ teaching the substantive course as issues are briefed or tried, so that they can be integrated into the course. In its first three years, the Clinic has handled employment discrimination cases involving race discrimination, sex discrimination, national origin/ancestry discrimination, marital status discrimination, physical handicap discrimination, age discrimination, religion discrimination, sexual, racial, religious and ethnic harassment, and retaliation. The Clinic has also handled housing and public accommodation discrimination cases involving race, sex, and marital status. During the first three years, 16 cases have been tried before the Administrative Court and another 40 have been settled prior to hearing. Clinic students have submitted 35 briefs, with most addressing several legal questions, arguing their cases.¹² This multitude of cases and issues facili-

11. During the program's first two years, the course was taught by one of two Department staff members who served as part-time lecturers to teach the course: Beverly Tucker, former DFEH staff attorney, currently staff attorney, United Auto Workers, and Marjorie Gelb, former DFEH General Counsel, currently DFEH Special Counsel. In 1984-85, Ms. Gelb taught the course one semester and Professor Jan Vetter taught it the other semester. Beginning in the Fall of 1985, Professor Vetter will teach it exclusively.

12. The following chart illustrates the diversity of the cases, identifying the number of cases handled each semester by substantive issue. It does not include the various evidentiary issues such as document admissibility and hearsay which arose in each case. Because the cases involve multiple substantive issues, the total are far higher than the total number of cases handled. Several cases were handled over more than one semester and are listed for each semester in which they required substantial work. Sexual harassment cases are listed separately from other sex discrimination cases because the nature of proof involved is substantially different.

Issue	Number of Cases Addressing Issue					
	Fall 1982	Spring 1983	Fall 1983	Spring 1984	Fall 1985	Spring 1985
Employment						
Race discrimination	1	1	1	2	—	—
Sex discrimination	—	1	1	1	—	1
Sexual harassment	2	3	3	3	10	7
Religious discrimination	1	—	1	1	—	—
Age discrimination	2	2	1	—	—	1
Physical handicap discrimination	3	2	6	4	9	2
Marital status discrimination	1	1	1	1	—	2
National origin/ancestry disc.	—	—	1	—	1	3
Retaliation for complaint filing	1	2	1	1	—	1
Failure to hire	4	2	5	4	1	—
Failure to promote/transfer	1	1	1	2	2	3
Termination of employment	3	5	9	6	8	9
Constructive discharge	4	6	4	2	6	8

tates the integration of the clinical work into the substantive course.

Clinic cases are also integrated into the advocacy course. The course consists of a weekly one-hour lecture and three-hour workshop. The lecture material, including demonstrations of trial techniques by the lecturer, draws on cases previously tried by the Clinic and still in the post-hearing briefing phase. fifty percent of the workshop assignments are drawn from the students' then-current caseload. Thus, a Clinic student may present an opening statement from one of her cases in the workshop early in the semester. It will be critiqued briefly in class and more extensively in a video review session. The following month the student will again present her opening statement—at the commencement of the actual hearing. The remaining half of the workshop exercises are drawn from a mock sexual harassment casefile¹³ designed to illustrate many of the common problems in the trial of harassment and discrimination cases.

One of the problems of using actual litigation that plagues clinical programs is the uncertainty of trial dates. In many urban areas, a trial may trail other trials for days or weeks, and frequent continuances make the most careful scheduling unreliable. By using the administrative hearing process, much of this uncertainty is eliminated. All Fair Employ-

Accommodation — phys. handicap	1	—	1	2	3	4
Accommodation — religion	1	—	1	1	—	—
Jurisdiction — employer subject to Act	2	3	2	—	—	—
Jurisdiction — phys. handicap defined	3	1	1	1	1	—
Jurisdiction — complaint timely	—	—	2	1	—	—
Damages — failure to mitigate	2	2	4	4	1	2
Damages — availability of compensatory damages	3	5	5	3	3	3
Damages — availability of punitive damages	2	2	1	2	3	2
Damages — Respondeat superior	2	4	3	3	3	1
Housing/Accommodations						
Race discrimination	1	1	2	2	1	—
Sex discrimination	1	—	1	—	—	—
Marital status discrimination	2	1	2	2	—	—
National origin/ancestry discrimination	—	1	1	—	1	—
Retaliation for complaint filing	—	1	1	—	1	—
Refusal to rent	3	2	4	2	1	—
Eviction	—	1	2	1	1	—
Jurisdiction — defendant subject to Act	1	—	1	1	—	—
Jurisdiction — complaint timely	1	1	1	1	—	—
Damages — amount of statutory limit	1	1	3	2	—	—
Damages — liability for agent	—	1	1	1	1	—
TOTALS	50	53	74	56	57	48

13. D. Oppenheimer, *DFEH v. Pacific Quad, Inc.*: A Mock FEHA Sexual Harassment Casefile (1983) (available upon request to the author).

ment and Housing Commission hearings are presided over by an Administrative Law Judge provided by the California Office of Administrative Hearings.¹⁴ Hearings are scheduled by the Clinic director four to six months in advance, and generally noticed to the defense attorney three months in advance. Continuances are strongly disfavored¹⁵ and, barring settlement, rarely occur.¹⁶ Thus, at the beginning of each semester the students can be informed that their cases, if not settled, are likely to go to hearing on a then-determined date.

At the hearings, which take place throughout Northern California¹⁷ and generally last two to ten days, the Clinic students represent the prosecuting agency. The Clinic director is present and participates in the hearing, but a majority of the trial work is performed by the students.¹⁸ Other students from the Clinic frequently attend as spectators in preparation for their own later hearings.

The response to the Clinic has, to date, been enthusiastic. Most of the 48 students who have participated have given glowing evaluations of the experience, several terming it their best class in law school.¹⁹ Complainants whose cases the Clinic has handled have been equally enthusiastic, citing their perception that the students worked harder and cared more about their case than an experienced government lawyer would have.²⁰ Opposing counsel have rarely objected to the case being handled

14. CAL. GOV'T CODE §§ 11500-11528, 12972 (Deering 1982).

15. OFFICE OF ADMINISTRATIVE HEARINGS (CAL.), ADMINISTRATIVE PROCEDURE ACT 28 app. (1985) (Office of Administrative Hearings Continuance Policy).

16. In six semesters, the commencement of hearing in a total of six cases has been continued into another semester.

17. Hearings have been held in San Francisco (4), Oakland (1), Fresno (4), Santa Rosa (1), San Jose (1), Redding (1), Modesto (1), Sacramento (2), and South Lake Tahoe (1). Two cases were settled at the commencement of hearing in Salinas.

18. The students always present the opening statement and the direct examination of the major witnesses. The supervising attorney has sometimes presented the direct examination of some minor witnesses and often conducts a portion of the cross-examination. In all but one of the hearings to date, the Administrative law Judge has permitted the students to conduct examinations with the proviso that the supervising attorney could take over the examination if the student requested. Closing argument is submitted in writing, by briefs drafted by the Clinic students. Interim argument on evidentiary objections is handled by the student or the supervising attorney on a case by case basis.

19. Boalt students are asked at the end of each semester to evaluate their courses. The course evaluation is designed to evaluate the teacher rather than the material, but with the belief that the overall evaluation of teaching effectiveness roughly corresponds to satisfaction with the course, the results are reported here. On a scale of 1 ("not at all effective") to 7 ("extremely effective"), the Clinic ratings were:

Fall 1982:	6.50
Spring 1983:	6.00
Fall 1983:	6.17
Spring 1984:	6.87

(Fall 1984 and Spring 1985 are not yet available).

20. While the students clearly have more time to work on any individual case, the author's observations do not support the perception that the agency staff cares less or works less hard on comparable cases.

by the Clinic rather than the agency's legal unit, and have sometimes exhibited a personal conflict between their role as defense counsel and the opportunity to serve as an instructor to law students. Faculty teaching the employment discrimination class have found that the students enrolled in the Clinic added enthusiasm and reality-testing to classroom discussions. The agency has benefitted from the Clinic's efficiency and its association with Boalt Hall.

The author believes that in any state where government agencies are responsible for administrative prosecutions, the clinical model presented here can be replicated. The model permits a law school to establish a clinic which is well integrated into the substantive curriculum at a relatively low cost, and with far greater certainty for the students that their cases will be settled or tried within their semester of enrollment.