Articling - A Law School Perspective

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Articling — A Law School Perspective

Frederick H. Zemans,*

My good friend Gary Bellow recounts an interesting story about a family with a lovely son who, for reasons that they could not fathom, never said a word to his parents.¹ The son went through his early years, and then into his fifth and sixth years, his seventh year, his eighth year and still never spoke, at least not to them. In all other respects, the boy was just fine. He spoke with friends, he spoke at school, but he never spoke at home. And then one morning, having sat down, as usual, for breakfast, he looked at his mother and father, and quietly said, “The toast is burnt.” His mother and father looked at him with tears in their eyes. They couldn’t believe what they had heard. After a few moments, they turned to him, and with great emotion, said, “Johnny, you finally said something! What made you finally speak?” He answered, “Well, up ’til now, everything was going all right.”

I would ask you to reflect on this tale as we begin to discuss legal education in Ontario—particularly the relationship between theoretical and practical legal education. It will be well to keep the story in mind, examining its implications for legal education and the changing legal profession, as we attempt to sort through the emotions that surround these issues. A consideration of articling requires us to address many of the fundamental debates that have confronted legal education in Ontario since the Second World War. Many of us who have long felt that all was not well with our articling process, have nonetheless remained silent. In light of the dynamic changes in the

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composition and employment patterns of the profession, we ought to take the unique opportunity this conference affords to acknowledge that everything is not all right.

Since the introduction of the Bar Admission Course, legal education in Ontario has been a five year enterprise. Normally it includes three years in attendance at one of the six Ontario law schools; a year of articling; and a further six months to complete the Bar Admission Course. My current first year students in Civil Procedure will not be called to the Bar in this province until April 1992, approximately five years after they received their acceptance to law school. The late Mr. Justice MacKinnon, who participated in planning this conference, and to whose memory I dedicate this paper, assisted the legal profession in grappling with the length and with the goals of legal education in Ontario. In his 1972 analysis, he underlined many of the problems with articling. Ultimately, he concluded that articling should be abolished.

It is not within the ambit of this conference to examine whether articling should continue, for this option is not being considered in Ontario. Nonetheless, it is important to underline that articling consumes slightly over twenty per cent of a future lawyer’s legal education. Thus, when we consider how articling could and should be improved, we must consider legal education in its totality. This paper is built on the premise that all aspects of legal education should and can contribute to the development of law graduates, the majority of whom continue to become legal practitioners. It also assumes that clinical education, a major innovation in legal education of the sixties and seventies, has much to offer to our analysis of potential alternatives, despite the fact that to date, clinical programmes have not

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2 We have witnessed the feminization of the legal profession during the last two decades as well as its massive expansion. The feminization of the profession has not as yet been translated into a humanization of the profession but I would suggest that we are beginning to recognize that feminization of law means more than the admission of women to practice or even to the management committees of large law firms. The other significant change within the legal profession of North America is the extent to which lawyers are becoming employees. Lawyers today are employed by government, legal aid, prepaid legal services programmes and large law firms in large numbers.

Two forces shape the current experiences of experts: the rapid growth in their numbers and the transformation of their world from self-employed to salaried forms. . . . Like many other experts . . . attorneys are finding themselves increasingly in salaried staff positions. See, Eve Spangler, Lawyers for Hire, Salaried professionals at Work, 1986, Yale University Press, ix-x.

3 As the number of lawyers in Ontario increased during the seventies, the percentage of the profession that actually became practitioners has decreased. In the early seventies, over ninety per cent of the profession were practicing lawyers. By the early eighties, the proportion fell to close to seventy per cent.
significantly altered the basic structure of legal education. I shall consider how articling could be more integrated into legal education through the clinical method, in order to enrich, strengthen and perhaps even shorten the legal education experience.

*Theory and Practice*

A continuing debate rages within both the law schools and the profession over how to strike a balance between the theoretical and the practical approaches to legal education. If one favours more practice, as do many law students, lawyers and judges, then the compromise has already been struck too far in favour of theory. If one favours more theory, as do the current generation of legal academics (particularly those who are members either of the Law and Economics movement or the Critical Legal Studies Conference), then legal education is too professional or too practical, at the expense of analysis and theory.

Much of the debate over practice versus theory, in my opinion, obscures rather than enlightens the real issues. Most types of legal education—from first year torts through articling and the bar admission course—contain elements of both theory and practice. Assessments of the balance between theory and practice stems essentially from the definitions that we choose to give to these terms rather than from actual fact. Many of our observations about both the law school curriculum and articling are based as much upon the nature of the teaching involved and the viewpoint of the observer, as they are upon the intrinsic nature of the activity. Recent literature, particularly the recent discussions of legal education in the United States and Canada, which has applicability to a variety of particularized situations. Practice, in contrast, starts from the specific and is considered as undertaking a task with expectation or repetition. Therefore many writers equate practice with gaining of skills because one generally gains skills by repetition, whether they be athletic, professional or domestic.

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5 By theory, we generally mean a set of general propositions or an abstract framework which has applicability to a variety of particularized situations. Practice, in contrast, starts from the specific and is considered as undertaking a task with expectation or repetition. Therefore many writers equate practice with gaining of skills because one generally gains skills by repetition, whether they be athletic, professional or domestic.

6 See Katherine Monteith, “Report Card On Law School”, 1988, 12 *Canadian Lawyer* 24 who writes:

It is a shocking fact that you can graduate today from a Canadian law school without every having written a statement of claim, contract, will or promissory note. Without exaggeration, you may not even have seen many claims, contracts, wills or promissory notes during three years of legal education. Yet, after a brief trial by fire doing articles and even briefer bar admission courses, law school graduates are considered ready to practice and advise clients.

The contrary perspective is given by Hasson and Glasbeek. They consider Canadian legal education to be dominated by professional interests with the profession’s concerns and interests influencing all aspects of the law school agenda. *Supra* note 4.

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ada, assist in understanding that the “traditional” approaches to legal education—the case method and legal realism—can be viewed either as predominantly theoretical or predominantly practical. Thus, a theory versus practice debate about legal education is not useful.7 I would add that much of the discussion of clinical education and skills training can similarly be obfuscated by attempting to discuss these forms of education as either predominantly practical or predominantly theoretical.8

The Clinical Option

Clinical education has meant different things to different people. To the realist of the 1930’s, skills training, direct observation of the courts and participation in legal aid clinics were heralded as an antidote to the aridity of the “reflection in a badly-made mirror of a reflection in a badly-made mirror”, which was their characterization of the Lagdellian case method, initiated at Harvard Law School a century ago.9 To the Council on Legal Education for Professional Responsibility (CLEPR), formed in 1968 with a $6 million grant from the Ford Foundation,10 clinical education was a means to mobilize the manpower of the law schools in the “war against poverty.” As “the central component of the clinical practice (is) working face to face over a period of time with clients”,11 the essential element of

7 Neil Gold in “The Role of the University Law Schools in Professional Formation in Law” 1986, 4 Journal of Professional Legal Education, 15-21, makes much the same point:

Our tendency to polarize is one source. Four example, law schools are often described as theoretical, conceptual, political and abstract in their orientations, to name but four characterizations. In contradistinction, practitioners and the profession as a whole are said to practical, functional, apolitical and concrete. Even within the academy there is division. Doctrine is contrasted with policy. Clinicians war with their “academic” counterparts. ... These divisive dichotomies cause all of us a great deal of harm and create a sort of schizophrenia or even “multiphrenia” about law study which polarizes the practitioner on the one hand and the academic on the other. These labels are often used as taunts or in aid of persuasion. Rarely is there any searching discussion in pursuit of meaning and value.

8 See Mark Spiegel, “Theory and Practice In Legal Education: an Essay on Clinical Education”, 1987, 34 UCLA Law Review 577-610. Spiegel writes: “My argument ... that each of three major educational traditions within legal education: the case method, legal realism and clinical education can be viewed as theoretical or practical depending upon what aspects are emphasized and the perspective of the observer.”


10 CLEPR was preceded by the National Council on Legal Clinic (NCLC) 1959-1965 which had allocated $500,000 to 19 law schools and the Council on Education in Professional Responsibility (COEPR) 1965-68 which had granted $290,000 to 21 law schools. CLEPR funded many of the original clinical programmes in the United States as well as the Parkdale clinical programme at Osgoode Hall Law School in 1971—the first full semester clinical programme in Ontario.

clinical education”, as defined by CLEPR, was the education of students to an awareness “of the legal profession as a service profession with major obligations to broad segments of society that go largely unserviced.”

The definition of “clinical education” has evolved to encompass any educational experience other than classroom discourse and library research. That may mean observation of and/or participation in some legal or administrative process or institution. It may include simulated exercises and “all student activities within the curriculum for pedagogical purposes including research activity, student teaching, legal writing (and) various forms of moot court.” It may extend to “active research applying the empirical techniques of the social sciences in the pursuit of law reform.”

It is a common misconception to view clinical education solely in terms of the theory versus practice dichotomy discussed above. In reality, clinical education has little to do with these categories but rather refers to educational activity which incorporates the clinical methodology. The essence of the clinical method resides in the three features Gary Bellow articulated in his seminal article on the subject:

1. the student’s assumption and performance of a recognized role with the legal system;
2. the teacher’s reliance on this experience as the focal point for intellectual inquiry and speculation;
3. a number of identifiable tensions which arise out of ordering the teaching-learning process in this way.

The learner—law student, articling student, bar admission student or young lawyer—is placed in a context (broadly defined to include any of the varied roles a modern lawyer may assume) which requires the internalization of certain attitudes, values and aptitudes of professional conduct. In the process of adjustment to this role, the student will assimilate a reservoir of understanding and new associations, and develop a frame of reference from which to initiate inquiry. The aim is that the student will gain the ability to challenge legal doctrine, values and institutions.

My thesis is that we ought to explore models of clinical legal education in the law schools as well as during articling and the bar.

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admission course, in order to fully develop alternatives for a fuller and more productive practical legal education. Clinical programmes offer an educational experience which simply cannot be provided in the traditional law school curriculum or within the existing articling structure. We have come too far for Canadian law school to return to our trade school origins.

Some might argue that the current articling regime in Ontario already provides the sort of role experience that clinical education calls for, in that the student is assuming and performing a recognized role within the legal profession. However, clinical methodology also envisions reflective and analytical activity which requires the involvement of professional educators to an extent not currently present in articling. Although articling students formally have their principals as teachers, there are limited opportunities for reflection and analysis. Tensions and concerns that naturally arise out of the new and usually alien articling experience, if not entirely ignored, are often dismissed as merely a required element in learning to cope or an unwillingness on the part of the articling student to assume the burden. Clinical legal education anticipates joint student-teacher efforts to identify professional and ethical tensions that have developed in the work relationship and the student’s assumption of various roles within the educational context.

Modern lawyers ought to recognize the need for an appropriate university education which surpasses the apprenticeship model. Nonetheless, we must recognize that the ambitious expectations of clinical education may not be feasible within our current articling structure because of the close linkage between articling and recruitment. Lawyers who require juniors and who are also attempting to assess whether the new blood is the appropriate strain to add to the firm’s mix may not be interested in the reflective and analytical aspects of clinical education. Nonetheless, the possible utilization of the private law firm as a placement for law school seminars and for

16 Some writers draw the obvious analogy to medical education. See, for example, Stephen Wizner and Dennis Curtis, "Here What we Do": Some Notes about Clinical Legal Education", 1980, 29 Cleveland State Law Review 673-684, who write:

While not seeking to force the analogy, one need only consider the respective functions and activities of a hospital clinic, a laboratory, a library, and a classroom to appreciate the significant differences in the content and methodology of learning in those settings. Our central belief, taken for granted in medical education, is that professional education involves the constant interaction of the theoretical and the practical, not just in the classroom and the library, but also in those settings where the profession is actually practiced.

Perhaps legal education developed artificial barriers between law schools and law practices because of the fear of interaction between the theoreticians and the practitioners.
opportunities to study the legal system is one of the unique and relatively unexploited benefits of the development of the clinical methodology. As Canadian law schools expand their clinical programmes and as law firms increase the numbers of their summer law students employed after first and second year law school, the potential for a significant nexus of these diverse yet complementary interests exists.

Full semester clinical programmes being developed in criminal, family and poverty law, have recognized the potential for such a nexus. Law school clinical programmes currently include: (a) legal aid clinics; (b) student internships in government or private agencies; (c) internships or placements with private law firms; (d) task force investigations; and (e) simulations. Students not only undertake research, represent clients, and observe hearings, but also discuss these experiences in full-semester seminars designed both to prepare them for their lawyering tasks and, perhaps more importantly, to allow them to reflect upon and to critique these experiences.

Existing models of clinical education offer opportunities for law schools and their individual faculty members to develop full semester and summer programmes as well as individual courses that combine specific practical, theoretical and systemic issues that could be credited towards articling. These combined programmes would unite practice and theory by offering academic credit for substantive legal instruction as well as placements with courts, law firms or legal aid clinics. Credits would be utilized towards both the LL.B. and bar admission requirements.

Clinical programmes in specific areas of substantive law have grown in their popularity and sophistication in American law schools where articling and bar admission courses are not found. As these programmes are developed in Canada it seems reasonable to suggest

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17 The Intensive Programme in Criminal Law was developed by Professor Alan Grant and has been taught by him for over a decade. The Intensive Programme in Family Law was developed by Professor Simon Fodden and taught by him and the writer for six years until 1985. Both are full semester programmes with students being placed in law offices for approximately two months; the courts for a month; and a social service, probation, or child welfare agency for one month. As well, students attend seminars at the law school one day per week and for two weeks at the beginning and the end of the semester.
18 Recent discussions of cooperative legal education have also explored this nexus.
19 Length limitations prevent a detailed exploration of the various models of university-based clinical programmes that could be considered as alternative to the existing articling experience.
that they could be considered as equivalent to at least six months of articling.21

The challenge of my suggestions is to create a structured and integrated model of legal education which recognizes that legal education—practical and theoretical—should be the responsibility of legal educators within Canadian law schools. Whatever the precise proportion of courses devoted to a clinical or the intensive semester model,22 the overall aim would be an integrated approach to legal education.23 I would therefore underline that I am not recommending that we develop programmes which would send law students out of the law school midway through the curriculum and then have them return to the law school for the completion of the traditional casebook curriculum.24

The impact or success of a clinical programme or course depends less on a particular approach than the educational content that is structured into the design of the programme.25 Where the academic element of a programme is weak and where students have little opportunity for active participation, clinical programmes do not survive. A “truly educational, clinical experience must include: (a) the opportunity to perform a wide variety of law-related tasks; (b) significant amounts of time allocated to introspection about what one is doing and why; (c) appropriate and adequate guidance; and (d) objective evaluation by an experienced lawyer or agency staff member who provides an assessment to a member of the law faculty.”26 If students are not given an opportunity to utilize their field placement

20 Students are also exposed to alternative methods of dispute resolution.
21 Clerking for the Supreme Court of Canada or the Ontario Court of Appeal—neither of which involves working for law firms—are already considered a valid substitute for traditional articling.
22 Perhaps twenty to thirty percent of courses taught after the first year could be devoted to clinical education.
23 W. Noel Keyes, “Approaches and Stumbling Blocks to Integration of Skills Training and the Traditional Methods of Teaching Law, 1980, 29 Cleveland State Law Review 685-692 argues for a true integration of clinical law into the general and post graduate curriculum of the law school. He would accomplish this by establishing a law school goal and policy whereby twenty to thirty percent of each course taught after the first year would be clinical in nature. This goal would be accomplished by adding clinical components to chapters of the casebooks used in each of these courses. I have strong reservations as to whether this approach would significantly meet the needs of any of the constituencies concerned about legal education.
24 I have some concern that cooperative legal education will only restructure the timing of the LL.B. programme so that some law students can work and experience law while obtaining their undergraduate legal education. I would emphasize the need for the integrative and reflective elements of a clinical semester or a clinical component of a law school seminar or course.
in pedagogically appropriate fashion, it becomes the responsibility of faculty supervisor to intervene and ultimately determine whether the placement is appropriate.

High quality of supervision is essential to the success of a clinical programme. As both a practitioner and as a law teacher, I feel that practitioners are not in a position to provide the level of supervision required for successful clinical programmes. Time constraints, combined with the difficulty of establishing a non-threatening atmosphere to discuss placement-related matters, suggest that law teachers should be primarily responsible for supervision. Since we have begun to recognize that trial advocacy, negotiations, interviewing and counselling are specific skills that should be taught by professional educators, junior lawyers could also benefit from the clinical approach and law school supervision. As John Ferren wrote, “the critical issues for today . . . are the mechanics of and learning potential from ongoing supervision itself.”

The real problem of most clinical programmes (including articling) is “in the regular failure of a student to learn as much as his case has to offer”. It is the function of the supervisor to explore the doctrinal, professional, institutional and personal dimensions of every case, problem and situation. This requires time, commitment and the skills to both reflect on the lessons to be drawn from the specific case and to assist the student to a step out of the specific case and its peculiar problems.

Case supervision as a method of pedagogy is the crucial and unique opportunity of clinical education as a potential model for enhancing the educational opportunities of articling. Whether this supervision takes place within an academic programme or within an existing private law firm articling situation, it offers the potential for growth of the lawyering and human relations skills of both the supervisor and his or her students. Whether it is possible outside of the law school where the economic aspect of the relationship must inevitably dominate remains to be seen.

Conclusion

I have briefly outlined some of the contemporary thinking about clinical education attempting to broaden the discussion of articling in Ontario. I hope that the issues raised stimulate law students and

practitioners to rethink the potential options for utilizing legal education (whatever its length) more effectively. I feel that the educational perspective which I have urged can meet the needs of the profession, law students, practitioner and most importantly the public—the ultimate recipients of legal services. Hopefully we will not remain silent like Johnny assuming that articling in Ontario is going all right.

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Tables of clinical and intensive programs in Ontario Law Schools are on pages 392 to 396 inc. which follow.