

# WHEN CLINICS ARE “NECESSITIES, NOT LUXURIES”:<sup>\*</sup> SPECIAL CHALLENGES OF RUNNING A CRIMINAL APPEALS CLINIC IN A RURAL STATE

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Before accepting the position of faculty director of the Defender Aid criminal appellate and post-conviction clinic at the University of Wyoming College of Law, I spent several years as an appellate lawyer in New York City.<sup>1</sup> While I never taught in New York,<sup>2</sup> I became quite familiar with urban appellate practice. Like New York, Wyoming has murderers, rapists, drug dealers, and assorted other felons, just not nearly as many of them.<sup>3</sup> The difference between an urban setting

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<sup>\*</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (finding as an “obvious truth” that lawyers are “necessities, not luxuries” in our adversarial system of criminal justice); *see also* *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985) (finding that lawyers are “necessary” in the first appeal as of right).

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<sup>1</sup> From 1993-96 and again from 1997-98, I worked at the Office of the Appellate Defender (OAD), a small, private, non-profit organization which trained appellate lawyers to handle court-appointed direct appeals from felony convictions occurring in Manhattan and the Bronx. OAD’s representation of those appellate clients sometimes continued through state and/or federal post-conviction proceedings.

<sup>2</sup> During my later years at OAD, I taught informally by supervising a few in-house attorneys and young law firm associates who took appellate cases, under OAD supervision, on a volunteer basis.

<sup>3</sup> In 2000, Wyoming’s crime index rate of 3298 reported crimes per 100,000 people was actually higher than New York’s statewide rate of 3099.6. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 2000, at 68, 74 (2000), *available at* [http://www.fbi.gov/ucr/cius\\_00/00crime](http://www.fbi.gov/ucr/cius_00/00crime)

and a rural setting like Wyoming, however, has implications as to how the law is practiced and to how practicing law is taught. A rural setting also presents teaching and law reform opportunities that are less available in more heavily populated areas.

In a rural state,<sup>4</sup> the law school's relationship with the state bar is critical both to teaching and legal reform opportunities.<sup>5</sup> Most rural states have only one or two law schools in the entire state, and at least one usually is a public land-grant institution.<sup>6</sup> Creation of land-grant institutions "introduced

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213.pdf (last visited Feb. 7, 2006). In raw numbers, however, New York has far more reported crimes than Wyoming. *Id.*; compare <http://www.disastercenter.com/crime/wycrime.htm> (last visited Nov. 11, 2005); with <http://www.disastercenter.com/crime/nycrime.htm> (last visited Nov. 11, 2005).

<sup>4</sup> For purposes of this article, "rural states" refers to states with a population density of less than seventy-five people per square mile. Thus, this term covers Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Kansas, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, and Wyoming. See U.S. CENSUS BUREAU, POPULATION, HOUSING UNITS, AREA, AND DENSITY (2003), available at <http://www.ceic.commerce.state.mt.us/C2000/PL2000/popdensityallstates.pdf>. Of course, plenty of other states, or portions thereof, may also be considered "rural" and experience many of the same challenges faced by our least densely populated states.

<sup>5</sup> In Wyoming, for example, the vast majority of the bar, the judiciary, and a large part of state government are alumni of the state's only law school. See UNIVERSITY OF WYOMING COLLEGE OF LAW, ACADEMIC PLAN 2004-2009 (2003), available at [http://uwadmnweb.uwyo.edu/law/Alumni/academic\\_plan.asp](http://uwadmnweb.uwyo.edu/law/Alumni/academic_plan.asp) ("[O]ur alumni occupy the highest positions of leadership in the state, including the governor, all of the state supreme court justices, the state attorney general, the state treasurer, state secretary of state, many legislators, and judges").

<sup>6</sup> Alaska has no law school. *Stu.Findlaw.com*, USA Law Schools by State, at <http://www.stu.findlaw.com/schools/usaschools/index.html> (last visited Feb. 7, 2006). Nine rural states, Idaho, Maine, Montana, Nevada, New Mexico, North Dakota, South Dakota, Vermont, and Wyoming, each have only one law school, and (except in Vermont) that school is a state school. *Id.* Arizona, Arkansas, Colorado, Iowa, Kansas, Mississippi, Nebraska, and Utah each are home to two law schools, at least one of which is a state school. *Id.* Minnesota, Oklahoma, and Oregon each have three law schools. *Id.*

The Morrill Act of 1862 gave all states federal land-grants for the support of higher education on condition that they create universities designed to serve regional and national interests and, in particular, to provide agricultural and technical education. See 72 U.S.C. § 301 (2000); see generally Gregory J. Vincent, *Reviving the Land-Grant Idea Through Community-University Partnerships*, 31 S.U. L. REV. 1 (2003).

the notion of service and outreach to American higher education and created a reciprocal relationship between the land-grant university and the citizens of the state.”<sup>7</sup> Any law school is expected to be a significant contributor to the life of the local legal community. When the law school’s local community is the entire state, the expectations increase exponentially. The law school in a rural state is a primary source for statewide continuing legal education programs, and law professors are expected to consult with legislators and to serve on bar committees within areas of their expertise. When the law school is part of a land-grant university, there is more than an expectation that the law school provide service and outreach in the state, it is an obligation. Thus, it is hardly surprising that clinical programs in rural states are expected to carry a substantial portion of the burden of meeting the legal needs of the poor throughout the state.

This article will address the pressure on law school clinics in rural areas to fill in gaps in the availability of legal resources for the poor, and the resulting challenge that presents. Second, it will address the impact of such demands on the clinic’s choice of and ability to fulfill its pedagogical (or andragogical) goals.<sup>8</sup> Finally, the article will address the opportunities presented for engaging in law reform and innovative practice. On balance, a law school criminal appellate clinic in a rural area presents more opportunities than it does problems. In a small state, where many students can be expected to go on to practice in the local community and indeed become leaders of the bar, contributing to improving the practice of law is one of the clinics’ greatest challenges and its most important opportunities.

### I. THE PRESSURE TO PRODUCE

The limited ability of poor persons to access and obtain meaningful relief from the justice system has been the focus of

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<sup>7</sup> Vincent, *supra* note 6, at 3 (footnote omitted).

<sup>8</sup> See *infra* notes 39-55 and accompanying text.

much recent attention and study.<sup>9</sup> Given the vast unmet legal needs of the poor throughout the country, virtually any clinical program will have to confront whether to provide needed legal services to more people or limit the quantity of cases to enhance the quality of the learning experience for the students. In a rural state, which has few other resources for providing access to justice for the poor, the state law school's clinic may be asked to play a significant role. Acceding to the pressures on clinics to provide legal services to those who may otherwise go unserved, however, can affect the quality of the learning experience, and the quality of the resulting representation.

Whether poor persons have adequate access to justice within the criminal justice system in particular was the subject of recent hearings conducted by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID). The resulting report, "*Gideon's Broken Promise: America's Continuing Quest for Equal Justice*,"<sup>10</sup> concluded that forty years after *Gideon v. Wainwright*,<sup>11</sup> "the

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<sup>9</sup> In 1994, ABA Division of Legal Services published a study which revealed that, in 1992, forty-seven percent of low-income and fifty-two percent of moderate-income households experienced a legal problem, but few turned to the courts for assistance. ROY W. REESE & CAROLYN A. ELDRED, AMERICAN BAR ASSOCIATION, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 9, 19 (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstufy.pdf>. In recent years, several states have conducted similar legal needs assessments. See NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, ACCESS TO JUSTICE SUPPORT PROJECT, available at [http://www.nlada.org/Civil/Civil\\_SPAN/SPAN\\_Library](http://www.nlada.org/Civil/Civil_SPAN/SPAN_Library) (last visited Nov. 11, 2005); see also ASSOCIATION OF AMERICAN LAW SCHOOLS, EQUAL JUSTICE PROJECT REPORT, PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES (2002), available at <http://www.aals.org/equaljustice/final%Freport.pdf>; c.f. DEBORAH L. RHODE, ACCESS TO JUSTICE (Oxford Univ. Press 2004).

<sup>10</sup> STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE*, A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDING (2004) [hereinafter *GIDEON'S BROKEN PROMISE*].

<sup>11</sup> 372 U.S. 335 (1963). The *Gideon* Court, of course, recognized the critical nature of the right to counsel and guaranteed that right to most indigent defendants.

promise of equal justice for the poor remains unfulfilled in this country.”<sup>12</sup> Problems identified in the report include: (1) inadequate funding for criminal defense services, (2) inadequate legal representation, and (3) structural defects in indigent defense systems that impair attorney independence and fail to ensure quality services.<sup>13</sup> These problems are just as prevalent in rural states, or more so, than elsewhere in the country. Law school clinics anywhere present opportunities to help address some of these problems. In rural areas, however, clinics must resist the temptations to take on too much. With only one or two law schools to share the excess load, the pressure to increase the volume of clinic representation is ever present.

Inadequate funding for criminal defense drives down the numbers of experienced, competent criminal defense attorneys.<sup>14</sup> This, in turn, leads to higher caseloads for the attorneys who remain.<sup>15</sup> Lack of funds for indigent defense also means that the substantial caseloads must be managed with minimal resources for experts, investigation, and support services.<sup>16</sup> In addition, with little funding of their own for training, public defender offices often look to law school clinics as a place from which to draw young attorneys who already have some training and experience and thus can hit the ground running.<sup>17</sup>

Rural areas are likely to have fewer qualified criminal defense appellate lawyers to provide representation to all indigent defendants who choose to exercise their right to appeal. When indigent defense providers are faced with funding and staffing issues, the law school clinic may appear to be an

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<sup>12</sup> *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 1.

<sup>13</sup> *Id.* at 7

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 7, 9-10.

<sup>16</sup> *Id.* at 10-11.

<sup>17</sup> Every year that I have run the Defender Aid Program, I have fielded calls from public defenders in Wyoming and Colorado complaining that we only offer an appellate clinic, when a criminal defense trial clinic would better serve their needs to hire trained young lawyers.

attractive source of free and eager labor. In Wyoming, for example, the state public defender has a limited staff for handling appeals from convictions occurring anywhere in the state.<sup>18</sup> Even with fewer criminals, the load on Wyoming's appellate public defenders is more than ample. For these attorneys, it is still a struggle to manage the state's appellate caseload.<sup>19</sup> Given its limited resources and some legal restrictions, the state public defenders handle very few state post-conviction and no federal post-conviction matters.<sup>20</sup>

Most law school clinics see themselves as having both educational and social justice missions.<sup>21</sup> In areas where the

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<sup>18</sup> In 1998, the Wyoming public defender's appellate staff for the entire state was two attorneys; since then, it has grown to three and one-half. The "half position" is held by an attorney whose responsibilities are split between direct appeals and state post-conviction work (especially in the state's few capital cases).

<sup>19</sup> For example, an appeal from a capital case, with a lengthy trial record, can grind progress on other cases to a halt.

<sup>20</sup> Until recently, Wyoming's public defenders were not authorized to provide assistance with state post-conviction petitions. In 1990, Wyoming's Public Defender Act was amended to provide that qualified "needy person[s]" were entitled "[t]o be represented in any appeal to a Wyoming court and in cases in which the death penalty has been imposed or in such other cases as the state public defender office deems appropriate in a writ of certiorari to the United States [S]upreme [C]ourt, provided this paragraph does not create a right to appointed counsel in proceedings under W.S. § 7-14-101 through 7-14-108." 1990 Wyo. Sess. Laws ch. 95 sec. 1 (emphasis added).

Prior to another amendment of the Act in 1999, the law school's clinic was the *only* entity which assisted indigent inmates with collateral post-conviction matters. Even now, public defenders are not encouraged to pursue post-conviction relief. Since 1999, the Public Defender Act has provided that a "needy person" may be "represented in any appeal to a Wyoming court, and in cases in which the death penalty has been imposed or in such other cases as the state public defender deems appropriate, in a writ of certiorari the United States [S]upreme [C]ourt, and in [state post-conviction] proceedings under W.S. 7-14-101 through 7-14-108." WYO. STAT. ANN. § 7-6-104(c)(ii) (2003); 1990 Wyo. Sess. Laws ch. 95 sec. 1-2 (emphasis added). Nonetheless, the post-conviction statute still provides: "[a]n indigent petitioner seeking relief under this act is not entitled to representation by the state public defender or by appointed counsel." WYO. STAT. ANN. § 7-1-104(c) (2003).

<sup>21</sup> Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1462-67 (1998); Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307, 309 (2001); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L.



legal needs are great, and other available resources for meeting those needs limited, these missions may conflict. Balancing the often disparate goals can be a delicate task.<sup>22</sup> Law school clinics aid the law schools' educational missions by inculcating students with the skills and values necessary to prepare graduates "to participate effectively and responsibly in the legal profession."<sup>23</sup> There also is little dispute that appellate litigation skills are an important facet of legal education,<sup>24</sup> and thus a valuable part of a law school's educational mission. But given those educational goals, and the clinical teaching methods used to achieve them,<sup>25</sup> clinics are "a relatively inefficient way of providing legal services."<sup>26</sup> Thus, clinics are ill-suited to provide high-volume representation without compromising the quality of the representation and the quality of the learning experience.

The Defender Aid Program at the University of Wyoming College of Law has become an important and necessary player in the provision of appellate and post-conviction services in the state. But to provide these services also involves a constant struggle to keep clinic caseloads at a manageable level, and at a level that ensures the quality of the resulting educa-

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REV. 1097, 1129 (2003); Kimberly E. O'Leary, *Clinical Law Offices and Local Social Justice Strategies*, 11 CLINICAL L. REV. 335, 337-40 (2005); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 999-1000 (2005); Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327 (2001).

<sup>22</sup> As clinical supervisors have become more integrated into the law school academic faculty, balancing the educational and social justice missions has become more challenging. See Wizner & Aiken, *supra* note 21, at 1003-04.

<sup>23</sup> See DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 2 (2002); see also SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, 2005-2006 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 20, 133 (2005); AMERICAN BAR ASSOCIATION, PROGRAM OF LEGAL EDUCATION, available at <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Jan. 10, 2006).

<sup>24</sup> See generally Committee on Appellate Skills Training, *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. CIN. L. REV. 129 (1985). Indeed, appellate brief writing and argument are included in most first-year law school curricula.

<sup>25</sup> See *infra* notes 41-43 and accompanying text.

<sup>26</sup> CHAVKIN, *supra* note 23, at 15.

tional experiences and of the legal services provided. The clinic has in some years been called upon to handle twenty to twenty-five percent of the public defender's appellate case load, and is the state's primary provider of all other post-conviction services for indigent inmates.<sup>27</sup> Once the clinic is established in such a substantial role, it is difficult to scale back the quantity of cases it takes; thus the clinic can become the victim of its own generosity.

As the only criminal appellate defense clinic, at the *only* law school in the state, working in conjunction with the sole criminal appellate defense provider in the state, the political pressures to ease the burden on the public defenders are ever present. In a state with a small legal community, the continued success of the clinical program depends, in large part, on maintaining good relations with the state provider. So, when the state provider asks for the clinic's help, it is often hard to decline. One of the challenges for a rural law school clinic is to set reasonable workload limits, and to ensure those limits are understood and respected by the state provider or whatever source from which the clinic receives its cases. The hardest part of the task is learning to turn down possibly meritorious post-conviction cases, even though without the clinic's help an inmate may have no other resources for assistance.

Another way in which the lack of resources for indigent defense manifests itself in rural states is the increased potential for conflicts of interest. One problem identified in "*Gideon's Broken Promise*" is a "lack of conflict-free representation" for indigent defendants.<sup>28</sup> The report cites hearing witnesses from three states in which individual attorneys or attorneys in the same office sometimes represent defendants with conflicting interests.<sup>29</sup> A contract public defender from

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<sup>27</sup> In addition to direct appeals, our clinic's practice includes motions for sentence reduction, state post-conviction petitions, state habeas corpus petitions, and federal habeas corpus petitions.

<sup>28</sup> *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 19.

<sup>29</sup> *See id.* (referring to witnesses from Montana, New Mexico, and Washington). Montana and New Mexico may readily be characterized as "rural," and much of Washington fits that description as well; even with denser population centers



Montana, for example, explained: "Lawyers in smaller, more rural counties in Montana are neither inclined nor trained to take cases when there are co-defendants or there is a conflict with the contract public defender. One contract defender advised me that the rural nature of his practice seems to encourage conflicts."<sup>30</sup> An upshot of these conflicts may be an increased request for the law school clinic to take potential conflict cases.

In rural states, the dearth of attorneys, particularly attorneys with adequate criminal defense experience, makes it difficult to provide competent, conflict-free representation in multi-defendant cases. Traditional imputed conflict of interest principles ordinarily would prevent any two attorneys within the public defender system, or at least within the same office, from representing clients with opposing interests.<sup>31</sup> The practical difficulties of finding an outside attorney with adequate criminal defense experience, however, often trump the rules. So, public defender colleagues within a single office, or from different offices within the state, may wind up representing co-defendants.<sup>32</sup>

Wyoming, like several other states, does not strictly apply imputed conflict rules to public defenders, favoring instead a

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like Seattle and Tacoma, the overall population density of Washington is eighty-nine people per square mile. See <http://www.nemw.org/popdensity.htm> (based on 2000 U.S. Census data) (last visited Jan. 10, 2006).

<sup>30</sup> *Id.*

<sup>31</sup> In any other setting, two attorneys who answer to the same supervisor undoubtedly would be considered part of a firm or "associated" in the practice of law, for imputed conflict of interest purposes. See *Ward v. State*, 753 So. 2d 705, 708 (Fla. App. 2000) (citing *Bouie v. State*, 559 So. 2d 113, 115 (Fla. 1990)) (viewing public defender office as a firm); *Perkins v. State*, 487 S.E.2d 365, 368 (Ga. App. 1997) (stating that a public defender's office is a firm); *State v. Watson*, 620 N.W.2d 233, 241 (Iowa 2000) (representing multiple defendants by attorneys from same public defender office is a conflict); *but see Jackson v. State*, 495 S.E.2d 768, 773 (S.C. 1998) (holding that contemporaneous representation of multiple defendants only presents a potential conflict of interest).

<sup>32</sup> See, e.g., *May v. State*, 62 P.3d 574, 586 (Wyo. 2003) (holding that although the public defender's office had a potential conflict, and an attorney from that office made a limited appearance for the defendant, without a showing that a conflict of interest adversely affected a lawyer's performance, there is not a denial of the Sixth Amendment right to counsel).

case-by-case determination of whether there is an improper conflict.<sup>33</sup> In fact, the Wyoming Supreme Court frankly acknowledged that the state's rural setting, and the consequent limited number of qualified attorneys, were considerations in its resolution of this issue.<sup>34</sup>

When the appeals from across the state are funneled back to the public defender's small appellate staff, the conflicts may be repeated or amplified. In a rural state, there are likely to be far fewer experienced criminal defense appellate lawyers than there are trial lawyers. That makes for even fewer options, other than a clinic, for finding conflict-free counsel outside the public defender system.

Issues such as the imputed conflict of interest problem can present important teaching opportunities for law school clinics. First, there is the obligation to teach not only what the law requires, but to teach what the law and good practice ought to require in such a circumstance. That means evaluating the rules and practices in the community, and discussing strategies for changing them or for protecting clients' rights within the existing practices. The clinic usually provides the first, and sometimes the only time and place a young lawyer can reflect upon and develop the practice habits he or she will

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<sup>33</sup> See *Asch v. State*, 62 P.3d 945, 953-54 (Wyo. 2003) (favoring a case-by-case determination); see also *id.* at 952 (citing *People v. Daniels*, 802 P.2d 906, 915 (Cal. 1991)) (holding that automatic disqualification would hamper ability of a public defender to represent indigents in criminal cases); *State v. Pitt*, 884 P.2d 1150, 1156 (Haw. 1994) (requiring a case-by-case inquiry because public defender's office, as a government office, is different from a law firm); *People v. Miller*, 404 N.E.2d 199, 202 (Ill. 1980) (holding no *per se* rule is necessary; a case-by-case analysis is sufficient to determine whether any facts peculiar to the case preclude multiple representation within a public defender's office); *State v. Bell*, 447 A.2d 525, 528 (N.J. 1982) (holding that same potential for prejudice does not exist in a public defender's office).

<sup>34</sup> *Asch*, 62 P.3d at 953-54. The court noted that "given Wyoming's many small communities, with a limited number of lawyers, it could be difficult in many cases even to find local counsel for a defendant." *Id.* at 953. The court also mentioned another reason it refused to impute conflicts automatically within a public defender office—money. *Id.* While being careful not to "put a price on" legal representation for the indigent, the court suggested that requiring outside counsel in multiple defendant cases would "be quite an expense for the taxpayers of the state." *Id.* at 953-54.

employ in the future. So, the clinic should demand the highest standards of practice, even if the custom in the local bar is more lax.

The clinic bears responsibility for teaching future lawyers how to manage potential conflict situations. In Wyoming, for example, that individual public defenders will zealously advocate on behalf of their individual clients is taken as a given; the Wyoming Supreme Court's decisions on the imputed conflict issue assume that in the absence of any improper financial incentives, the lawyers will conduct themselves with the best interests of their respective clients in mind.<sup>35</sup> The clinic should then foster the professionalism and zealous advocacy which would make such an assumption appropriate. Moreover, the rule permitting representation of co-defendants by attorneys in the same public defender office is predicated upon the office having "effective measures [to] prevent communications of confidential client information between lawyers employed on behalf of individual defendants."<sup>36</sup> That predicate, however, may be hard to achieve in the rural offices where it may be needed the most. A public defender office in a rural community is likely to have limited space, and the individual attorneys will likely share support staff and an investigator. That makes it more difficult to prevent even unintended communication of confidential client information. So, the clinic should also provide the future lawyer with other tools, such as good office practices, to manage such potential conflicts, and to protect confidential client information.

Another unfortunate downside to the lack of other counsel for conflict cases, at least in rural Wyoming, is that when the public defender's appellate staff gets a case in which there is the possibility of an ineffective assistance claim, the case often gets referred to the clinic.<sup>37</sup> That means a disproportionate

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<sup>35</sup> See *id.* at 953.

<sup>36</sup> *Id.*; see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 203 cmt. d.(iv) (proposed final draft No. 1 1996).

<sup>37</sup> This is especially true in trial cases that arise from the office in Cheyenne that houses trial public defenders and the state's entire appellate staff. Within that small office, trial attorneys frequently share information about cases and cli-

number of ineffectiveness claims get raised, or at least investigated,<sup>38</sup> in cases litigated by the clinic. Of course, few experienced criminal defense lawyers are pleased when their actions in a particular case are called into question by another lawyer; resentment increases when the questioning comes from a law student. Such cases must be handled with great delicacy to guarantee that the client receives zealous representation on appeal, and hopefully to avoid impairing the clinic's relationship with the state criminal defense bar. While the latter concern cannot be permitted to impair clients' interests, the clinic's relationship with the local bar is critical because many clinic students will later seek jobs as state public defenders, or in small criminal defense firms.

## II. THE EFFECTS OF RURAL PRACTICE ON CLINICAL PEDAGOGY/ANDRAGOGY

For law schools in rural areas, part of the law school's mission is to prepare students for the types of practice that are prevalent in that particular region;<sup>39</sup> often, that means

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ents, and seek advice from their appellate colleagues while preparing for or in the midst of trial; this gives rise to potential conflicts even with the more lax approach taken by the Wyoming Supreme Court in *Asch*.

<sup>38</sup> More often than not, a thorough investigation reveals that a defendant's complaints that the trial counsel was ineffective are without merit. But, with some defense lawyers, even the investigation causes hard feelings.

<sup>39</sup> See, e.g., The University of Montana School of Law, *Law School Mission Statement*, at [www.umt.edu/law/welcome.htm](http://www.umt.edu/law/welcome.htm) (to prepare students for the "people-oriented practice of law" and to prepare competent practicing attorneys) (last visited Nov. 11, 2005); The University of South Dakota, *Law School Mission Statement*, at [http://www.usd.edu/law/about\\_us/missionstatement.cfm](http://www.usd.edu/law/about_us/missionstatement.cfm) (last visited Feb. 7, 2006). Therein the mission statement notes:

The mission of the University of South Dakota School of Law is to prepare the lawyers and judges who will administer the federal, state, and American Indian tribal justice systems in South Dakota, and to provide a legal education which will serve as a solid foundation for the practice of law or other professional careers anywhere in the world.

*Id.*; The University of New Mexico School of Law, *Law School Mission Statement*, at <http://lawschool.unm.edu/about/mission.php> (noting the responsibility to educate future lawyers for practice in the state, and recognizing that because few graduates will receive additional training in a law firm setting, law schools must provide a strong foundation in legal theory and practice) (last visited Nov. 11, 2005).

preparing students for small firm or solo practice. Thus, a clinical program at such a school must provide students with opportunities not only to acquire legal knowledge, but also to develop independent professional judgment, practice skills, and values necessary for a future in which they may receive little additional training or mentoring. In addition, students who return to rural communities will find that many of their clients either cannot pay, or cannot pay full price for legal services. Clinics can help educate and sensitize these future lawyers about the needs they will find in their rural communities and encourage them to assist in serving the underserved. Thus, clinical legal education provides a valuable way to prepare students for a more rural practice.<sup>40</sup>

There is much debate about proper clinical teaching and supervisory methods, particularly as to the degree of direction that supervisors should provide.<sup>41</sup> David Chavkin's clinical education text adopts as its descriptive model for clinics, Donald Schön's term, "reflective practicum," meaning, "an educational setting in which 'students mainly learn by doing with the help of a coach.'"<sup>42</sup> Chavkin, however, acknowledges the limitations of the "coach" image for clinic supervisors; rather

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<sup>40</sup> See Gary Bauer, *Addressing the Needs of Solo/Small Firm Practitioners Through Law School Based Programs to Reduce Stress in Practice – Several Approaches*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 1, 7-10, 13-14 (2003).

<sup>41</sup> In recent years the prevailing view in clinical legal education has embraced adult learning theory (andragogy) favoring more non-directive supervision as opposed to more directive, teacher-driven pedagogy. See, e.g., Margaret Martin Barry, *Clinical Supervision: Walking that Fine Line*, 3 CLINICAL L. REV. 137, 165 (1995); Frank Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982); Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 213-14 (1996); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 135-37 (1993); James H. Stark, et. al, *Directiveness in Clinical Supervision*, 3 B.U. PUB. INT. L.J. 35, 45-47 (1993). But see e.g., Brook Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. (1999); and Linda Morton, et al., *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 CLINICAL L. REV. 469, 480-81 (1999). In practice, however, most clinical teachers fall somewhere in the middle, using both directive and non-directive supervisory techniques. See Medwed, *supra* note 21, at 1132-33.

<sup>42</sup> CHAVKIN, *supra* note 23, at 1.



than directing students or "calling plays," effective clinic supervisors assist "students in discovering the best ways to approach particular lawyering tasks and in helping students reflect on their experiences and the lessons to be drawn from them."<sup>43</sup> Students in rural areas, who can be expected to enter a small or solo practice, need to learn how to find answers for themselves, and need opportunities to develop their own professional judgment. Finding the appropriate supervisory balance, then, is important to fulfilling these goals. In a criminal appellate clinic, particularly one that represents indigent defendants in their only appeal of right, too little direction, however, can conflict with the defendant's right to receive effective assistance of counsel.<sup>44</sup> Non-directive supervision must be coupled with opportunities to evaluate and critique the directions the students choose, before it is too late and the quality of representation suffers.<sup>45</sup>

In many clinical settings, with vast numbers of cases from which to select, the clinic must develop mechanisms for selecting those cases which best serve educational and other goals.<sup>46</sup> For an appellate clinic in a rural state, that is far

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<sup>43</sup> *Id.*

<sup>44</sup> When the clinic represents indigent defendants on direct appeal, the clinic's responsibilities take on constitutional dimensions. A defendant has the right to the effective assistance of counsel on a first appeal of right. *See* *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

<sup>45</sup> Again, there is a wealth of clinical legal scholarship addressing the struggles of clinic supervisors in dealing with their dual roles as attorney to a particular client and educator. *See* George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415 (1991). Professional and ethical obligations to the client require the supervisor to make sure that the client receives highly competent representation; the student-attorney, however, may sometimes fall short of that mark. When and how to correct such problems is a constant concern for the clinical supervisor. *See, e.g.*, Stacy Caplow, *A Year in the Practice: The Journal of a Reflective Clinician*, 3 CLINICAL L. REV. 19, 27 (1996); David Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1531-32 (1988); Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 182-84 (1995); Stark, *supra* note 41, at 45-47.

<sup>46</sup> For discussions of the importance of considering their educational value when selecting cases for a clinical program, *see, e.g.*, O'Leary, *supra* note 21; Donald Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical*



less of a concern or an option. While there is certainly no shortage of appellate cases, neither is there a super-abundance. With fewer cases from which to choose, pre-screening is of little value. When the clinic is ready to take on a case, or if the public defender requests our assistance because of their particularly heavy caseload at the time, the public defender simply assigns us one. We have an understanding about the record size that is appropriate for a clinic case,<sup>47</sup> but beyond that we have few other specific requirements.<sup>48</sup> With our respective small staffs, neither the state public defender's office nor the clinic has the resources to extensively pre-screen cases before they are assigned to the clinic.

Once a case gets to the clinic, it is screened by the clinic supervisor to make sure that it presents *something* that can be raised on appeal. Even if the issues are not particularly strong, we will usually keep the case and move forward with the appeal.<sup>49</sup> With only one faculty supervisor for the clinic, we do not have the luxury of reviewing and rejecting multiple cases until we come across one which appears to have one or

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*Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1, 9 (1997); Kenneth Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 320-22 (1981). Of course, other selection criteria may also be considered.

<sup>47</sup> For our clinic, key selection criteria for direct appeal cases include the time constraints of the project and student availability. Whenever possible, we try to limit the records to fairly short, two to three-day trials. Because most students are only in the clinic for a single semester, it is difficult to get through larger records and complete the appellate brief in a timely fashion.

<sup>48</sup> With the exception of conditional pleas, the public defender generally tries to avoid sending the clinic guilty plea cases because they often do not involve any appealable issues. Of course, one non-negotiable limit is that Wyoming's student practice rules provide that the clinic cannot represent an appellant without his or her consent. RULES OF SUP. CT. OF WYO. PROVIDING FOR THE ORG. & GOV'T OF THE BAR ASS'N & ATTORNEYS AT LAW OF THE STATE OF WYO. 12 (1989).

<sup>49</sup> While this is the case for direct appeal cases, which we receive from the state public defender's office, more meaningful screening processes are applied to our cases seeking collateral post-conviction review. We consider a variety of factors when deciding whether to pursue post-conviction relief, including the significance of the legal issues presented, the existence of procedural problems, the available proof, the severity of the sentence being served, timing/deadlines, and availability of student resources.

more strong appellate issues. The learning goals of the clinic are set knowing that the luck of the draw will give us both strong and weak cases. Our goal is to teach criminal appellate litigation skills. Even a weak case can present valuable learning opportunities—about client relations, the appellate process, working with a record, issue selection, candor to the court, creativity, advocacy, and professionalism.

Even with the “luck of the draw” case selection, students frequently get to litigate important issues. Many rural states, like Wyoming, have no intermediate appellate courts.<sup>50</sup> That means the criminal defendant’s first, and only appeal of right goes directly to the state’s highest court. In Wyoming, the state’s smaller population leads to fewer cases thus, some issues which are resolved in other jurisdictions, may still be open questions. As a result, any issue raised on appeal takes on added importance—the court’s decision on any issue becomes the law for the entire state. Law students in the appellate clinic have opportunities to help mold the state’s law. While this increases the pressure students may feel, it also presents great teaching opportunities. In the appellate clinic students must engage in thorough exploration and critical analysis of the legal questions and their implications. Having been through such experiences in the clinic, the students see the value of such critical analysis when they enter their own practice.

In rural states, the distance between communities can present resource issues for the clinic, and may limit the ability to provide a broad range of lawyering experiences to clinic students. First, the state prisons are likely to be a considerable distance from the law school, making in-person contact with appellate clients difficult.<sup>51</sup> Second, even if the law

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<sup>50</sup> Those states are: Delaware, Maine, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, West Virginia, and Wyoming. See Stephen J. McEwen, Jr., *The Intermediate Appellate Courts of Pennsylvania*, 26 JUST. SYS. J. 93, 94 (2005). Almost all of these would be considered rural states. See *supra* note 4.

<sup>51</sup> The primary men’s prison in Rawlins, Wyoming is about 100 miles from the law school, and the primary women’s prison in Lusk, Wyoming is about 200

school is a manageable distance from the appellate court in which students will litigate direct appeals, a statewide appellate and post-conviction practice also sometimes requires practice in courts in distant parts of the state.<sup>52</sup> Although the courts are very accommodating, permitting telephone appearances when appropriate, some things simply must be done in person.

The time, distance, and related expense issues presented by a rural statewide practice were recently underscored for me during a three week period in June. In that period, Defender Aid had two matters set for hearing and/or argument in Casper, Wyoming, which is about 180 miles away from the law school. One matter required a final trip for discovery and investigation (there had been other trips in prior months) and, shortly thereafter, a second trip for an 8:30 a.m. hearing in state district court.<sup>53</sup> The other matter was an argument in federal district court<sup>54</sup> a week later. Each round trip to Casper results in at least six hours in the car. It is extremely difficult to put this time to productive use. Although the investigative and courtroom experiences for the students were invaluable, three trips to Casper in less than three weeks were expensive and the equivalent of about two working days was

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miles away. Exacerbating that problem, the relatively high incarceration rate in our small (in population) state has resulted in numerous male and female prisoners being housed in Colorado and Texas, and in the recent past, they have also been housed in Virginia, Oklahoma, and Nevada. Of course, the distance to the prisons is not a problem that is limited to rural states. In many states, the state's prisons are located in more rural settings far from population centers and law schools. Indeed, I have visited more clients in the Wyoming prisons than I ever was able to visit in New York.

<sup>52</sup> Although the filing and arguing of the appeal itself may occur at the state supreme court, there are occasions when problems with the trial record, or potential ineffectiveness claims (which Wyoming law requires to be raised on direct appeal, see *Calene v. State*, 846 P.2d 679, 687 (Wyo. 1993)), may require extensive communication with and even travel to distant parts of the state.

<sup>53</sup> Given the travel time involved, the early hearing also led to the expense of an overnight stay before the hearing.

<sup>54</sup> Wyoming has only one federal judicial district, but there are federal district courthouses in both Cheyenne and Casper. A federal habeas petition filed at the District Court Clerk's Office in Cheyenne may be randomly assigned to the judge in Casper.

lost in travel time alone. Thus, the time, distance and expense involved sometimes leads the clinic to decline cases which would have presented valuable educational experiences.

*Rural Communities and Innovative Practice*

One of the positive developments identified in “*Gideon’s Broken Promise*” is the growth of holistic approaches to criminal defense. One significant finding in the report was: “Model approaches to providing quality indigent defense services exist in this country, but these models often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support.”<sup>55</sup> In other words, some jurisdictions have experimented with innovative approaches and achieved success, but these approaches are not cheap. It takes substantial resources to continue or to adopt creative ways to provide quality indigent defense services. One recent model approach “sometimes referred to as ‘holistic,’ ‘problem-solving,’ or ‘whole-client’ advocacy . . . endeavors to address underlying problems in clients’ lives that may lead to repeat criminal offenses.”<sup>56</sup>

In a rural state, access to the variety of resources necessary to make such an approach work may be limited. For example, not every small community will have specific programs available for substance abuse treatment, mental health services, and other special needs presented by indigent defendants and inmates. Problems of distance from resource providers make such advocacy a challenge, but also heighten the need for it.<sup>57</sup> The distance issues present far more difficult

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<sup>55</sup> *GIDEON’S BROKEN PROMISE*, *supra* note 10, at 40.

<sup>56</sup> *Id.* at 37; see also Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences & Reentry into Criminal Defense Lawyering*, 31 *FORDHAM URB. L.J.* 1067, 1071-72 (2004); Cait Clarke, *Problem Solving in the Community: Expanding the Conceptual & Institutional Boundaries of Providing Counsel to the Poor*, 14 *GEO. J. LEGAL ETHICS* 401, 433-36 (2001); McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 *U. TOL. L. REV.* 479, 480-83 (2004); see generally Kim Taylor-Thompson, *Taking It to the Streets*, 29 *N.Y.U. REV. L. & SOC. CHANGE* 153 (2004).

<sup>57</sup> Indeed, most of the successful efforts at “holistic” or “community-based”

obstacles for the client who likely will have neither the ability nor the wherewithal to seek out resources that may only be available miles away from his or her home community. Thus, an indigent defender who can help connect a client with resources available throughout the state and educate the court about the services available, can have a positive impact on the client's life regardless of the outcome on the particular charges. Of course, a program that permits indigent defenders to take the time to engage in holistic representation will not be cheap; an already overworked indigent defender cannot also be a fulltime social worker. Thus, more personnel, more community resources, and a statewide recognition of and commitment to the value of such services are essential to successful holistic representation. But, successful holistic representation also substantially benefits the community, in reduced recidivism and in the defendants' improved ability to be productive members of the community.

Appellate clinics, which deal primarily with questions of law that arise from a prior trial, may seem ill suited to provide holistic representation. Often, there is little that can be done to improve the immediate circumstances of an incarcerated appellate client. At minimum, a holistic approach to appellate representation may require an understanding of the workings of the corrections system, the services available within the system, and the steps the inmate must take to access needed services. In addition, holistic post-conviction representation can involve assisting the inmate with identifying services that may be necessary when the inmate is released.

Some drawbacks to working in a rural state, such as, small populations and small governments, also present great opportunities. Without the large entrenched bureaucracies

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representation have occurred in urban settings. *See, e.g.*, MCGREGOR SMYTH, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS (2005), available at [http://www.nlada.org/DMS/Documents/1110924022.69/document\\_info](http://www.nlada.org/DMS/Documents/1110924022.69/document_info) (last visited Jan. 10, 2006); Taylor-Thompson, *supra* note 56 (describing various programs, mostly in urban areas).

common in more urban settings, change may be easier to accomplish in a rural state or community.<sup>58</sup> Also, while public defenders in rural states have full caseloads (that seem to be trying to catch up with our urban neighbors), they remain, for the time being, manageable. Without crushing caseloads, rural defenders have opportunities to be creative. With the infusion of minimal additional resources, their offices can become laboratories for trying to improve the criminal justice system.

Clinics, appellate or otherwise, can be valuable contributors to the dialogue and experimentation process. Many of the characteristics that make clinics inefficient for large volume representation are assets for encouraging creative, innovative lawyering. As students reflect upon their experiences in the clinic, on the experiences of their clients, and on the actions and reactions of other parties in the criminal justice system, they will discover areas of needed reform. The time and resources for such reflection, and action upon those reflections, may be hard to come by when attorneys become wrapped up in busy practices. Students who, in the clinic, had the time to recognize systemic problems and experience the value of holistic representation may be more willing to continue that experimentation when they enter the practice. Moreover, in a rural state, those students are likely to become the leaders of their communities, the bar, and the state. In such positions they can advocate for the resources that would enable indigent defenders to “participate effectively and responsibly in the legal profession.”<sup>59</sup>

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<sup>58</sup> For example, a few academics and attorneys in Wyoming became interested in the budding national jury reform movement. See Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 108-11 (1998). They brought their ideas to the Wyoming Supreme Court, which promptly created a jury commission in 1998. See Wyoming Commission on Jury System Improvement, *Re-Examining Wyoming's Jury Trial Procedures*, 1 WYO. L. REV. 93, 95 (2001). Within eighteen months the commission had proposed some innovative jury reforms. *Id.* at 96. By October 2000, many of those proposals were approved by the Wyoming Supreme Court. See, e.g., WYO. R. CIV. P. 39.1-39.4, 51.

<sup>59</sup> See *supra* note 23 and accompanying text.