THE NEW HAMPSHIRE APPELLATE DEFENDER PROGRAM: AN APPRENTICESHIP CLINIC

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Most law school clinical programs are born out of the inspiration and initiative of law school faculty and administration. Although law school clinics generally need the cooperation of courts and other agencies in order to function, the law school retains primary control over the clinic's structure, rules, and activities. In this article, I describe a clinical program that, in origin and in operation, follows a different model. Unlike the founding of most law school clinical programs, the creation of the Appellate Defender Clinic at the Franklin Pierce Law Center ("Pierce Law") more closely resembled a marriage than a birth. In establishing the clinic, Pierce Law and the New Hampshire Public Defender cooperated to create an institution that belongs to each as much as it belongs to the other.

As New Hampshire's Chief Appellate Defender since October 2001, I share with three public defender attorneys the responsibility of representing most of the indigent criminal appellants in the New Hampshire Supreme Court, the state's only appellate court. I also hold a tenure-track faculty appointment at Pierce Law. In that capacity, I teach one doctrinal class each semester in addition to supervising the students enrolled in the Appellate Defender clinic.

* Professor of Law and Chief Appellate Defender. I owe a debt of gratitude to my teaching colleagues Kimberly Kirkland, Ellen Musinsky, and Sophie Sparrow, and to my current Appellate Defender colleagues, David Rothstein, Andrew Winters, and Ted Lothstein, for their valuable insights and comments on earlier drafts of this article.
As a result of its unusual structure, the Appellate Defender clinic operates as a kind of pedagogical compound. As in traditional clinics, Appellate Defender students learn by doing much of the work of an appellate lawyer. As in externships, students also learn by watching the Appellate Defender lawyers litigate appeals. Finally, as in classroom courses, students read a text that encourages theoretical thinking about appellate work and participate in wide-ranging discussions. In this Article, after describing the history and structure of the Appellate Defender Program, I identify some of the unique pedagogical opportunities and challenges created by its composite structure.

I. THE ORIGINS OF THE APPELLATE DEFENDER PROGRAM

In the early 1970s, the New Hampshire Legislature established the state's first public defender program and by 1981 that program covered the whole state. At present, the New Hampshire Public Defender employs more than ninety lawyers, most stationed in one of the nine regional offices focused on trial practice. The Appellate Defender comprises a tenth office, defined not geographically, but by its appellate function. The New Hampshire Supreme Court appoints the Appellate Defender not only to represent clients represented by Public Defenders at trial, but also other indigent criminal appellants, such as those who elected self-representation at trial, retained counsel, or for some other reason had a non-public defender trial lawyer.

In 1980, when both Pierce Law and the Public Defender remained very new institutions, James E. Duggan, then a public defender who also taught at Pierce Law and now an Associate Justice of the New Hampshire Supreme Court, received a one-year grant to establish New Hampshire's first appellate public defender. During that first year, Duggan

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2 The Franklin Pierce Law Center first opened its doors in the fall of 1973.
handled a full appellate caseload, while assisting the private lawyers appointed to supplement his efforts. In 1981, because of the success of the program in its first year, and with the encouragement of the New Hampshire Supreme Court, Pierce Law and the Public Defender decided to provide the funding and institutional support necessary to continue and expand the program. Duggan hired a second lawyer, eliminating the private bar's direct participation, and served as Chief Appellate Defender until his appointment, effective January 2001, to the New Hampshire Supreme Court.

By statute, the Public Defender may "subcontract for attorney services, including appellate services, as may be necessary . . . ."\(^3\) Pursuant to a contract between Pierce Law and the Public Defender, the school provides statewide appellate public defender services through the Appellate Defender Program, housed on the Pierce Law campus.\(^4\) In recognition of the job's split responsibilities, the Public Defender and Pierce Law each pay a part of the salary of the Chief Appellate Defender.\(^5\) At present, the staff includes a deputy chief, stationed indefinitely with the Appellate Defender, and two other lawyers, each serving a two-year rotation in the office. At the end of their rotations, those lawyers will return to Public Defender trial offices.\(^6\)

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\(^4\) In consideration for the appellate services rendered under the contract, the Public Defender pays Pierce Law an annual sum to cover expenses such as rent, supplies, equipment, and the salary of the office administrator.

\(^5\) The contract provides that Pierce Law and the Public Defender shall cooperate in hiring the Chief Appellate Defender who then selects, with the concurrence of the Public Defender, three Public Defender lawyers to act as Assistant Appellate Defenders. The Public Defender pays their salaries, according to its pay scales.

\(^6\) The contract contemplates increasing the number of assistant appellate defenders, if the number of cases open and active at any one time exceeds the contractually specified limit of seventy-five.
II. THE STRUCTURE OF THE APPELLATE DEFENDER CLINIC.

During its twenty-five years, the Appellate Defender clinic has taken various forms, and it continues to develop each semester. At present, only upper-class students who have completed a course in Criminal Procedure may enroll in the clinic. Unlike appellate clinics at some law schools, the Appellate Defender clinic lasts one semester, and enrolled students earn three credits. Because of the intensive nature of the research and writing, the clinic fulfills the ABA requirement of an upper-level writing course.8

The clinic operates year-round, although it attracts more students during the academic semesters than during the summer. The relatively modest prerequisite requirement and the clinic’s one semester duration serve to make it available to a broad range of students. To maintain the intensity and quality of the clinical program, in light of the involvement of students entering with varying skills and substantive knowledge, and in light of the lawyers’ significant non-teaching responsibilities, enrollment in the clinic is limited to four students per semester.9

At the beginning of the semester, the students meet collectively on several occasions in classroom sessions in which, after reading chapters of a book on written advocacy, they analyze and discuss briefs recently written by Appellate De-

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8 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2004-05, STANDARD 302(a)(3).

9 See Sullivan, supra note 7, at 1288, 1306 (noting that “intensive nature of the case workload . . . severely limited the number of students who could be managed adequately by the single supervising attorney . . . ”).
fender lawyers with the authoring lawyers. Early in the semester, each student receives a trial transcript and other documents relevant to the first appeal on which the student will work. Under the supervision of the attorney assigned to that case, the student drafts and, with the benefit of the supervising attorney's comments, redrafts each section of the brief until the student produces a satisfactory final version. Meanwhile, that attorney also reads the record and prepares a brief in the case. After the student produces a final version of the brief, the student reads the lawyer's brief and can see the extent to which the lawyer incorporated the student's ideas and formulations. The student and the lawyer can then discuss the choices reflected in the approaches each has taken to the strategic questions presented by the case. At an appropriate point mid-semester, each student receives the record of a second case and begins the process again, working with a different appellate lawyer.

In addition to writing two briefs, each student participates more generally in the work of the Appellate Defender. Students receive draft briefs circulated by Appellate Defender attorneys, and must read them and return timely substantive comments and editorial suggestions. Each student accompanies an attorney on at least one visit to an incarcerated client on whose case the student is working. Students attend, and are encouraged to participate as questioning judges, moot arguments made by attorneys preparing for oral argument. Students also attend oral arguments in the New Hampshire Supreme Court. In order to encourage discussion about observed oral arguments and about the client meeting, students write short reaction papers reporting their observations and reflections about those experiences.

Under the current version of New Hampshire's student practice rule, law students may practice in the trial courts under certain conditions, but not in the New Hampshire Supreme Court. Clinic students, therefore, cannot orally argue the appeals on which they work. The clinic strives to provide

10 N.H. SUP. CT. R. 36(1).
students the best available substitute for that experience by requiring them to present an oral argument to a panel composed of the Appellate Defender lawyers. One important difference between the Appellate Defender and traditional clinics involves the issue of case selection. Traditional clinics can often screen cases before agreeing to undertake representation.\textsuperscript{11} Lawyers experienced in running traditional clinics have sought to develop criteria designed to identify the most educationally-promising cases.\textsuperscript{12} Having identified such cases traditional clinics can accept only those cases, while declining others.

The Appellate Defender, however, cannot select its cases based on educational or any other criteria. Absent some disqualifying conflict of interest,\textsuperscript{13} the New Hampshire Supreme Court appoints the Appellate Defender to represent all indigent appellants convicted of any crime more serious than a Class B misdemeanor. Appellate Defender lawyers choose which open and active cases to assign to students, but the scope for choice remains fairly small.

On any given day, the Appellate Defender may have between ten and twenty cases with transcripts prepared, and briefing deadlines set. Given the Supreme Court’s practice of setting briefing deadlines sixty days after preparation of the trial transcript, the list of cases available for assignment to students on the day they arrive at the clinic is limited to those cases having a briefing deadline more than a month away. The Appellate Defender could, in theory, assign students cases on which the attorney has essentially completed work. Such an assignment though, would defeat two important advantages of the Appellate Defender clinic: the chance for the student to observe the lawyer working on the same case at the same time; and the chance for a student’s work to contribute to the

\textsuperscript{11} See, e.g., Laflin, supra note 7, at 9-11 (discussing case selection).
\textsuperscript{13} For example, when co-defendants separately appeal.
quality of the brief actually filed. Thus, excluding the half of
the cases on the list having too-near deadlines, the pool of
candidate cases often shrinks to between five and ten.

When the lawyers also exclude cases having transcripts
too voluminous for even the most diligent student to manage
in the time allowed or too slender to confront a student with
an adequate fact-statement drafting challenge, the list of can-
didates can shrink further. The lawyers screen the remaining
cases for relatively meritorious issues, but the conclusions
reached before a careful reading of the transcript and before
researching the issues raised are somewhat speculative. Thus,
it inevitably happens that, for some students, one of the briefs
they have to write will raise no substantial appellate claim.

The challenge posed by frivolous and near-frivolous claims
is not only pedagogical but also ethical and confronts not only
students and teachers but also all appellate lawyers who cannot
select their cases. The ethical quandary arises from the
rule prohibiting the filing of frivolous pleadings.14

In _Anders v. California_,15 the United States Supreme
Court held that states may establish procedures by which a
criminal appellate lawyer can tell the reviewing court that his
client's case lacks a meritorious claim.16 The New Hampshire
Supreme Court, in a case litigated by the Appellate Defender,
rejected the _Anders_ rule.17 Instead, lawyers in New Hamp-
shire who find themselves handling a frivolous appeal, must
consult with, and advise, the client, but if, after consultation
and advice, a client prefers to proceed with the appeal, New
Hampshire lawyers must "argue[] the defendant's case as well
as possible."18

As the New Hampshire Supreme Court noted in _Cigic_,
truly frivolous appeals are "extremely rare."19 However, the
court, in explaining that assertion, properly excluded from the

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14 N.H. Rule of Prof'l Conduct 3.1.
15 386 U.S. 738 (1967).
16 Id. at 744.
17 State v. Cigic, 639 A.2d 251 (N.H. 1994).
18 Id. at 254.
19 Id. at 253.
truly frivolous category appeals seeking "an extension, modification, or reversal of existing law."\textsuperscript{20} While some appeals seeking a change in the law may have substantial merit, many such claims, although not technically frivolous, have no real hope of success. I now turn to discuss that and other pedagogical opportunities and challenges arising out of the structure of the Appellate Defender clinic.

III. PEDAGOGICAL CHALLENGES AND OPPORTUNITIES OF THE APPPELLATE DEFENDER CLINIC

The Appellate Defender clinic shares many features with other criminal appeals clinics. Students work on real cases for clients the program represents, under the supervision of experienced lawyers, who offer them intensive and practical instruction in legal research and writing. I refrain here from discussing the many important issues common to all criminal appeals clinics. Other articles in this Symposium, and articles published elsewhere, discuss such issues thoroughly and insightfully.\textsuperscript{21} Instead, I focus here on the variations in instruction and emphasis that arise out of the unique structure of the Appellate Defender clinic.

A. "What Are We Going To Do With This Case?"
   Reflections on Frivolous Appeals

As the principal provider in New Hampshire of appellate representation to indigent criminal defendants, the Appellate Defender cannot choose its cases. As already noted, that fact results in students having to work occasionally on appeals raising no substantial claims. That circumstance creates a pedagogical dilemma perhaps best stated in the form of a question: "So what are we going to do with this case?" My experience with this problem has yielded several relevant lessons.

First, one should not overstate the frequency of the prob-

\textsuperscript{20} Id.
\textsuperscript{21} See, e.g., Ronner, supra note 7.
lem. Most cases, once subjected to the Appellate Defender's processes of intensive and collective analysis, yield at least one plausible, non-frivolous claim. Indeed, clinic students often get to work on cases having a real chance of success, that require considerable research and effort in the development of the argument. Furthermore, the New Hampshire Supreme Court's recent adoption of a plain error rule will tend to reduce the problem by expanding the field in which appellate counsel may search for claims.\textsuperscript{22} Thus, many more appeals present claims with some chance of success than present claims with no chance at all.

Second, even the relatively low-merit, but non-frivolous appeal can afford students a rich educational opportunity. The process of finding and articulating the claim alone leads students into thickets of caselaw and legislative history, as students seek to evade what appear at first to constitute obvious replies and fatal flaws. Having identified the claim, students must seek reasons to support the rule on which the claim depends. That process often requires students to develop a sophisticated understanding of the policies underlying the relevant statutes or rules. In short, the process of building a plausible claim out of sparse materials confronts students, as it confronts lawyers, with a singularly great challenge that draws on a wide range of imaginative research and writing skills. Looking back on the process from the vantage point of the completed brief, students also learn a valuable lesson about the virtue of perseverance and the need to maintain hope and an open mind in the face of major obstacles.

Third, even the truly frivolous appeal offers important lessons. Where the meritorious appeal invites students into conversations about the meaning, purpose, and interrelationship of statutes, rules, and constitutional provisions, the frivolous appeal requires hard conversations with clients and an understanding of the boundaries of ethical argument in a regime requiring the lawyer to argue frivolous claims "as well

\textsuperscript{22} N.H. Sup. Ct. R. 16(a).
as possible.\textsuperscript{23}

Ethical lawyers must develop the ability to tell a client, when necessary, unpleasant truths.\textsuperscript{24} No prisoner facing years of incarceration wants to hear that the appeal, on which rests all the prisoner's remaining hopes, has no chance of success. Some prisoners in that position refuse to believe such an assessment. Some prisoners lack the psychological strength to survive their grim daily routine if told by their lawyer that their appeal will fail. Other prisoners need to know their chances and would suffer greater damage from the encouragement of false hope than from hearing of the sad truth.

When students work on cases having little or no chance of success, they ask their supervising attorney what the attorney will tell the client. To reply that the lawyer will tell the client the truth only begins to give an answer, for truths may be told in many ways, and as much can depend on the manner as on the message. A wide variety of topics may arise in those difficult attorney-client meetings. Lawyers usually begin by talking about the controlling law that defeats the claim, in an effort to explain to someone without a legal education why the law does not support the argument. Those discussions about the law often become conversations about people. Some clients express doubts about the integrity and independence of a Public Defender paid by the same government that pays the prosecutors and who, in the eyes of the client, may seemingly prefer to argue the prosecutor's position. The conversations can also shift to the client's goals and values as a client wonders about the advantages, if any, the client might reap by withdrawing the appeal.\textsuperscript{25} Or the client may explain a

\textsuperscript{23} Cigic, 639 A.2d at 254.

\textsuperscript{24} Sophie Sparrow, Professor of law and the Director of the First Year Writing Program at Pierce Law, notes that first year students often struggle with the task of writing a predictive/objective memorandum for a hypothetical client that suggests that the client might lose. It is, perhaps, natural to find psychologically difficult the chore of delivering bad news in plain, direct language to a person for whom one feels sympathy and responsibility.

\textsuperscript{25} For example, remission of the cost of the appeal. The Office of Cost Containment, a New Hampshire governmental agency, seeks repayment from indigent defendants of the cost of their defense. See N.H. REV. STAT. ANN. § 604-A:9
heartfelt desire to challenge a conviction, even on frivolous grounds, for reasons wholly independent of the likelihood of success. Some clients despair upon hearing that their appeals will fail and need the lawyer to help identify a path that leaves at least some hope for a better life. Students can learn much from watching a lawyer, to better or worse effect, engaging in one of those delicate and important conversations.

Frivolous appeals not withdrawn by clients also impose another delicate and important duty on lawyers that students benefit by observing: how does one argue a frivolous appeal "as well as possible?"26 Again, the ethical rule barring lawyers from making misrepresentations in court constitutes a touchstone governing the framing of the argument, but the touchstone does not answer all questions. Should the lawyer ignore material adverse facts, or should the lawyer acknowledge them by making the best possible, but still extremely weak, argument for their immateriality? Should the lawyer try to distinguish some precedent involving similar facts, or should the lawyer offer the best, albeit weak, argument to overrule the precedent? Finding the right answers to these questions in a particular case may require the lawyer and the student working on the case to interpret and apply the law controlling the claim and the law marking the limits of ethical conduct. Watching lawyers struggle with such challenges advances students' education in legal ethics.

B. Whose Case Is It Really?

Many scholars, commenting on clinical legal education, note the powerful incentive of student effort and learning created by the experience of bearing ultimate responsibility for a real client's case.27 The Appellate Defender clinic faces a challenge in this regard. Although students work on real cas-

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(26) Cigic, 639 A.2d at 254.
(27) See, e.g., Laflin, supra note 7; David F. Chavkin, Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor Reconceptualizing the Supervisor-Student Client Relationship, 51 SMU L. Rev. 1507, 1551-32 (1998).
es, and meet the real client whose future depends on the outcome of the case, the students know that the supervising attorney will brief and argue the appeals. Four years worth of attention to the clinic’s students has taught me several lessons about the implications of this circumstance for the clinic and also some techniques for managing the challenge.

First, students vary in the extent of the effort they devote to their cases. The best students engage fully in the process, knowing that their work can influence and improve the supervising lawyer’s brief and thus directly benefit the client. Students understand that the educational value of the clinic to them increases in proportion to the time and effort they dedicate to it. Those desiring to join the relatively small New Hampshire bar undoubtedly take note of the career benefits that accrue to a student who makes a favorable impression on the Appellate Defender lawyers. Weaker and less motivated students try to get through the clinic, as they try to get through law school, by working close to the line dividing minimally adequate work from failing work. The clinic’s low enrollment cap allows the supervising attorneys to identify such students early and to respond by increasing the number of required drafts and feedback meetings, so as to set the minimal adequacy bar as high as reasonably possible.

Second, many of the students who enroll in the Appellate Defender clinic also participate during their law school careers in one of the Law Center’s several trial practice clinics, in which students speak in court for a client. Law students often find their first experience of speaking for a client in court unforgettable. Having once had the experience of seeing a client’s vulnerability when confronted with the machinery of justice, few students require a reminder, and most thus take seriously their relatively smaller responsibility in the Appellate Defender clinic for the client’s fate. Students without prior clinical experience often have a similarly motivating event when, in their first visit behind prison walls, they meet a client who vividly manifests deeply human qualities of confusion, frustration, hope, and fear. In her post-prison visit reaction memo, after describing how little her client conformed
to the socially prevalent perception of imprisoned persons as inhuman monsters, one student reported having an unexpected emotional reaction to the visit; she wept.

Third, the fact that a lawyer writes a brief in each case on which a student works brings certain educational advantages. Each student gets the benefit of discussions about the case with, and comments on the student's work made by, a lawyer whose thorough familiarity with the transcript and the case's particular research and drafting dilemmas arise out of the lawyer's simultaneous confrontation with those same dilemmas. Indeed, the distinguishing feature of the Appellate Defender clinic's pedagogical method is its creation of a kind of apprenticeship in which students both watch experienced practitioners perform the litigation tasks in a real case and perform those tasks themselves under the supervision of that lawyer.

Scholars of teaching recognize that students can learn a great deal when they combine the activity of watching accomplished practitioners perform their craft with the activity of attempting to do the task themselves. For example, in *Cognitive Apprenticeship: Teaching the Crafts of Reading, Writing, and Mathematics*, Collins and his co-authors set out the theoretical justification for teaching via the apprenticeship model:

> [T]he apprentice repeatedly observes the master executing (or modeling) the target process, which usually involves some different but interrelated subskills. The apprentice then attempts to execute the process with guidance and help from the master (i.e., coaching). A key aspect of coaching is the provision of scaffolding, which is the support, in the form of reminders and help, that the apprentice requires to approximate the execution of the entire composite of skills. Once the learner has the grasp of the target skill, the master reduces (or fades) his participation, providing only limited hints, refinements, and feedback to the learner, who practices by successively approximating smooth execution of the whole skill.²⁸

As adapted to the cognitive nature of the target skills involved in the law school clinical setting, that paragraph describes the teaching method to which the Appellate Defender clinic aspires.29 "Thus, rather than transmitting expertise through theory and propositional discourse or leaving the novice entirely to the lessons of her own tasks, the expert can display her own understandings and performances and explore her own exemplars of practice so as to guide the novice’s quest for competence."30 By showing the student so explicitly the lawyer’s own learning process through the course of the case, the clinic aims to encourage students to become conscious of the process by which they also learn.31

C. Who Are These Lawyers?

The discussions above make clear that the success of the Appellate Defender clinic depends on the qualities of the supervising attorneys.32 The example of a supervising lawyer’s practices and habits, for good or ill, may prove influential to students who often have little or no other experience of seeing, so fully exposed to their view, the dilemmas of law practice. In several respects, the New Hampshire Public Defender attorneys who staff the Appellate Defender clinic set a distinctive example.

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30 Baker, supra note 29, at 73.
31 For a fuller discussion of the advantages of self-conscious learning, or "metacognition," see, e.g., Robin A. Boyle, Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student, 81 U. DET. MERCY L. REV. 1 (2003). I am indebted here also to Professor Sophie Sparrow, who gave me a copy of the materials she created in conjunction with a workshop titled Introduction to Teaching Metacognition: Helping Students Reflect Upon Their Learning.
32 See Sullivan, supra note 7, at 1295 (noting dependence of success of clinic on supervising attorney's skills as teacher and as litigator).
First, the Appellate Defender program emphasizes teaching and learning, not only in the context of the clinic, but more generally. I teach a doctrinal course every semester, and the deputy regularly teaches a course in advanced appellate advocacy. Before entering the clinic, many students know one or more of the lawyers, and for that reason feel more comfortable both in seeking our help and in challenging our assumptions.

Moreover, the New Hampshire Public Defender emphasizes continuing legal education in a variety of respects. For example, newly-hired Public Defenders undergo a month-long period of training at the outset of their careers, and many Public Defender lawyers teach during new lawyer training. By the time they arrive to do a two-year rotation at the Appellate Defender, most Assistant Appellate Defenders have had the experience of teaching their skills to less experienced lawyers.

Once enrolled in the clinic, students see the briefs, the moots, and the oral arguments, not only of the most experienced appellate lawyers, but also of the attorneys filling the two-year rotating slots. That variety not only exposes students to a diversity of styles, but also allows students to inspect the work of attorneys at different stages of development as appellate lawyers. Students also watch as, in the substantially non-hierarchical working relationship of the Appellate Defender lawyers, the more experienced lawyers learn from the newer appellate practitioners.

Second, to some extent, students become part of the larger organization – the New Hampshire Public Defender – of which the Appellate Defender is itself a part. With some frequency, trial attorneys dealing with issues in pending cases consult with Appellate Defender lawyers, and the legal dimensions of the quandaries raised in those conversations can become subjects of discussion amongst the Appellate Defender lawyers. Where appropriate, the lawyers involve the students in those discussions and in research projects arising from them. Through those discussions and conversations about the appellate cases on which the students work, students also begin to gain some appreciation of matters of trial strategy and practice that explain why a trial lawyer raised an argument in a certain
way or neglected to make a different argument.

By association with New Hampshire Public Defender lawyers, students also encounter that organization’s characteristically high morale and level of accomplishment. The Public Defender enjoys a good reputation nationally.33 The program’s commitment to vertical representation in the trial offices produces well-rounded lawyers who deliver high-quality representation.34 Trial lawyers who come to the Appellate Defender thus bring with them a wealth of experience about trial practice in all its phases.

Third, and perhaps this constitutes the principal structural advantage of the Appellate Defender clinic, the students work with appellate attorneys who currently write and argue appeals. Every year each Appellate Defender lawyer files between fifteen and twenty-four briefs and has almost as many oral arguments. Students thus learn from lawyers who, through their own current appellate practice, are themselves constantly learning and refining their own techniques.

IV. CONCLUSION

The Appellate Defender Clinic’s method adopts features of several different models of instruction. Like doctrinal courses taught in classrooms, the clinic has a classroom component in which students assimilate the lessons of a text on legal writing and reasoning and discuss the tactical, doctrinal, interpersonal, and ethical dilemmas that arise in the setting of a law office handling indigent criminal appeals. Unlike doctrinal courses, but as in traditional clinics, the Appellate Defender program also engages students in the process of learning by doing. Students read transcripts, research issues, write briefs, and make

an oral argument. Traditional clinics do not generally have instructors handle any significant number of cases apart from those on which the students work. Thus, unlike traditional clinics, but as in externship settings, the Appellate Defender Clinic engages students substantially in the process of learning by watching experienced lawyers practice. Students read the briefs written by Appellate Defender lawyers, watch their arguments, and talk with them about the dilemmas arising in the work. Finally, unlike many externships, Appellate Defender students do not work only on the kinds of contained, specific tasks often defined by externship supervisors who seek to complete some larger project with the student’s help. Instead, Appellate Defender Clinic students undertake, for their cases, the same broad range of tasks that the lawyer performs.

Perhaps inevitably, the integration of all of those models of learning into a single program produces drawbacks as well as benefits. The rule barring student practice in New Hampshire’s appellate court imposes limits on the depth of the learning by doing, as compared with clinics in which students file the brief and argue the appeal. The obligations of the clinic’s lawyers to their clients and cases sets limits on the time they can devote to their teaching roles. Yet, by devices such as the low enrollment cap, the Appellate Defender accommodates those limits in such a way as to maintain a program having great educational value. In turn, those accommodations require others. In order to offer the educational benefits to as many students as possible in light of the low enrollment cap, the program draws in a new group of students every semester. In the end, the program aims to offer a unique educational experience by incorporating in a single setting learning by studying, doing, and watching.

In the course of writing this article and thinking about the Clinic, I have paused to envision future directions. Assuming the possibility of a rule change allowing student practice in the New Hampshire Supreme Court, the clinic could add a two-semester version which holds out to students the possibility of filing their own brief and giving oral argument in their cases. In that version, students who demonstrate the requisite ability during their first semester could, during their second, have
primary responsibility for filing a brief and/or arguing an appeal.

Such a two-semester version of the clinic would involve its own distinct challenges. For example, because of delays between the filing of the appellant's brief and the scheduling of oral argument, even a two-semester version might not allow enough time for one student to demonstrate sufficient mastery, file a brief, and argue the appeal in that same case. A student could perform all of those tasks in a single case only for a brief written relatively early in the student's term in the clinic, before the student had yet assimilated many of the lessons the two-semester experience offers. Alternatively, if a student filed a brief written during the student's second semester in the clinic, that student would almost certainly have finished the course and graduated before the court would call the case for oral argument. A lawyer or a different student would then have to make the oral argument in such a case.

A second question confronting the envisioned two-semester version involves client consent to student representation. Why do clients consent to representation by a law student? To that question, law school clinics can offer some extremely persuasive answers. Often, law school clinics serve clients who lack the means to afford counsel and lack any right to court-appointed counsel. The choice facing such clients, thus, is law school clinic representation or pro se representation. The Appellate Defender clinic, of course, cannot offer that answer, as its clients have a constitutional right to appointed counsel.

In that respect, the Appellate Defender clinic is not unique. Criminal trial practice clinics, for example, often represent clients who have a constitutional right to counsel, as do some appellate clinics. A second feature, however, distinguishes the Appellate Defender clinic from all of those clinics of which I am aware. Those clinics offering student-attorney representation as an alternative to licensed-practitioner representation exist apart from the institution that provides representation to the bulk of the similarly-situated client population. Such clinics, accordingly, can describe their advantages by comparison with that institution. Clinics carry a much smaller caseload than do
that institution's lawyers. The clinic has experienced practitioners on staff whose exclusive professional responsibility consists in supervising the student attorneys and ensuring that their work meets appropriate standards. Clients choose to accept representation by such clinics, thus, because the client's choice lies between a focused, reflective team of students and lawyers on the one hand, and an all-too-often overburdened, inadequately-supported institutional lawyer on the other. Such clinics can, with good reason, often accurately describe student-attorney representation as at least as competent as the available experienced-attorney alternative.

The Appellate Defender, however, occupies a different position in that analysis. Though busy keeping up with the brisk pace of deadlines, Appellate Defender lawyers regard themselves as having sufficient time and support to produce consistently first-rate work. In the two-semester version of the clinic, the client's choice therefore would lie between a student supervised by an Appellate Defender lawyer or that Appellate Defender lawyer him- or herself. Fairly or not, many incarcerated prisoners tend to regard public defenders with suspicion, often for having just been convicted at trial while represented by one. Such clients may view student representation as an evasion of attorney responsibility, rather than as a valuable supplement to an attorney's efforts.

Good answers to those concerns undoubtedly exist. For now, though, I conclude my contemplation on a hypothetical future version of the Appellate Defender clinic by returning to the essential method of the current version. In the future, as at present, I expect that the Appellate Defender's particular structure and constraints will continue to guide it toward an apprenticeship model. Such a model engages students simultaneously in learning by doing, by seeing fully exposed to their view the work processes of experienced practitioners, and by reflection and discussion about their experiences.