mediation. NPMP uses a facilitative style of mediation and has an agreement rate of 79.9% for parties that utilize the process. Without the program, the vast majority of cases would not have any resolution at all or would escalate into more serious and dangerous situations.

Most of the cases that are assigned to NPMP from the City Prosecutor’s intake department are not well suited for the courts. This may be due to insufficient evidence, the existence of cross-complaints, a long history of minor criminal complaints between parties, an ongoing relationship between the parties, or the involvement of multiple parties. NPMP mediations may be as small as two parties or as large as a full block of a neighborhood. NPMP mediations serve many purposes, such as improving communication and understanding by providing a safe and structured environment for parties to hear and understand each other. As a result, some disputes are resolved and other misunderstandings are prevented from escalating into serious criminal offenses. In some mediations, parties determine how to end their relationships. In others, relationships are saved, and neighborhoods are unified by working out issues and deciding on specific agreeable terms to move forward.

Mediators at NPMP

NPMP mediators Julia Dillon, Romona Inskeep, Karen Preston, Christy Radigan, Vivian Russell, Derek Collins, and Susan Shostak have a variety of different styles and day jobs, but all are devoted to the mediation process and assisting parties in discovering mutually acceptable agreements. Many
of them have developed mediation programs in other settings. While it is not possible to convey the full extent of all of their experience in a brief article, some examples can illustrate the practical skills of the mediators: Vivian implemented peer mediation when she was working as a school counselor; Karen has two mediation businesses and has mediated issues ranging from business disputes to gang violence in schools; Ramona worked for CASA and ran the mediation in the juvenile division of the courthouse; Susan is a full-time mediator in Franklin County, and Christy works in small claims mediation.

**The Partnership Between NPMP and Moritz Law Students**

Most of the NPMP mediators took part in the students’ training weekend in order to coach them through mediation role-plays. Following training, students started traveling downtown to observe NPMP mediations, which consisted of more than just passive learning since, after each mediation, the mediator would debrief with the student and staff attorney about the process, techniques, strategies, and the result of the mediation. Students were able to see the basic training process in action and, more importantly, to learn how to develop skills beyond the basics. The subtleties of the mediation process can be developed only with experience, as each case is as unique as the individual parties involved.

The professional mediators have embraced the students’ involvement in NPMP. It is not unusual to have three mediators debriefing with one or two students about cases that came through that night and the techniques used. Debriefing allows students the opportunity to ask questions about how the mediator knew to take certain action and to explore the effectiveness of different techniques for different situations. It has also been of interest to the mediators to hear about other cases in great detail and to hear the students’ perspectives. Christy notes that the students keep the mediators on their toes with eager questions and fresh ideas. Vivian also says that she finds working with the students very interesting, as they bring something new to the program and are very eager to learn the process. Susan also notes that the students are very well prepared, creative, and receptive to feedback, which they apply in their own mediation experiences.

Students appreciate the opportunities given to them by NPMP and the insight from each of the professional mediators. As 2L Michael Stinziano notes, the range of styles, techniques, and personalities of the different mediators is very beneficial, along with the application of mediation skills. 3L Lauren Hamilton echoes Michael’s sentiments and says that it is helpful to see what dispute resolution is all about in reality.

The skills that the Multi-Party Mediation Practicum students learn this semester will assist them whether or not they mediate again. The active listening, information gathering, issue identification, and problem solving skills are helpful for a lawyer/counselor in practice. By partnering with NPMP, students are able to develop these skills while serving the community with effective mediation.
Facility Biography

Profile: Professor Sarah Cole

Professor Sarah Cole came to Moritz Law in 1998 and has quickly made her mark as one of the rising stars of the nationally ranked Alternative Dispute Resolution Program. She has coauthored a treatise and a casebook on ADR and written over half a dozen articles on the subject. Before coming to Moritz Law, she was a clerk on the Ninth Circuit, a private attorney, and a five-time NCAA Division II swimming champion. Earlier this year, she was named the first Squire, Sanders & Dempsey Designated Professor of Law. Recently, she sat down for an interview with Clinic News:

Q: You began teaching at Creighton University School of Law in 1994, and Alternative Dispute Resolution was among the first classes that you taught. Have you always been interested in ADR issues? What made you interested in this field?

SC: I became interested in alternative dispute resolution when I was in law school. I was editor-in-chief of the University of Chicago Legal Forum, a law journal that holds a symposium each year on a timely legal topic. During the year I served as editor-in-chief, the journal symposium focused on the role of the jury in civil dispute resolution. While editing an article by then professor and now judge Diane Wood (our inaugural Blackmun lecturer in 2005), I learned that English and American courts were reluctant to enforce agreements to arbitrate. I decided to look at the historical record on that issue and discovered that the courts' hostility toward arbitration was a relatively recent development that was based on an obscure English decision from the 1850s. I wrote a paper on that topic and published it after graduating from law school. Between that experience and a couple of courses in arbitration and negotiation, I was hooked. It helped that I practiced labor and employment law for a few years. Mediation, arbitration, and, of course, negotiation, all play major roles in labor and employment disputes. I enjoyed participating in the processes but also became fascinated with the interplay between courts and dispute resolution processes.

Q: How many students are enrolled in the Mediation Practicum each year?

SC: When we first started the certificate program in 1998, we offered two mediation practica each year. Twenty-four to 36 students took the practicum during the first few years of the certificate program. Within the last couple of years, demand for the course has increased dramatically. Even though the practicum is resource intensive—because it requires two professors to teach in the classroom and supervise students while they conduct mediations—we concluded that it was very important to satisfy student demand. As a result, we now offer three mediation practica each year.

Q: How many hours a week do students spend conducting actual mediations and how many hours do they spend in class?

SC: Although professors run their classes with some differences, we all discuss important legal and policy issues affecting mediation. And, we train our students to mediate cases. After extensive training, we send our students to Franklin County Municipal Court, the Night Prosecutor’s Mediation Program, and several other venues to gain experience mediating actual cases while under a clinical professor’s supervision. We use simulated mediations to train our students but then focus on discussion of what they learn downtown as well as discussions of mediation theory throughout the semester to enrich students’ learning experiences.

Q: I assume that most, if not all, of the students who work on the Ohio State Journal on Dispute Resolution, which...
you advise, are also students who enroll in the Mediation Practicum. How much overlap is there in the different jobs that these students do on the journal and in the practicum—or, to put it another way, do you think that writing and editing pieces on mediation requires a distinct skill set from actually being a mediator?

SC: I think there is some overlap but that the skill sets are more different than the same. Working on the journal, students use primarily traditional academic skills—writing and editing. Interpersonal skills are also important, but because most of the work is done independently—writing a note, editing an article, reviewing articles for publication—one’s ability to think and write clearly is more important than other skills. By contrast, mediators in training focus more on developing excellent interpersonal skills. Dean Josh Stulberg, in his book Taking Charge/Managing Conflict, offers a wonderful description of the kind of skill set a mediator should develop. A mediator should, among other things, be neutral, objective, intelligent, flexible, articulate, effective as a listener, skeptical, imaginative, and forceful and persuasive. While we hope all of our graduates have these skills, the skills are not the focal point of journal work. Of course, one attribute that students on the journal and students who learn to be mediators should share is the ability to think analytically and critically about material presented to them.

Q: You have already written numerous articles in the mediation field, as well as coauthoring a treatise and a casebook. What are you working on now?

SC: I am currently working on an article examining party misuse of mediation communications. This article is going to be published in the University of Kansas Law Review as part of its symposium on secrecy and transparency in dispute resolution. In the article, I examine parties’ attempts to introduce mediation communications, which most states make confidential, into subsequent judicial proceedings. It might seem surprising that parties misuse mediation communications in this way, but I was more surprised by the fact that courts have done very little to discourage this blatant violation of confidentiality rules. Since confidentiality is viewed as the key to success in mediation, I believe courts should sanction parties and their attorneys (in some situations) when they violate their jurisdiction’s mediation confidentiality statute. Also, beginning in January, I am going to work on revising the mediation treatise I coauthor with Dean Nancy Rogers and Dean Craig McEwen [of Bowdoin College]. We think that a new edition is overdue since the last edition was in 1994 and a lot has changed since then!

Q: Obviously you are a believer in alternative dispute resolution programs. What do you see as the future of ADR in the legal system? Specifically, what are the biggest changes or improvements that need to be made in the legal system or in existing ADR programs to make them more effective?

SC: As I said before, one of the big issues, in my view, is ensuring that parties, attorneys, and courts take statutes governing dispute resolution processes seriously. If courts fail to enforce confidentiality statutes, parties will be less candid in mediation, and mediation will be less effective. As to the broader question, it seems clear that arbitration and mediation are here to stay. Courts continue to be enamored with processes that help them reduce their dockets. I think that one of the bigger challenges for arbitration is to make sure that the process is fair to parties who are bound by arbitration agreements. With mediation, I think that the challenge is to educate attorneys about the benefits of mediation so that the primary way they use mediation in the future is by agreement rather than by court order.

Q: How do you hope your students will utilize the skills and theory they learn in your practicum once they begin practicing?

SC: I hope that the practicum, like other law school classes, improves students’ analytical and writing skills. I also hope that the students, most of whom will become lawyers rather than full-time mediators, will be advocates for the use of mediation and efficient and educated users of the mediation process. I hope that they will be at the forefront of the mediation movement, encouraging and educating others about the benefits of mediation. I should say that I have been very pleased that a number of my former students are now full-time mediators. I think it is a credit to the strong dispute resolution program here at Moritz Law that court systems throughout the country have recognized that our graduates, even with relatively little practice experience, can make excellent mediators.

Professor Cole teaches Facilitation, Lawyering within Dispute Resolution Processes, Torts, Issues in Arbitration, Commercial and Labor Arbitration, Mediation, and Legal Writing.
A Short History of the Clinical Program at the Moritz College of Law
Part II: 1979–2005

In 1978, Professor Charles “Chuck” Thompson assumed the directorship of the Clinical Program. He quickly gained a reputation as someone who was committed to clinical education and who cared passionately about the rights of criminal defendants. Thompson was also known to the students and faculty as a “character” who wore Levis to class and loved motorcycles, jazz, and softball.

During Professor Thompson’s term as director, several clinic cases reached the U.S. Supreme Court. The Civil Law Practicum worked on In the Matter of Subler (In Re Otis) in 1979, a case that involved a mother’s losing custody of her child without due process. In 1980, Jago v. Van Curen also reached the Supreme Court, but not before Judge Porter of the U.S. District Court of the Southern District of Ohio remarked on the high quality of the brief submitted by Ohio State students. And Chapman v. Rhodes, a project of the Civil Law Practicum under Professor Lou Jacobs, was heard by the U.S. Supreme Court in 1981.

In 1980, the law school expanded the clinical curriculum by offering two half-year sections in which students assisted parolees who were reintegrating into the community. At the same time, practica were extended from 10 to 15 weeks. For the first time, video equipment was purchased by the program so that students could enhance their interviewing and negotiating skills by viewing and critiquing their own performances.

Professor Thompson stepped down as director in 1982 and died unexpectedly one year later. He received a posthumous Outstanding Teacher Award from the Class of 1983.

Professor Rhonda Rivera became the Clinical Program director in 1982. Under her guidance, the program was re-organized and the office modernized. Even more importantly, the clinical curriculum expanded still further. At the beginning of her tenure as director, the Clinical Program consisted of four practica: Civil (previously known as Poverty Law), Criminal (which was exclusively criminal defense work), Juvenile, and Family Law. With Professor Rivera’s encouragement and success in obtaining grants, two significant additions were made over the next few years: in 1983, Professor Nancy Rogers founded the Mediation Clinic, and the next year Professor Harriet Galvin and staff attorney Elizabeth Manton established the Prosecution Practicum.

The Mediation Clinic marked a new trend for the Clinical Program, since it was the first course to expose students
to the skills of mediation. In fact, the clinic was new not only to this university but also to the entire legal profession, so that course materials had to be created from scratch. Dean Jim Meeks conceived of the idea for such a clinic and asked Professor Rogers to design it. The Mediation Clinic was composed of a Multi-Party Mediation Practicum and the Small Claims Practicum. The clinic was first headed by Professor Rogers (who is currently the dean of the law school) and supervising attorney Carol O’Brien. At the time, the area was so new that a number of Moritz Law student course papers were published and contributed to the legal thinking about mediation. The Mediation Clinic was quite popular with students, and it was expanded in 1988.

The Prosecution Practicum was a change in direction for the Clinical Program, since up until that time all criminal pratica were based on defense representation. Professor Lou Jacobs had assisted in the successful prosecution of a felony trial as a third-year law student and believed that such an opportunity would be welcomed by Ohio State law students. After the practicum was designed by Professor Galvin, Professor Jacobs and staff attorney Bob Krivoshey took over the class as co-teachers. One obstacle was that cases could not come out of Franklin County because of conflicts of interest with the Criminal Defense Practicum already operating there; luckily, Craig Mayton ’80 was the Delaware city prosecutor in neighboring Delaware County and was happy to provide cases for the students. Under the student practice rule set out by the Ohio Supreme Court, students were allowed to represent the State of Ohio on any misdemeanor case, and in the first few years the case load consisted of a wide range of criminal activity: drunken driving, theft, bar fights, drug possession, public indecency, and domestic violence. Professor Krivoshey selected cases based on their instructional value and their likeliness of going to trial.

During the early 1980s, the Clinical Program also evolved in other ways. Trial Practice, Legal Negotiations, and Pre-Litigation courses, which had been independent courses, were integrated into the clinic curriculum. The Labor Law Practicum, which had collaborated with the local Teamsters union for several years, was a grant-based practicum that ended when the grant expired. The Civil Liberties Practicum and the Consumer and Commercial Law Practicum were also removed from the curriculum during this period.

Professor Rivera stepped down as program director in 1986 and was replaced by Professor David Goldberger, who described the Clinical Program as “one of the best structured legal clinic programs in the country.” Under his leadership, the program continued to expand into new areas. First, Professor Katherine Hunt Federle founded the Justice for Children Practicum in 1998, co-teaching the class with staff attorney Anita DiPasquale. The practicum is part of the Justice for Children Project, which aims to explore the ways in which the law may be used to improve the experiences of children through direct legal representation of children in local courts and original research and writing in areas affecting children and families. The practicum’s interdisciplinary approach allows law
students to collaborate with psychologists, social workers, and other professionals to further this goal.

In 1999, Ohio State Provost Richard Sisson, acting out of a “profound concern for the student body,” approached the law school faculty about a program that could address the problems of student-tenants who are treated unfairly by landlords. The result was the Student Housing Clinic, which employed law students who assisted a clinic staff attorney. The housing clinic was different from the rest of the clinical practica in that it did not include a classroom component. Nonetheless, because of the high volume of student housing cases, the clinic offered an abundance of hands-on experience to students. Katherine Wise ’97 was the first director of the clinic; in 2004 Susan A. Choe ’96 became the new director. Today, the Student Housing Clinic assists about 1,000 students per year and has saved more than $300,000 for student-tenants since its founding.

In 2000 the law school created the Legislation Practicum at the suggestion of Professor Jim Brudney. The practicum was designed to allow students to work for a variety of institutions at the Ohio Statehouse, including the Legislative Service Commission, leadership caucuses, individual members of the General Assembly, and at other state government offices. Professor Steven F. Huefner served as the practicum’s first director, and Professor Terri Enns supervises the students’ work.

The Clinical Program also worked on a number of significant Supreme Court cases during Professor Goldberger’s tenure. In 1995, he and clinic students briefed and argued McIntire v. Ohio Elections Commission, in which the Court ruled that the right to distribute anonymous campaign leaflets was protected by the Constitution. In 2005, clinic faculty and students brought Cutter v. Wilkinson to the Court, successfully representing prison inmates who were defending the constitutionality of a federal statute that protected their right to religious exercise.

The latest chapter in the history of the Moritz Law Clinical Program occurred early in 2005, when Professor Greg Travalia took over the directorship of the program after having taught the Civil Law Practicum for many years. Today, the program stands out as one of the oldest of its kind, providing real litigation, mediation, and legislative experience to 60 percent of the Moritz Law student body.
I was at the law school from the fall of 1970 through December 1973. (Actually, I first entered the school in 1968 but returned home from my very first day of classes to find a draft notice in the mailbox.) My clearest recollections are of Ray Twohig and Linda Champlin. Ray, in particular, was—in memory at least—the guiding light of the program during my time there. This was the time of antiwar demonstrations, the Kent State “massacre,” and student activism generally. As a returning veteran who had become somewhat radicalized in the Army, I found the ideals of the Clinical Program very appealing. At that time, there was something called the Poverty Law Practicum, as well as the Criminal Law Practicum and Civil Law Practicum. Ray was very active in public battles with the Columbus Police Department over issues of police brutality, even bringing a class action lawsuit against the department, I believe under the auspices of the program. I remember being involved in some of the discovery activities in the case. I also recall Ray’s being a target of the police department and have a vague recollection of his being arrested at one point, which he said was a set-up by the department.

I also recall Ray’s being involved in some capacity in the defense of Professor Charles Ross, who was charged with inciting a riot on the campus. William Kunstler was brought in to lead Ross’s defense. I remember attending the trial conducted by Chief Judge Fais and seeing the sparks fly between Kunstler and the judge. Kunstler also came to the law school as a visiting lecturer for one class. I remember it was the first time I heard the famous lawyer joke about the three people in a life raft discussing who would dare jump into the water full of sharks to pull the raft to safety at the island in the distance. Of course, the lawyer volunteered, and the sharks parted as he swam to the island. When the others marveled, the lawyer explained it was just professional courtesy. It was hilarious to hear Kunstler tell the story.

I especially remember two cases that I was very involved with as a clinical student. One was the defense of a black man who had been charged with a misdemeanor violation of a Columbus city ordinance that prohibited conduct that constituted “an annoyance to passersby.” The man had been heard to utter a profanity in a bar by an off-duty policeman. The man was convicted in Municipal Court and his conviction was upheld by the Court of Appeals and by the Ohio Supreme Court. We took an appeal to the U.S. Supreme Court, which reversed the conviction, finding the ordinance to be unconstitutional. It was a wonderful learning experience.

The other case was also a criminal misdemeanor matter involving charges of, among other things, resisting arrest. This was after the Supreme Court had authorized student participation in trials with appropriate supervision. Ray was the supervisor and he actually let me try the case to a jury. I remember staying up all night the night before the trial preparing my opening and closing arguments. And, miracle of miracles, the defendants were acquitted.

We want to hear from you!
If you are an alumnus of the Clinical Program at Moritz Law and would like to share a memorable experience you had in a clinic, comment on the program, or just let us know what you are doing now, please contact us!

Write to:
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Or send e-mail to:
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Updates from the Clinics

Legislation Clinic Faces Unique Challenge

In most law school clinical programs, “case rounds” are an important part of the student experience. These group discussions of individual cases that particular students are handling give all participating students the opportunity to share in the learning opportunities of each case. But because the Legislation Clinic does not operate on the clinic-as-law-firm model that enables these case rounds, it must find alternative means of sharing the practical learning that most clinical programs generate through the rounds.

Worth noting at the outset is the fact that, in contrast to litigation clinics, students in the Legislation Clinic do not engage in the practice of law, and the Legislation Clinic does not create an attorney-client relationship with any of the offices in which students work. Because the Legislation Clinic provides its services to a variety of offices of Ohio’s state government without regard to party or ideology, clinic students may often be working on opposite sides of the same issue. For instance, one student placed in the House minority caucus may be working to defeat or substantially alter the same legislative measure that another student working in the House majority caucus is actively helping to enact. These realities understandably could give rise to difficult conflict-of-interest problems were the clinic operating as a law firm—as if students in the same criminal law clinic were working for both the defense and the prosecution.

Accordingly, each clinic student is expected to develop and maintain a confidential professional relationship with the office in which they are working. In fact, as part of their obligations as a clinic participant, Legislation Clinic students must sign a confidentiality agreement that protects all private legislative information they learn through their placement. This confidentiality requirement, which the clinic stresses from the first day of class and reinforces throughout the semester, strictly prohibits students from sharing private details of their experience with anyone, including other students. The only exception is that students may discuss their work with the clinic faculty. The faculty, for their part, may not disclose this information to anyone else and may make use of it only to assist the disclosing student in performing clinic work. Some of the students’ most interesting experiences and observations therefore must remain unknown to other students. Indeed, even the particular issues on which students are working are frequently confidential.

Nonetheless, the clinic has had no shortage of interesting class discussions, drawing from students’ observations of public aspects of the legislative process or from their generalized reflections about their work that do not disclose any confidential information. For instance, almost every semester a number of students end up seeing a poorly prepared witness dissembling at a legislative hearing. From their inside perspective, students quickly learn how damaging such performances can be and how important it is for witnesses or lobbyists to be fully knowledgeable and to provide accurate information. Similarly, most semesters, students have interesting reactions to the nature of the proceedings that take place on the floors of the Ohio House and Senate. Especially those students who are new to the legislative process are often surprised at how ceremonious these sessions are and how little of the essential legislative compromise typically occurs at this stage.

Fortunately, these students are all in positions to see much of what is occurring behind closed doors as well, particularly with respect to the issues on which they are working. Over the life of the clinic, these assignments have included issues relating to school funding, campaign finance reform, the state budget, death penalty administration, other criminal justice issues, and terrorism and security, among many others. By working firsthand on a specific proposal, clinic students also develop a rich understanding of the many factors that shape legislative policy and often are able to discuss these insights with the rest of the students without need to refer to the particular issue on which they are working.

All in all, students in the Legislation Clinic either see enough intrigue occurring in public settings or can reflect with sufficient abstraction on their confidential experiences to permit the faculty to hold a form of case rounds on a weekly basis. Although not your typical case rounds, these discussions have a similar feel, and any observer would recognize the shared learning that occurs as students react to their part in the legislative process and reflect on its strengths and weaknesses.

These realities understandably could give rise to difficult conflict-of-interest problems were the clinic operating as a law firm—as if students in the same criminal law clinic were working for both the defense and the prosecution.
Justice for Children Project Advances Children’s Rights in Washington State

In 2001, when L.B. was six years old, her parents decided to separate. Divorce is always hardest on the children, but for L.B. it was even worse as one important factor made L.B.’s story quite different: L.B.’s parents are a same sex couple who had been living together for 12 years. One of her mothers had conceived L.B. in 1994, with semen donated by a male friend; the other was L.B.’s primary caregiver for the first six years of her life. When her two mothers decided to end their relationship, acrimonious litigation began as Mian Carvin, L.B.’s non-biological caregiver, demanded access to and ability to maintain a relationship with L.B. Page-Britain, L.B.’s biological mother, refused.

The trial court found that although both “mothers” were fit, Mian lacked standing both under Washington’s Uniform Parentage Act (“UPA”) and as a de facto parent to bring any action for custody or visitation; in fact, Mian failed even to qualify for third-party visitation. Mian appealed and the case was set before the Court of Appeals of the State of Washington–Division 1 in late 2003.

Prior to oral argument in the appellate case, the students of Moritz Law’s Justice for Children Project interceded as amicus curiae. In the fall of 2003, the students filed an amicus brief with the court—not to argue for or against Mian’s right to custody or visitation, but instead to assert that young L.B. had a constitutional right to have a voice in the proceedings. In May 2004, the Washington Court of Appeals held that L.B. was a necessary party to the common law action to determine her parentage, and that, as such, L.B. should immediately be appointed a guardian ad litem. As to Mian’s claim for custody, the appellate court held that a common law claim of de facto parentage exists in Washington and that such a claim does not unconstitutionally infringe upon the rights of biological parents.

L.B.’s biological mother appealed the decision to the Washington State Supreme Court, and the Justice for Children Project again interceded, filing an amicus brief asserting that L.B. had a constitutional right to be represented by counsel in the common-law parentage action. On November 3, 2005, the Supreme Court of Washington held that the common law claim to de facto parentage survives constitutional challenge in Washington and that as a result, Mian Carvin has standing to claim to be L.B.’s de facto parent in the trial court.

Most excitingly, the Court went on to address the issue raised by the Justice for Children Project amicus:

...Particularly relevant, amicus curiae the Justice for Children Project advocates on behalf of L.B. for appointment of independent counsel . . . we strongly urge trial courts in this and similar cases to consider the interest of children in dependency, parentage, visitation, custody and support proceedings, and whether appointing counsel, in addition to and separate from the appointment of a GAL, to act on their behalf and represent their interests would be appropriate and in the interests of justice.

The case now has been remanded to the trial court and we hope that L.B. will be appointed independent counsel in the trial proceedings so that her voice is heard in this most critical decision about her life.

This case is but one of many in which the Justice for Children Project seeks to advance the rights of children. As part of that endeavor, the project hopes to expand its amicus efforts by adding a new staff attorney who will focus on amicus and appellate cases for the project.
Prosecution Practicum Students Learn Value of Reliable Witnesses

One of the primary benefits to the clinics is that they can provide students with unexpected learning opportunities about the true challenges facing practicing attorneys. Such a learning opportunity presented itself in one of our trials this semester, involving a violent altercation in a bar. The defendant had been verbally harassing a friend of the victim; the victim eventually told the defendant (in strong language) to leave the friend alone. The defendant responded by pushing her lit cigarette up against the victim’s cheek, causing a serious burn and leaving a permanent scar.

The case presented a number of challenges for the student prosecutors, some expected and some quite surprising. The first expected challenge was to overcome a self-defense claim; there was some evidence that the victim had been belligerent towards the defendant, and perhaps the defendant would claim that she acted in self-defense. The students researched self-defense law and felt confident about their ability to meet and refute such a defense if raised.

But a surprising—and much more difficult—challenge arose as the trial date approached: although three of the victim’s friends were present and witnessed the event (not to mention a bartender and dozens of other individuals in the crowded bar), the student prosecutors struggled to ensure that they would have sufficient witnesses at trial to prove their case. Witnesses were disappearing, or deciding that they did not wish to testify. In the end, the student prosecutors were left with only two eyewitnesses—the victim and her boyfriend. The testimony of these two was subtly different every time they were interviewed, because (like every witness) they forgot certain details or used different words when repeating the same story a second or third time.

In the end, it was a few different words that changed the outcome of the trial. During her direct examination, the victim testified that the cigarette “brushed against” her cheek, rather than saying (as she had in prior interviews) that the defendant had “pushed the cigarette” into her cheek. The defense attorney pounced on this description of the incident, and immediately the defense became accident rather than self-defense: in a crowded bar, during a heated altercation, the defendant’s hand got a little too close to the victim’s cheek, and her cigarette accidentally brushed the victim’s face, causing a burn.

The trial was broadcast over the Internet, and closing arguments began just as the other 18 students were starting class. Students in the classroom watched their two colleagues make their closing arguments and then discussed what they believed would happen in the case. Most were confident of a conviction, but a few were worried about the “brushed against the face” testimony. The students knew what had really happened because together the class had reviewed all the witness statements, which unequivocally indicated an intentional pushing of the cigarette against the victim’s face. But the jury didn’t get to hear all of the witness statements, only the in-court testimony of the victim and her boyfriend. As a result, the jury came back with an acquittal, believing there was insufficient evidence to prove beyond a reasonable doubt that the burning was not an accident.

At the next class, the student prosecutors offered their own perspectives on the trial. “If I learned one thing,” said one of them, “it is that you live and die with your witnesses.” Over two years of law school had given them the training to research and prepare for a possible self-defense argument. Trial practice classes and simulations had shown them how to conduct the voir dire, examine witnesses, and deliver closing arguments; but nothing had prepared them for what is perhaps the most important aspect of litigation: finding, securing, and preparing your witnesses. This is an important gap in legal academia that only clinics can fill.

Over two years of law school had given them the training to research and prepare for a possible self-defense argument . . . but nothing had prepared them for what is perhaps the most important aspect of litigation: finding, securing, and preparing your witnesses. It’s a lesson that all litigators—and especially prosecutors—ultimately must learn the hard way.
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