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# Establishing a Securities Arbitration Clinic: The Experience at Pace

Barbara Black

In the fall of 1997 Pace University School of Law established one of the first law school clinics to provide student assistance to small investors who have disputes with their broker-dealers. What follows is a brief account of the clinic's educational objectives, an analysis of the initial organizational issues, and a report on the clinic's operation during its first two years. I am writing this in the hope that it will provide guidance and assistance to other law schools that contemplate establishing a securities arbitration clinic.

This is a nuts-and-bolts article written from the perspective of an experienced law professor who had not previously taught a law school clinic. There is a tremendous volume of literature on the theory and practice of clinical education, and anyone teaching a clinic for the first time should do some reading in the area. The experienced clinicians at your school can provide suggestions.<sup>1</sup>

## Background

Since the Supreme Court's 1987 decision in *Shearson/American Express Inc. v. McMahon*,<sup>2</sup> most investors are required to arbitrate disputes with broker-dealers before panels sponsored by the securities industry.<sup>3</sup> The volume of securities arbitrations filed with all SROs (self-regulatory organizations) rose from approximately 2,800 in the year before *McMahon* to about 6,100 in the year after.<sup>4</sup> In 1998 about 5,500 new cases were filed with the National Association of Securities Dealers, which in that year processed almost 90 percent of all securities arbitration claims in the United States.<sup>5</sup>

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My thanks go to Jill Gross, who joined the clinic as codirector in its third year, for her comments and suggestions on this article.

1. An article I found particularly helpful as a good starting point is Philip G. Schrag, *Constructing a Clinic*, 3 *Clinical L. Rev.* 175 (1996).
2. 482 U.S. 220 (1987). The Supreme Court held that predispute arbitration clauses in customer's agreements were enforceable, overruling *Wilko v. Swan*, 346 U.S. 427 (1953). See *id.* at 228-34, 238.
3. The New York Stock Exchange and the National Association of Securities Dealers are the two principal self-regulatory organizations.
4. See Report of the Arbitration Policy Task Force to the Board of Governors, NASD, *Securities Arbitration Reform* 7 (1996).
5. NASD Office of Dispute Resolution, *Arbitrator Training Course Preparation Guide* 9 (Washington, 1999).

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As a speedy, economic, and fair forum for resolution of disputes, securities arbitration can meet the needs of both investors and broker-dealers. One experienced and thoughtful commentator has concluded that the “process works well so long as the public is convinced that should a controversy arise it will be resolved on a level playing field.”<sup>6</sup>

Yet many investors have deep suspicions of industry bias, and, as a result, securities arbitration is frequently described as “a deck stacked in favor of the brokerage firms.”<sup>7</sup> Investors with small claims feel particularly disadvantaged. Many of them are unable to obtain legal representation because their claims are quite small, and they must present their cases pro se against brokerage firms represented by experienced legal staff.

Observers of the arbitration scene frequently note that arbitrators understand the pro se claimant’s difficulties and are willing to do equity in cases where there is a genuinely aggrieved customer. They wonder whether, in actuality, the pro se claimant is disadvantaged. But, for several reasons, the arbitrators’ willingness to give the pro se claimant some latitude in presenting his claim may not compensate for the investor’s difficulties. Because the securities industry is so heavily regulated, attorney representation may be necessary to establish the securities law violation and rebut the broker’s defenses, particularly if the broker is relying on exculpatory language in the customer’s agreement. The investor may not be able to identify the form of injury—colloquially, the SCUM<sup>8</sup>—he has suffered. He may not be able to organize the complex record of his trading documents to present a succinct account of his trading history with his broker-dealer. Finally, what is perhaps most difficult for the investor who feels aggrieved, he may not be able to distinguish between losses caused by broker-dealer misconduct and losses resulting from his own assumption of market risk. These difficulties, readily understandable in any layperson, are intensified given the anger, shame, and humiliation frequently experienced by investors who feel (rightly or wrongly) that their brokers have taken advantage of them.

Small investors’ perceptions that they would fare better with legal representation appear to be accurate. A survey reviewing about 8,100 awards between July 1991 and June 1996 shows that investors win more frequently when represented by counsel and that represented investors who win achieve a significantly higher recovery rate than pro se investors.<sup>9</sup>

Nonattorney representative firms (NARs) have sprung up as low-cost alternatives to private counsel. Questions have arisen about the ethics and competence of NARs,<sup>10</sup> and their activities may be deemed to be unauthorized

6. Constantine N. Katsoris, *Should McMahon Be Revisited?* 59 *Brook. L. Rev.* 1113, 1114 (1993).
7. Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 *Brook. L. Rev.* 1095, 1111 (1993) (mentioning the phrase but not agreeing with it).
8. Suitability, Churning, Unauthorized trading, Misrepresentations.
9. SAC Award Survey: *How Fares the Pro Se Investor in Arbitration?* *Sec. Arb. Commentator*, Feb. 1997, at 1.
10. See generally Michael Siconolfi, *Imperfect Advocate: Investors with Gripes Gripe About a Firm That Pleads Their Case*, *Wall St. J.*, Nov. 14, 1995, at A1.

practice of law.<sup>11</sup> In 1995 the Securities Industry Conference on Arbitration, an independent commission appointed to oversee the securities arbitration process and propose improvements, recommended restrictions on NARs and regulation of their activities. SICA also recognized “that claimants should have broad access to the SRO arbitration process and a wide choice of representation.”<sup>12</sup> There was a recognized need for other avenues of representation.

### **The Genesis of the Securities Arbitration Clinic**

In March 1997 I received a phone call from the office of the chairman of the Securities and Exchange Commission, Arthur Levitt, inquiring whether the Pace law school would be interested in establishing a securities arbitration clinic. The phone call reached a receptive ear; I thought the proposed clinic might meet both the SEC’s and Pace’s objectives.

#### *The SEC’s Objectives*

At town meetings conducted by Levitt in various locations, small investors talked about their difficulties in arbitrating their disputes with their broker-dealers on a pro se basis. Many investors, already feeling taken advantage of by brokers, lacked confidence in the system’s fairness. Levitt thought that law school clinics might be established to provide assistance to small investors.

#### *Pace’s Objectives*

Like many law schools today, Pace wants to develop additional clinical offerings. The 1992 MacCrate Report emphasized the importance of developing the fundamental lawyering skills and the fundamental values of the profession within the law school curriculum.<sup>13</sup> Current and prospective students, graduates, and the bar generally often articulate the desire for more clinical opportunities for law students. In addition, the Pace law faculty had previously expressed a desire to increase the school’s offerings in the business law area. A securities arbitration clinic would be not only another clinical offering, but an offering that might interest a different community of students in an area targeted by the faculty for development. The proposed clinic seemed to be an attractive intersection between the business curriculum and the skills training urged by the MacCrate Report.

11. The Florida Supreme Court has issued an advisory opinion that nonattorneys who receive compensation for providing representation in securities arbitration proceedings are engaged in the unauthorized practice of law. Florida Bar re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So.2d 1178, 1183–84 (Fla. 1997). Brokerage firms have sued an investment recovery firm in California, charging it with the unauthorized practice of law. See, e.g., *Linsco/Private Ledger Inc. v. Investors Arbitration Services Inc.*, 50 Cal.App.4th 1633 (1996); *Royal Alliance Associates Inc. v. Investors Arbitration Services Inc.*, 50 Cal.App.4th 1633 (1996).
12. Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys, 22 *Fordham Urb. L.J.* 507, 523 (1995).
13. See generally Section of Legal Education and Admissions to the Bar, American Bar Association, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development—An Educational Continuum* (Chicago, 1992).

Pace regularly operates two to four in-house clinics each academic year, depending on faculty availability. Most of them are yearlong litigation-oriented courses, carrying six credits per semester and necessarily requiring substantial student commitment. An attractive feature of the securities arbitration clinic was that it could be offered as a relatively low-credit but nevertheless live-client clinical offering (a yearlong course, two credits per semester).<sup>14</sup> It would appeal to students who wanted a clinical experience and yet did not want the intense immersion of the other clinics. In addition, the clinic would appeal to students with an interest in business and securities law, who might not have an interest in either the subject matter of the other clinics or their emphasis on litigation. Finally, as a law school with a part-time program, Pace was especially interested in developing clinical opportunities that would be available to part-time evening students. Evening students who could arrange their daytime schedules to accommodate a one- or two-day hearing would be able to participate in the clinic, since the seminar would be scheduled in the evening and meetings with clients and the rest of the clinical work could take place during evenings and weekends.

Providing assistance to investors would permit students to develop lawyering skills in relatively low-risk, low-stakes cases. Securities investors are not indigent, and they were willing participants in the venture in which they have suffered a monetary loss. While their situations warrant sympathy, they are not tragic victims. The informal nature of the arbitration hearing, with its minimal emphasis on rules of procedure and evidence, would be a good introduction to litigation for inexperienced students. We did have questions, however, about whether the clinic would allow students meaningful opportunities to develop their lawyering skills. First, does the uncertainty of determining the law in this area mean that students might not be able to improve their lawyering skills in the traditional sense of identifying and applying the relevant precedent?<sup>15</sup> Second, since many claims are settled before arbitration, would too few students actually have the opportunity to develop litigation skills? Third, would the lack of expertise in the securities industry, on the part of both students and the faculty supervisor, prove to be a serious disadvantage? Recognizing and balancing these competing considerations, we decided to operate the clinic for at least a two-year trial period.

As the faculty member who developed this clinic, I also had a personal motive. Before entering law teaching, I had practiced corporate and securities law as an associate in two large law firms. After teaching traditional law school classes (principally Contracts, Corporations, and Securities Regulation) for about fifteen years and after a stint of administrative service in legal education, I was eager to try something different. I wondered what lawyering skills I had retained, after so many years in academia. Would it be difficult to make a transition from neutral observer of the law to advocate for a client? I needed something to get the adrenaline flowing again. And I found it.

14. Low-credit clinical experiences tend to be externships or simulations rather than live-client in-house clinics.
15. Since most customer-broker disputes go to arbitration and since arbitrators do not normally give reasons for their decisions, there is a paucity of decisional law on broker-dealer regulation since *McMahon*.

### Amending the Student Practice Order

An early step in the planning of the clinic was petitioning the court to amend the student practice order that permits students, under the supervision of an admitted attorney, to provide legal representation. Although the issue of whether representing investors in arbitration hearings amounts to the practice of law has not been addressed in many jurisdictions, it seemed clear to us that New York would answer this question affirmatively, and so we would need authorization for the students to represent investors.<sup>16</sup> Moreover, the idea that a clinical experience has educational value and should carry academic credit is founded on the premise that the students are engaged in lawyering work. So we resolved early on that an amendment to the student practice order was a prerequisite for offering the clinic. We got the amendment in the summer of 1997. The relevant language of the order provides that clinic students can advise and represent clients "in arbitration proceedings involving disputes with broker-dealers before the New York Stock Exchange and/or the National Association of Securities Dealers or other self-regulatory organizations of the securities industry."<sup>17</sup>

### The Clinic's Basic Design

We offered the clinic as a yearlong four-credit course (two academic credits, two clinical credits). We decided, at least for the first two years, to limit enrollment to six students who would work together in pairs.<sup>18</sup> Preference in registration would be given to third- and fourth-year students. We decided that there would be no prerequisites, to permit as many students as possible to apply and to attract a diverse group. I thought that in the early weeks of the course students could gain a basic understanding of the typical kinds of broker-dealer fraud through readings and lectures and be able to intelligently interview prospective clients, and so I did not think that Securities Regulation was necessary (particularly since the Pace course spends little time on broker-dealer regulation). But we strongly recommended that students take the basic Corporations and Evidence courses before enrolling. Trial Advocacy and Interviewing, Counseling, and Negotiating are also recommended courses.

In the fall semester the class meets once a week as a seminar, to study the substantive law of broker-dealer regulation, arbitration theory and practice, and lawyering skills.<sup>19</sup> Private practitioners, SEC attorneys, SRO staff, and broker-dealers have participated in the teaching of the seminar—another reason why it is scheduled at night. Besides sharing their expertise, they have

16. N.Y. Jud. Law § 478 (McKinney's 1999); 1996 WL 742860 (N.Y. St. Bar Assn. Comm. Prof. Eth.).
17. Supreme Court of the State of New York Appellate Division: Second Department Student Practice Order, as amended July 1, 1997.
18. There is considerable writing by clinicians about the benefits and disadvantages of student teams. For a discussion and further references, see Schrag, *supra* note 1, at 217–20.
19. Substantive law topics include securities industry regulation (SEC, SRO, state), federal securities fraud claims against broker-dealers (suitability, churning, unauthorized trading, misrepresentations), and state law claims (breach of agency).

given the students a better understanding of the participants and the culture of the securities industry.

In addition to the weekly seminar meeting, students are expected to handle, under faculty supervision, the clinic's caseload. Students are responsible for responding to preliminary inquiries from prospective clients and investigating their complaints. If, after investigation, it appears that the investor may have a viable claim against the broker that cannot be amicably resolved, and if the investor chooses to file an arbitration claim, the student will draft and file a statement of claim with the appropriate SRO. We had initially estimated that small claims could be resolved, through either a hearing or settlement, within one academic year, so that students would have both the emotional satisfaction of bringing a matter to resolution and the valuable learning experience of assessing the consequences of the decisions they had made in course of representing the client. As it turns out, while some claims may be settled within one academic year, it is extremely unlikely that a claim that culminates in a contested hearing can be concluded in one year. Nevertheless, in those protracted cases the students do learn a variety of skills, including picking up and handing over a case.

In the spring semester, as students work more intensively on their assigned cases, the seminar meets every other week. Many of these sessions are devoted to student presentations and discussions of the individual cases. Each case has presented unexpected twists and turns that have provided excellent opportunities to discuss a variety of substantive and strategic issues. We have discussed, for example, issues as diverse as the law on negligent misstatements, the appropriateness of claiming punitive damages, and methods of researching the credentials and background of brokers. Particularly in its second year of operation, as three of the clinic's cases were in the discovery phase and one proceeded to a hearing, we had numerous opportunities to discuss professional responsibility and ethical issues as students learned to deal with difficult opposing counsel and sometimes uncooperative clients.

To supplement the classroom component and to prepare the students for their own claims, I had hoped to provide the students with some experiences in observing actual arbitration hearings. This proved not to be feasible. Although the NASD staff was cooperative in working to arrange this, there were two difficulties. First, the arbitration hearings are private, and many attorneys or the parties did not wish to be observed. Second, since so many hearings settle in the minutes before the arbitration is scheduled to start, I was reluctant to require my students to travel all the way to Wall Street to observe a hearing that might well be canceled. As an alternative to observing a session, the NASD has offered to include the students in its arbitrator-training sessions or to hold a special training session for the students at its headquarters.

### **More Nuts and Bolts**

#### *An Office Manual*

Every clinic needs an office manual that sets forth its procedures for office management, particularly its filing and tickler systems, as well as a standard form representation agreement. I was fortunate in being part of a well-

established clinical program where all these were already in place. Even so, all of the procedures and forms should be reviewed, because some modifications will likely be necessary.<sup>20</sup>

#### *Clinic Library*

The clinic has a working library that we have tried, for budgetary reasons, to keep small. Students conduct most of their research in the school's library or at the computer terminals within the clinic's offices. We have found it useful to have near at hand a securities arbitration treatise, and if the clinic becomes a permanent part of the school's clinical offerings, we want to add more research materials.

#### *Experts*

We have on several occasions had to explore the availability of pro bono expertise. Since Pace University includes a graduate school of business, we have been fortunate to be able to call upon the expertise of that faculty. The chair of the finance department has conducted a class on expert witnesses and has volunteered his services as an expert in some cases where financial expertise was needed in assessing liability and damages. Some types of cases—for example, churning (excessive broker's commissions)—are very difficult to win without expert testimony.

In another of our cases a request by the client to his broker for copies of his records produced a key agreement containing a signature which our client claims is not his. This has provided an opportunity for students to be creative in locating possible experts willing to donate their services to the clinic. Through the assistance of a colleague who is a former prosecutor, we were able to obtain the pro bono services of a handwriting expert.

#### **Developing a Client Base**

##### *Statistics on Pro Se Cases*

An early issue in planning the clinic was trying to determine whether there were really investors out there who would benefit from its services, i.e., who had apparently meritorious claims but could not otherwise obtain representation because they could not afford to pay a fee or because the potential recovery was too small to sustain a sufficient contingent fee. Statistics supplied by the NASD showed that 859 cases were filed in 1996 seeking hearings in New York City. Of these, 334 (38.9%) were filed pro se. Of those 334, 182 were claims of \$50,000 or less. Also in 1996, 138 cases were filed for decision on the papers submitted. Not surprisingly, since the amount of these claims is \$10,000 or less, a much higher percentage (71%) were filed pro se. The New York Stock Exchange handles fewer arbitration cases than the NASD; its records

20. Students need to review the representation agreement and consider whether to modify it specifically for a particular case. In one case, for instance, we specifically stated that our representation did not extend to enforcing any arbitration award; we knew (and had advised the client) that this would be a problem.

show that there were about 30 claims of no more than \$10,000 filed in New York City in 1996.<sup>21</sup> These figures, of course, do not take into account investors who get discouraged and give up on pursuing claims. We rather quickly agreed that there seemed to be a need for the clinic's services.

#### *Client Eligibility Standards*

In planning the clinic, we thought hard about whether the law school should devote resources to helping people who are not indigent. The clinic's charter provides that it may undertake to act only in representation of the indigent, the aged, and "areas of concern to the public where the interests of the public may be protected or furthered." We determined that our proposal met that last criterion. The strength of the American financial markets, it is frequently noted, rests in no small part on a generally shared belief that the system is fair and is not rigged. Any public perception that brokers can perpetrate frauds on small investors with impunity would undermine confidence in the system's fairness, particularly given the frequently expressed concerns about industry bias in the arbitration process. We also decided to give a preference to senior citizens, since the clinic's charter expressly refers to representation of "the aged."

It was also very important to the law school that the clinic not be perceived as taking viable cases away from practitioners; the clinic's purpose is to educate law students and to provide public service, not to compete with the local bar. In discussions with the SEC, the SROs, experienced practitioners, and law professors, a consensus developed as to the type of investor who would have difficulty in getting legal representation and for whom representation by the clinic would be appropriate. That consensus is reflected in our client eligibility guidelines:

- Household income cannot exceed \$75,000.
- Securities claim cannot exceed \$50,000.<sup>22</sup>
- Investor has no major assets except a home and a car.
- Preference is given to senior citizens, for whom Pace's clinic charter expresses special concern.<sup>23</sup>
- Investor must have consulted three attorneys who have declined to take the case because of the amount or nature of the claim, or must have been referred to the clinic by a legal referral service that certifies that the investor is unlikely to obtain representation on a contingency basis.<sup>24</sup>

21. All the above statistics were supplied by the NASD and the NYSE at a meeting held at a New York regional office of the SEC on May 16, 1997.

22. Most of our claims, in fact, are less than \$20,000, and only in unusual circumstances would the clinic take a \$50,000 claim. While the SEC proposed this as a cutoff, discussions with practitioners indicate that, at least if there is a solvent brokerage firm that can be named as a respondent, a \$50,000 claim can be profitably handled on a contingency basis. Referrals from the city bar rarely exceed \$30,000.

23. As did Congress in the 1995 securities laws amendments. See Private Securities Litigation Reform Act of 1995 § 106.

24. The requirement of a three-attorney turndown is an interpretation of the clinic's charter.

### *NASD Referral*

The NASD agreed to include a description of the clinic and its eligibility questionnaire in the information packet it mails out in response to telephone inquiries from investors about the arbitration process, targeting inquirers close to Pace, i.e., in the Westchester and Bronx County zipcodes. We initially thought that this would be the source of most of the clinic's potential clients. In fact, for reasons we have not yet been able to figure out, this has not proved to be particularly effective in directing potential clients to the clinic.

### *City Bar Referral Service*

The Joint Committee on Legal Referral Services, sponsored by the New York city and county bar associations, receives between 400 and 600 calls a day from persons seeking legal representation. Its records show that from 1993 through 1996 some 2,000 out of about 139,000 referrals were for securities arbitration. Of this total only about 300 potential clients actually reported meeting in person with one of the referral service's securities arbitration attorneys, and about one-half of those potential clients became actual clients.<sup>25</sup> When we approached Allen Charne, executive director, about the possibility that the service might refer investors with small claims directly to the clinic, he was encouraging. Indeed, he noted the clinic's approach was in keeping with one of the service's aims: "to increase the availability of legal information and representation to persons of moderate means."<sup>26</sup> After two meetings in which the proposal was thoroughly reviewed, the Legal Referral Service agreed to refer inquiries involving securities arbitration claims of \$15,000 or less directly to the clinic, based on its experience that it is extremely difficult to find an attorney to take such a case. If the claim is \$15,000 to \$30,000, it will attempt to assist the investor in finding a private attorney; if that proves unsuccessful, it will then refer the investor to the clinic.

This arrangement is proving to be an effective source for clients that meet the clinic's standards.

### **Should the Clinic Charge Fees?**

We gave some thought to charging minimal fees for our services, but we concluded that our legal assistance should be free. Solid arguments can be made that it enhances the student's sense of professionalism to require her to account for her time because the client is being billed for it, even if the client is paying only a nominal fee. On the other hand, the clinic's charter limits representation to the indigent, the aged, and matters of concern to the public. In establishing a new clinic, we thought it was important to avoid even the perception that it might be diverting potential fee-paying clients from practitioners. Finally, the federal district court and circuit court student practice rules prohibit looking to the client for compensation or remuneration for student work. While technically these rules may not be applicable, we decided,

25. Joint Committee on Legal Referral Services, Memo to Participants in Securities Clinic Meeting (Aug. 13, 1997).

26. *Id.*

in light of all these circumstances, to adopt a conservative interpretation and not to charge clients for legal services. The client is responsible for all costs incurred, such as filing and hearing fees. In appropriate cases, the clinic plans to seek awards of punitive damages, costs, and attorney's fees. Recovery of punitive damages and costs will benefit the client; recovery of attorney's fees will benefit the clinic.

#### Procedure and Profile of Initial Inquiries

In its first two years of operation, the clinic received over 125 inquiries from investors seeking assistance. From these, twelve investors were interviewed at the clinic, and nine were offered and accepted representation. Thirty-four people were referred to the clinic by the city bar, and four clients have come from these referrals. Others heard about the clinic from a variety of sources, including initial publicity.<sup>27</sup> Many of these inquiries were from investors who did not live near the law school or who appeared to have income and net worth levels in excess of the clinic's limits.

After an investor telephoned or wrote to the clinic, a student would call him back and briefly describe the clinic and its purpose.<sup>28</sup> This introduction was necessary since some people called about securities matters that did not involve arbitrating disputes with broker-dealers.<sup>29</sup> The student then asked about the investor's situation. If the investor worked or resided in the New York metropolitan area and described a small claim against a broker-dealer, the student proceeded to outline the clinic's eligibility standards.<sup>30</sup> Some investors recognized that they did not meet the standards, either because of the size of their claim or because of their personal financial worth. If the investor indicated an interest in pursuing the possibility of clinic representation, the student promised to send out the description of the clinic and its eligibility questionnaire. The student concluded the phone conversation by emphasizing the preliminary nature of the inquiry.

About half of the investors to whom we mailed a questionnaire chose not to return it. If the investor did return the questionnaire, the student would

27. In November 1997 the SEC issued a press release about the clinic, and shortly thereafter CNN did a story about it. In early 1998 an article about the clinic appeared in the chain of local newspapers; later that year, the *New York Times* ran two articles on the clinic. See Diana B. Henriques, *Aid for the Little Guy in Securities Arbitration*, N.Y. Times, Oct. 4, 1998, § 3, at 8; Penny Singer, *Pace Securities Clinic Aids Small Investors*, N.Y. Times, Oct. 18, 1998, at 8WE.
28. Students initiated each phone call by saying something like this: "We provide representation in arbitration hearings to investors who have disputes with their broker-dealers and who, because of the small amount of the claims, cannot obtain legal representation. Is this your situation? We cannot provide general advice about securities matters."
29. About 20 percent did not involve securities disputes with broker-dealers resolvable through arbitration. They involved matters as disparate as potential criminal investigations, commodities trading, contract disputes over close corporations, bankrupt brokerage firms, lost securities, claims against issuers and principal shareholders, attempts to vacate arbitration decisions, and attempts to sue previous attorneys.
30. Since the clinic received so much publicity, we received many phone calls nationwide. Even though it was unlikely that the clinic could assist them, we thought it was important that every inquiry receive a response. At least 20 percent of the calls were from investors that had only minimal contacts with the New York metropolitan area. They were advised to seek a referral from their state or local bar association.

review it with the faculty supervisor and make a decision about whether to invite the investor to the clinic to get more information about the investor's possible claim. In some instances a decision not to proceed further has not been based on an assessment of the merits, but has been made because the investor appeared to exceed the income and net worth limits, because the investor did not reside or work in the metropolitan New York area, because the claim appeared stale, or because procedural issues made the case too complicated for the clinic. In such instances we sent a letter advising that the clinic could not offer representation. The letter emphasized that, because of limited resources, the clinic could offer representation in only a few cases, and that this decision not to represent was not based on an assessment of the merits of the claim. In other instances, the faculty supervisor and the student decided that legal or factual research was warranted before inviting the client in for an interview; we did not want to waste the client's time or raise false hopes unless we thought it was likely that the case would be an appropriate one for the clinic.

If it appeared that the claim was an appropriate one for the clinic to handle and the investor met the eligibility standards, the student team would invite the investor to the clinic for an interview, asking her to bring documentation about her claim and copies of her income tax returns. These interviews, always conducted with the faculty supervisor present, lasted at least an hour. The interviews concluded with the students' reminding the investor that this was still a preliminary factual investigation and fixing a date by which time they would discuss with her their assessment of the claim and whether they could offer to represent her. Each investor was reminded that ultimately the decision whether to accept student representation would rest with her.

Of the twelve interviews held in the first two years, nine of them led to a decision by the clinic to offer representation. In some instances, we offered representation for the limited purpose of investigating the matter further, making it clear that we would not decide about filing a claim until we had heard the broker's explanation. The students orally (either in a subsequent interview or in a conference telephone call) communicated to the investor a rather detailed analysis of the strengths and weaknesses of his claim. The students also advised him of the relevant filing fees and other costs associated with the proceeding. The students followed up the interview with a confirming letter setting forth the assessment and a representation letter. In each case, the investor has accepted the clinic's offer of representation.

Of these nine cases, six were concluded by either a hearing or a settlement. The clinic represented one investor in an uncontested hearing, which resulted in a favorable award; it represented investors in two contested hearings, one favorable to the claimant and the other not. In three instances the clinic negotiated a favorable settlement for the claimant. As for the remaining three matters, the clinic advised two clients that it would not represent them in arbitration, and one client decided to terminate the relationship with the clinic.

It has surprised me that 125 preliminary inquiries yielded only nine appropriate cases. (It has not, however, surprised my clinician colleagues.) A fruitful

topic for further study is why more investors did not pursue further the possibility of clinic representation. Were they uncomfortable about the quality of representation? Or did the clinic's procedures impose daunting obstacles? It has been suggested that filling out the questionnaire is discouraging. If that is so, weeding out some claimants is not necessarily a bad result. Arbitrating a securities claim requires a committed client.

### **Outreach to the Community: Investor Education**

As microcap fraud, cold-calling scams, and Internet fraud abound, frequently targeted at the elderly, both the SEC and the New York attorney general have been active in investor education activities. The clinic joined with the attorney general's office in presenting such a program aimed at local senior citizens. Besides providing the students with the opportunity to practice their public speaking skills, the program let the community know about the assistance provided by the clinic. In the future, we hope to expand these activities in the community and to develop listings of resources available to small investors, perhaps through the clinic's Web site. "There's so much fraud out there" is a frequent student comment, and they want to help inquirers find assistance for problems not within the scope of the clinic.

### **Preliminary Observations**

#### *What Have the Students Learned?*

As I've said, the clinic was designed to allow students to develop lawyering skills in real-client cases where the stakes were relatively low but the students would be able to use all the lawyering tools employed in larger and more complex proceedings. All the students have had extensive experience in interviewing. First, in the initial telephone conversations, they have to quickly elicit salient facts to make a rough judgment about whether this might be a possible client. For example, did the client buy securities from a broker, or directly from an issuer? Is this a stale claim? Second, in the more extensive initial interview with a prospective client at the law school, students have to begin the process of learning more about the investor. Is this a motivated and cooperative person who can work with them in developing and presenting the claim—and in gathering the relevant information to make an assessment about the merits of the claim?

Students also have the experience of gathering and organizing the complicated facts necessary to understand their client's case. They have to figure out how to read the broker's statements and trading confirmations. One client walked in with a shopping bag of documents and told us, "Everything you need to know is in the bag." They have to learn how trading on margin works and what uncovered put options are. In short, students have to learn what lawyers do—the often tedious and exacting work of compiling a case through documentary evidence and understanding the complexities of the transactions involved.

Since so many of these claims turn on conflicting versions of the truth, it is very difficult to predict whether an arbitration panel will ultimately conclude that our client was the victim of broker misconduct or that he was a willing

bearer of market risk. Indeed, much of our seminar discussions deal with this dilemma—how to be both a sympathetic listener to the investor's account and a detached critical observer looking for the story's deficiencies. While this is familiar to an experienced advocate, it is all new to the clinic students. What kind of impression will our client make on the arbitrators? What kinds of responses should we expect from the broker? What kinds of documents might exist in the broker's files that our client has not told us about? If our client did not tell us about signing that agreement, was it because she was lying to us or because she doesn't remember? How can we test our client's version of the story without impairing the developing attorney-client relationship of trust and confidence?

One possible criticism of the clinic is that the students, in their zeal to provide representation, may encourage investors to pursue meritless claims; every experienced securities attorney has nightmare stories of the aggressive pro se claimant pursuing a claim out of spite or revenge. In the initial investigatory stage, of course, it is not always possible, even for experienced attorneys, to develop a sense of what claims are truly based on broker-dealer misconduct as opposed to disappointed expectations; students may well give the investor every benefit of the doubt. One of the responsibilities of the faculty supervisor is help the students understand that a professional reputation suffers if a lawyer files frivolous claims, and a client is not well served if he is encouraged to pursue one. In addition, the clinic's procedures may serve to weed out any clients who come to us with an expectation that we will provide an easy path to a monetary recovery; for this reason, I have not been particularly concerned about the low return rate of the preliminary questionnaires.

We had predicted difficulties in "finding the law" because of the paucity of case law, the arbitrators' tendency to do equity, and their customary practice of not providing reasons for their decisions. Our prediction proved true. The first years of the clinic's operation coincided with the dramatic growth in online trading. Some of the clinic's first cases raised issues about the responsibilities of discount brokers. While it was a challenge to develop theories on discount brokers' responsibilities in the absence of directly applicable precedent, it was especially difficult to advise prospective clients about the likelihood of success. For me, the transition from neutral classroom teacher to advocate for clients was a not-always-easy adjustment that was exacerbated by the legal uncertainties.

Students had varied writing experiences. Most students drafted a statement of claim, arbitration's equivalent of a complaint (which fortunately can be drafted in a more readable, less stylized narrative of events). Each statement of claim went through several drafts and was edited both by the faculty supervisor and by an adjunct securities teacher who was amazingly generous with his time. In preparation for drafting the statement of claim, students also researched and drafted memoranda on the relevant legal issues in their cases, which the faculty supervisor critiqued. Students also gained experience in drafting letters to prospective clients about the strengths and weaknesses of their claims; several of these drafts formed the basis of seminar discussions.

Some of the students commented that they never realized how much time and effort could go into writing a letter.

At the end of the clinic's first year of operation, three statements of claim had been filed. For most of the next year the students were handling the discovery process and involved in the selection of arbitrators for these cases. The best experience for the students was learning to handle the frustrations resulting from dealings with opposing counsel and SRO staff. The representation of the brokers varied considerably in the three cases. One attorney was aggressively uncivil but nonetheless complied with the letter (if not the spirit) of the discovery rules. Another announced that he would not comply with the discovery deadlines, knowing that there was no enforcement mechanism in place until the appointment of the arbitration panel (delayed because of administrative error). In the third case the brokerage firm adopted a completely passive attitude toward discovery. The students also had many occasions to deal with SRO staff charged with overseeing the process of selecting arbitrators and scheduling the cases. Many of these people, like administrative staff in similar settings, are overworked and perhaps undertrained, and they frequently make mistakes.

In the spring of the clinic's second year, one of its cases went to a contested hearing, and preparing for the hearing was the focus of the clinic's activity. The two students who had the case devoted an incredible amount of time to preparing for the hearing. The other students helped by playing the roles in a moot hearing a few weeks before the actual hearing. At the actual hearing, the students presented the entire case themselves and provided excellent representation for the client. They handled themselves professionally and held their own against the broker's experienced counsel. The client expressed his satisfaction.

In the clinic's first two years, only three students actually had the experience of presenting a case before an arbitration panel. While we may be able to increase that number somewhat, perhaps by assigning more students to work on an arbitration (in cases where that is feasible), nevertheless it is likely that some students each year will not have the equivalent of a litigation experience. For some students—we know from experience—this will be a disappointment.

The students also negotiated successful settlements for two clients. In one instance, the student drafted a statement of claim, and we decided to send it to the firm before filing, to explore the possibility of settling the case. The firm was amenable to negotiating a settlement, and the case was promptly resolved.

#### *Benefits of the Clinic*

There are certainly many investors out there who believe that they have been victimized by their broker-dealers. We have heard many horror stories from intelligent, hard-working people who feel that they have been taken advantage of by unscrupulous brokers. Many of them admit that glib-talking cold callers have talked them into investments that they did not fully understand, and they express guilt and humiliation over losing their savings. But we are cognizant that we are hearing only one side of a story and that fraud cannot be proven by hindsight.

Given the small number of clients the clinic has represented and the few monetary benefits it has gained for them, I hesitate to speculate about whether the clinic has yet demonstrated that it can provide significant benefits at least of the sort that Arthur Levitt identified in his press release. Much of the clinic's work has been to provide assistance to investors that has not resulted in the filing of arbitration claims. It has provided investor education services—reviewing account statements, reading and explaining customer's agreements, explaining margin rules. In some instances, the students have acted as an intermediary between the customer and the broker to figure out why the losses in the investor's account occurred. In some cases, a student has been able to resolve the dispute through a settlement satisfactory to both the broker and customer. In those instances where the customer losses are not attributable to the broker's mishandling of the account, the students explain to the customer why the loss occurred and why the loss cannot be attributed to the broker. While the customers may be disappointed that the law does not provide a remedy for their loss, many have thanked the students for taking the time to investigate and explain the situation to them. Beyond this, I think it is simply too soon to tell.

#### *Looking Forward*

Organizing and running this clinic has been the most time-consuming project I have undertaken as a law teacher. While I believe that my lack of expertise in the securities industry has not been a serious disadvantage, I have had to invest huge amounts of time in familiarizing myself with securities arbitration practice and researching issues that are probably routine for experienced brokers' counsel. As a consequence, I have had to put aside some research projects and other professional commitments. But the benefits have been enormous. I have had to think about lawyering skills in ways less abstract than the traditional classroom teacher's. Since I have no plans to give up traditional classroom teaching, it will be interesting to see if my clinical experiences affect how I teach my basic Contracts and Business Associations courses. I have made many new professional friendships among securities arbitration practitioners and regulators in the securities industry that I hope will continue to grow. Finally, I have a new respect for my colleagues who are *real* clinicians, although I still have only a murky understanding of what they do.