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# Additional Thoughts on Romanian Clinical Legal Education: A Comment on Uphoff's "Confessions of a Clinician Educator"

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## Commentary

### ADDITIONAL THOUGHTS ON ROMANIAN CLINICAL LEGAL EDUCATION: A COMMENT ON UPHOFF'S "CONFESSIONS OF A CLINICIAN EDUCATOR"

KANDIS SCOTT\*

In his essay "Why In-House Live Client Clinics Won't Work in Romania: Confessions of a Clinician Educator,"<sup>1</sup> Professor Rodney Uphoff relates that he went to Romania with the notion of "practicing and modeling what we preach"<sup>2</sup> in the United States, but he discovered that this model does not fit the Romanian system and available resources. Professor Uphoff's critique of the feasibility of superimposing American solutions onto Romanian problems evidences a fundamental respect for other cultures and their right to self-determination. His essay reminds us to look afresh at clinical curriculum and methods in the United States as well as abroad.

My own observations of the Romanian legal system and of education in that country<sup>3</sup> are largely consistent with Professor Uphoff's description. In this comment, I would like to join his effort to develop alternative approaches to providing Romanian lawyers some of the benefits of clinical education. The approach I propose here is to go outside the law school and use continuing legal education programs for recent graduates to teach lawyering by means of clinical methodology.

#### TRAINING AFTER LAW SCHOOL

As in the United States, law school is the first stage in becoming a Romanian lawyer. Having taken the first entry exam just after graduation, a potential advocate must find a lawyer-supervisor (a "maes-

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<sup>1</sup> 6 CLIN. L. REV. 315 (1999).

<sup>2</sup> *Id.* at 337.

<sup>3</sup> With the assistance of grants from the Fulbright-Hayes Scholar program and the International Research and Exchange program, I have been studying law practice in Romania after decollectivization of the Bar. I have been conducting interviews, in English and Romanian, of lawyers in four cities. The five-month research project will culminate at the end of Spring, 2000.

tru”) in the county where he or she wishes to practice.<sup>4</sup> After passing a second exam, the graduate becomes a “stagiar” and is permitted to practice law, but to litigate only in the lowest courts. The county bar association sponsors mandatory monthly training sessions for stagiari and often assigns homework which will be evaluated.<sup>5</sup> One to two years later, the stagiar takes a final examination to become a full-fledged lawyer. In this system, a young lawyer would seem to receive individual supervision by an experienced attorney — an ideal way to learn to practice law. In reality, however, good practical training is rare.

Only a few maestri want to train young colleagues. It is very difficult for a law school graduate to find a maestro at all because a flood of new lawyers has supersaturated the market in certain cities.<sup>6</sup> The economic laws of supply and demand flourish underground: Maestri charge stagiari from \$1000 to \$10,000 to sign on as their sponsor.<sup>7</sup> Some women law graduates are rumored to have had to pay maestri with sexual favors. Graduates with family connections may find that the potential clients they can bring to the maestro are deemed to be sufficient compensation. The fact is that most stagiari work under lawyers who have no desire to teach them.

Stagiari report a variety of problems in working with their maestri. Very commonly the maestro refers smaller cases to the stagiar and does not participate actively in the representation, leaving it to the stagiar to find and represent his or her own clients.<sup>8</sup> That is permissible because the stagiar is a lawyer and therefore does not need a supervising attorney’s approval, signature, or presence in court. It is said that some maestri never meet with their stagiari. At the other extreme, some maestri control their stagiari but give them no cases or responsibility, except for “carrying the attorney’s briefcases.” (That metaphor is used in Romania too.) Although there are some maestri who do give meaningful work to their stagiari and supervise it care-

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<sup>4</sup> This process is waived in a few special situations, such as for the child of a lawyer.

<sup>5</sup> In Timis county, the Stagiari’s Conference meets monthly. Students summarize assigned articles and are tested. In Iasi county, the stagiari hear presentations of actual cases involving different legal problems.

<sup>6</sup> At present more than 1000 students graduate from law school each year. Before 1990, the number who graduated annually was only 300. In the 1980’s there were only three law schools, all public. After the overthrow of the Ceausescu regime in 1989, several other state law schools were opened or reopened. Private universities, including colleges of law, were permitted at that time. As Professor Uphoff noted, the greater prestige of the state schools and the high tuition at private law schools limit enrollment at private law schools to relatively wealthy students who were not admitted to state schools.

<sup>7</sup> This is always paid in hard currency: dollars or German marks.

<sup>8</sup> These cases are often appointments to defend in criminal cases, for which stagiari are paid small fees by the government.

fully, that experience is unfortunately rare.

As one might expect, young lawyers are frustrated at this stage of their career. The greatest concern is financial: The young lawyers struggle to find clients in competition with older members of the bar who have established reputations, a wide range of acquaintances, and repeat clientele.<sup>9</sup> However, the young lawyers also crave more practical training and supervision. Some criticize their law schools for failing to prepare them for law practice as sole practitioners (the most common form of practice). These underemployed lawyers have the time for and interest in learning about client development and law practice and would attend clinical courses.<sup>10</sup>

Teaching *stagari* also solves some of the specific problems identified by Professor Uphoff. First, it would not require legislation authorizing student practice.<sup>11</sup> Second, it does not present a totally new concept, which attorneys might resist. Although clinical training is new and different, continuing legal education existed during the communist regime and still exists for *stagari*.<sup>12</sup> The present program is more practical than law school training and therefore is a good starting point for clinical education. Finally, the *stagari* are 22 year old graduates and so are more mature and prepared in the substantive law than a law student would be.

#### CURRICULUM

The questions of what to teach, who will teach, and how to fund clinical continuing education courses are interrelated. These functional issues underlie a new concept of legal education and therefore should be resolved, as Professor Uphoff suggests, in a way sensitive to Romanian values.<sup>13</sup> A cautious start in designing a curriculum is to ask what novice lawyers identify as their needs. *Stagari* will answer: "More clients."<sup>14</sup> They also want to know how to navigate the litiga-

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<sup>9</sup> This problem is so severe that some *stagari* said in interviews that they would like to change careers, usually to become judges, despite the very low level of judicial salaries.

<sup>10</sup> Uphoff, *supra* note 1, at 345 n.79.

<sup>11</sup> Romania is not a federal state and any legislation regarding law practice must be adopted by the national parliament. It is realistically impossible to persuade Parliament now to pass a student practice act, especially in light of legislative battles over issues such as restitution of nationalized real property, a budget which will satisfy the International Monetary Fund without provoking violent citizen uprisings, and laws necessary to be eligible for admission to the European Union.

<sup>12</sup> See *supra* text accompanying note 5.

<sup>13</sup> Uphoff, *supra* note 1, at 339.

<sup>14</sup> *Stagari* use dramatic words like "starving" to describe themselves and their colleagues, and characterize practice as a "battle." Lawyers accuse those (often young lawyers) who charge less than the minimum fees set by the Union of Advocates of "dumping" so as to "steal" clients. Such is the competition for business. Such a minimum fee rule might violate antitrust laws in the United States. Cf. Superior Court Trial Lawyers Ass'n v.

tion system. Finally, they want to know how to win at trial, because they believe that clients are attracted to victorious litigators who perform well, or at least aggressively and theatrically. A continuing education program that meets these identified needs would have credibility and could slowly expand into other matters now taught in clinical courses in the United States.

Beginning with a limited or incomplete clinical education program is reasonable in Romania. As was true in the United States not many years ago, few Romanian lawyers accept skills training as a serious topic of study.<sup>15</sup> They do not consider most lawyering skills to be complex or difficult to acquire, although there probably is general agreement on the importance of acquiring the skills.<sup>16</sup>

Moreover, law is practiced differently in Romania than in the United States and demands different skills. In some parts of the country, for example, it is commonplace for clients to approach a lawyer in the court hallway to request representation. If the lawyer agrees to interview the client, part or all of the initial interview may take place in the hall. Court calendars are crowded because almost no cases are settled, except in the areas of family law and inheritance or when the client is a foreigner. There is no discovery procedure. Most judgments are appealed. Thus an average Romanian lawyer might think courses in interviewing, negotiation, and discovery planning are of little use, mere novelties. While novelty can be a draw, a curriculum not grounded in identified needs is unlikely to succeed.

Based on the "market," the best courses to start with would be client development,<sup>17</sup> a litigation preparation course with drafting exercises, and trial advocacy with demonstrations and court observation.

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F.T.C., 493 U.S. 411 (1990).

<sup>15</sup> This is indicated in my interviews. Romanians have had a demanding, non-participatory, theoretical education throughout their lives. Although many are eager for change, the lasting effect of such an educational culture influences the attitudes of most lawyers. With only limited resources, one is unlikely to invest in something very new and implicitly critical of Romania's traditional education. Contravening this is the recognized need for lawyering skills and the knowledge that at least one important Western nation, the United States, has moved to other methodologies.

<sup>16</sup> In surveys asking lawyers to rate the difficulty of certain skills, many respondents rated all skills as of average and equal difficulty. When rating importance, answers varied more but there was great support for the importance of in-court litigation skill. The skills which the Romanian lawyers evaluated were client interviewing, fact gathering, client counseling, negotiation, drafting court documents, drafting other documents, in-court litigation, and fee collecting.

<sup>17</sup> ABA-CEELI offered a Law Office Management course, and some Romanian lawyers use Western ideas, such as firm brochures, to attract clients. Unfortunately most of these are found in large Bucharest firms which seek Western business and institutional clients, such as the World Bank. Their efforts may be irrelevant to the vast majority of advocates who are sole practitioners.

A “curriculum” of this sort is rooted in local reality, rather than theory, and it does not require changes so drastic as to provoke resistance.<sup>18</sup> The clinical pedagogy (simulation and modeling) does not require elaborate instruction of the teachers themselves. Such modest changes in the curriculum have the potential to change the educational culture, transform the existing stagiari education program, and set the stage for a more sophisticated clinical education program. The way to achieve those goals is to begin teaching what students want to learn.

### TEACHERS

The C.L.E. teachers could be the same respected practitioners and professors with extensive local practice experience who currently teach in the bar associations’ programs for stagiari, assuming, of course, that these teachers were willing to cover new subjects. Unfortunately most of these teacher/lawyers have learned by doing, and are unfamiliar with the literature discussing good lawyering. They could, therefore, fall into “war story” practical training. One antidote would be to translate United States clinical teaching materials into Romanian.<sup>19</sup> Western clinical educators also can play a valuable role by describing and modeling new teaching techniques. This is, of course, a far cry from foreigners teaching clinical courses. Teachers who do not speak Romanian cannot alter the local educational culture, but they can assist Romanians who wish to make changes.

Professor Uphoff identified three problems regarding Romanian law teachers which also pertain to the faculty of continuing clinical education courses for stagiari. First, advocates resist sharing their practice “secrets” with others.<sup>20</sup> Courses on practice skills—as opposed to courses in substantive law—would give rise to fears of aiding the competition. The easiest solution to this problem would be to invite lawyers from a different county to teach clinical subjects, since these non-local lawyers would not usually be competing for clients with the stagiari in the class.<sup>21</sup>

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<sup>18</sup> Because continuing education is more flexible than a law school with tenured faculty, it is less controlled by an entrenched curriculum.

<sup>19</sup> The cost of translation would not be enormous. In Romania, the average reported net salary is approximately \$90/month and experienced teachers, including English teachers capable of translations, work at that salary level. Of course there are also costs for copyright permissions and publishing the material. The total might still be less than the cost of sending a United States advisor to Romania.

<sup>20</sup> Uphoff, *supra* note 1, at 331 n.45. The fear of competition is also shown by the fact that “avocati,” those lawyers able to represent any client in any matter, went on strike briefly in 1999 to oppose a proposed law that would have permitted in-house counsel, who are tested differently and limited in what they can do, from becoming *avocati*.

<sup>21</sup> Despite Professor Uphoff’s dismay about the lack of VCRs, they are not impossible

The second problem is the time and effort needed to prepare new courses.<sup>22</sup> Given resource limitations, it may be advisable to offer only a single continuing legal education class (as is commonly done in the United States) rather than an entire curriculum. Obviously an integrated clinical curriculum would be the ideal, but as Professor Uphoff concluded, a modest objective is more likely to be realized and could provide momentum for later expansion.<sup>23</sup>

The third problem may be the most difficult to resolve: compensating the teachers. Romanian lawyers, freed from the collective's limitation on their earnings, want to maximize their income. There is no tradition of lawyering in the public service, and few lawyers engage in *pro bono* practice.

### FUNDING

How can such clinical continuing legal education courses be funded? The local mandatory bar associations could add clinical content and pedagogy to already-existing educational programs for *stagiari* which are provided to new lawyers at no cost. Alternatively or additionally, attendees could pay fees, as is done in the United States. Although the cost might be difficult for lawyers struggling to find work, most *stagiari* would pay periodic modest course fees if the instruction were worthwhile.<sup>24</sup> Finally, an effort could be made to secure Romanian lawyers to teach occasional courses without compensation. Politically ambitious lawyers are the most likely volunteers because the public role would appeal to them. Nonetheless it would be a challenge to persuade lawyers to resist the cultural norm and to teach new material on a *pro bono* basis.<sup>25</sup>

If Romanian lawyers could be induced to volunteer as instructors, the C.L.E. program would advance another aspect of clinical education: the teaching of values and professional responsibility in the larger sense. Practitioners who teach without fee would model a new professionalism in the finest tradition of clinical legal education.<sup>26</sup>

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to find. Accordingly, with some effort, videotaped lectures and demonstrations by outside lawyers could be used.

<sup>22</sup> Uphoff, *supra* note 1, at 320.

<sup>23</sup> See Uphoff, *supra* note 1, at 318-19 (acknowledging that the Romanians' alleged fatalism is often realism).

<sup>24</sup> *Stagiari*, like law students, would be eager to attend. Uphoff, *supra* note 1, at 345 n.79.

<sup>25</sup> One might persuade non-political lawyers to participate for the sake of publicity. The few big firms may believe that Western clients would be impressed by reading in a firm's brochure that members of the firm teach a clinical continuing legal education course.

<sup>26</sup> There are some lawyers who already do more than represent their clients. Some are active in the organized bar; some are getting Ph.D.'s in law; some participate in community organizations and political parties. Such activities are uncommon, but are not unheard of.

Fostering such behavior would be a truly meaningful contribution that western consultants could make to the future of the Romanian legal profession.

#### CONCLUSION

This suggestion for introducing clinical education in Romania is rooted in Professor Uphoff's principle: "Institutional or systemic change . . . is not accomplished quickly."<sup>27</sup> Change at a slow but steady rate avoids stirring up fears of cultural and economic threats. The approach that this comment proposes can be implemented without great institutional change.

Perhaps the most useful part of Professor Uphoff's "confession" and this proposal is that they exemplify a non-formulaic approach to the design of good legal education in service of clients. Neither Professor Uphoff's proposals nor this one is revolutionary, but they invite clinicians to acknowledge and address the realities of a problem and to seek solutions that fit the facts. Clinical teachers, whose teaching is grounded in experience and theory, must be flexible and resilient in resolving problems in ways that lie outside their experience and theories and that may not fit their pedagogical models comfortably.

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<sup>27</sup> Uphoff, *supra* note 1, at 334.

