

## THE LAW SCHOOL CLINIC AS A MODEL ETHICAL LAW OFFICE

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### I. INTRODUCTION

Every clinical teacher is a legal ethics and professional responsibility teacher, though few think of themselves as such.<sup>1</sup> Clinical law teachers readily state that they teach lawyering or professional skills such as problem solving, client interviewing and counseling, alternative dispute resolution, and litigation skills.<sup>2</sup>

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1. For the purposes of this essay, I use the terms “legal ethics” and “professional responsibility” interchangeably because they are often used interchangeably when discussing the legal profession’s ethical rules and conduct toward clients and others. *See, e.g.*, Stephen Gillers, *Legal Ethics: Art or Theory?*, 58 N.Y.U. ANN. SURV. AM. L. 49, 49 (2001) (stating that some schools use the term “professional responsibility” when referring to what other schools call “legal ethics”); Fred C. Zacharias, *Five Lessons for Practicing Law in the Interests of Justice*, 70 FORDHAM L. REV. 1948 (2002) (referring to a professional responsibility teacher discussing “legal ethics” with students).

2. *See Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 512-13 (1992) [hereinafter *In-House Clinic Report*]. A special American Bar Association (ABA) task force identified ten fundamental lawyering skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. AM. BAR ASS’N SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL

Many clinical faculty also stress that they teach professional values, such as striving to provide competent representation and promoting justice, fairness, and morality.<sup>3</sup> Some clinical teachers even include specific ethics issues in the classroom sessions accompanying a clinical course.<sup>4</sup> Yet, it has been my experience that few clinical teachers view themselves as legal ethics and professional responsibility teachers in every aspect of structuring their clinics and teaching their clinical courses. Why not?

All law teachers, those teaching doctrinal courses, simulation skills courses, or live-client clinical courses, cannot help at least “model” some version of “the good lawyer.”<sup>5</sup> Entering law school, many law students only “know” the lawyers they see on film or read about in newspapers or books. For these students, the first lawyers they get to know in the flesh are their law professors.<sup>6</sup> As Professor Carrie Menkel-Meadow explains, classroom law teachers “create images of law and lawyering when we teach doctrine through cases and hypotheticals.”<sup>7</sup> What each professor emphasizes or ignores about the lawyering done in the cases the students study “crystallize[s] images of ‘the good lawyer’ in students’ minds.”<sup>8</sup>

In considering the role of law professors in shaping law students’ understanding of the ethical lawyer, a special American Bar Association (ABA) committee stated: “Deans and faculties of law schools should keep in mind that the law school experience provides a student’s first exposure to the profession, and that professors inevitably serve as important role models for students.

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DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 141-207 (1992) [hereinafter MACCRATE REPORT].

3. “Clinical courses expose students not only to lawyering skills but also to the essential values of the legal profession: provision of competent representation; promotion of justice, fairness, and morality; continuing improvement of the profession; and professional self-development.” Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 13 (2000); see also MACCRATE REPORT, *supra* note 2, at 207-21.

4. See, e.g., DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 25-37 (2003) (devoting a chapter to ethical issues in client representation); J.P. OGILVY, LEAH WORTHAM & LISA G. LERMAN, LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS 49-78 (1998) (devoting a chapter to ethical issues in externships).

5. Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 3 (1991).

6. Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 405 (1994).

7. Menkel-Meadow, *supra* note 5, at 3.

8. Joy, *supra* note 6, at 405.

Therefore the highest standards of ethics and professionalism should be adhered to within law schools.”<sup>9</sup> This idea was reinforced more recently by the ABA Section of Legal Education and Admissions to the Bar when it stressed that “[p]rofessionalism ideals can either be enhanced or undermined by the behavior of faculty in and out of the classroom.”<sup>10</sup>

The process of law faculty shaping images of good, competent, and ethical lawyering in law students is even more evident in live-client, in-house clinical courses where law teachers are actually practicing law and representing clients with their students.<sup>11</sup> In this regard, clinical faculty model some version of the good lawyer by the clinic office procedures they implement and in the representation of every client.<sup>12</sup> It is interesting and somewhat

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9. COMM’N ON PROFESSIONALISM, AM. BAR ASS’N, “. . . IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 19 (1986).

10. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS’N, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE 13 (1996). The report emphasized that “[f]or most students law professors are their first and most important role models of lawyers,” and the “law school experience has a profound influence on their professional values and their understanding of the practice of law and the role of lawyers in our society.” *Id.*

11. In-house clinical programs “refer to law school clinical programs where law students are primarily supervised by full-time law faculty. The other dominant form of clinical programs are external, or externship, clinics . . . where law students are primarily supervised by practicing lawyers or judges who are not full-time law faculty.” Joy, *supra* note 6, at 403 n.8. Clinical teachers also teach tutorials and classroom components in clinical externship or field placement courses. For the purpose of this essay, I do not focus on clinical faculty teaching externships because, in their capacity as externship teachers, they are not working in or running a law office that provides direct client representation within the law school. Nevertheless, clinical faculty in externship programs also confront ethical issues with students in their courses, and externship clinical faculty must be mindful to set good examples for their students by establishing procedures to protect client confidentiality, to guard against conflicts of interests, and to ensure compliance with other ethical duties. Additionally, externship clinical faculty have the added responsibility to guarantee that students are placed in ethically sound externship or field placement law offices.

12. There are many different types of clinical models, but a prevalent model involves students certified by their jurisdictions’ student practice rules and representing clients in a “first chair” capacity with the clinical faculty person acting as a supervisory lawyer on the case. Other models include those in which students who are not certified under student practice rules function as lawyer assistants or clerks to the clinical faculty, or students doing work permitted of nonlawyers, such as representing clients in certain administrative hearings, such as unemployment hearings in some states. See Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 514-21 (2002) (describing various models for clinical courses and the ethical responsibilities of clinical faculty and students in each model).

disturbing, then, that some classroom professional responsibility teachers think that clinicians “pay too little attention to the law of professional responsibility.”<sup>13</sup> This perception among classroom ethics teachers may be fueled by those clinical teachers who take contradictory positions on ethical issues, such as conflict of interest, “sometimes defining our [clinic] ‘law firm’ broadly and sometimes narrowly to accommodate our [clinical] teaching and supervision needs.”<sup>14</sup>

In this essay, I contend that all clinical teachers should explicitly acknowledge that they are legal ethics and professional responsibility teachers and role models of the “good lawyer” in everything they do. I argue that every in-house clinical teacher should strive to make her clinic a model ethical law office.

## II. GROWTH OF CLINICAL PROGRAMS AND THE EMPHASIS ON PROFESSIONAL RESPONSIBILITY

Clinical legal education has been a part of legal education in the United States for more than a century, and clinical programs have their roots in efforts to fulfill the legal profession’s professional responsibility to make lawyers available to those unable to afford to hire lawyers.<sup>15</sup> Starting in the late 1890s and early 1900s

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With respect to in-house clinical programs, some commentators have observed that by choosing particular “practice areas, legal work and clients, we [clinical faculty] produce the professional responsibility issues, and in the aggregate, the picture of the profession that we present to our students.” Joan L. O’Sullivan, Susan P. Leviton, Deborah J. Weimer, Stanley S. Herr, Douglas L. Colbert, Jerome E. Denise, Andrew P. Reese & Michael A. Millemann, *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 141 (1996). These same commentators contend that clinical faculty “exercise professional responsibility by, for example, distributing scarce legal resources to some, but not all, of those who cannot afford to purchase it. In the process, we express and model our conceptions of ‘the good lawyer.’” *Id.*

13. James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 FORDHAM L. REV. 2377, 2377 (1999).

14. Ian S. Weinstein, *Report of the Working Group on Representation Within Law School Settings*, 67 FORDHAM L. REV. 1861, 1862 (1995). Professor James Moliterno has also observed that some clinicians believe that “classroom professional responsibility teachers are out of touch with the day-to-day rigors of practice, especially poverty practice.” Moliterno, *supra* note 13, at 2377.

15. The preamble to the ABA Model Rules of Professional Conduct states:

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those

by volunteering at “legal dispensaries” or legal aid bureaus, law students and faculty put legal theory into practice by assisting clients who were unable to afford lawyers.<sup>16</sup> Although few law schools created clinical programs in the first half of the twentieth century,<sup>17</sup> four significant events helped clinical programs become permanent parts of law school curricula and spread rapidly from the 1960s through the 1990s.

First, from 1959 through 1978, the Ford Foundation provided nearly \$13 million in grants to more than 100 law schools through what was ultimately known as the Council on Legal Education for Professional Responsibility (CLEPR).<sup>18</sup> This funding coincided with law student calls for more relevancy in legal education and their interest in serving the poor.<sup>19</sup> William Pincus, who directed

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who because of economic or social barriers cannot afford or secure adequate legal counsel.

Model Rules of Prof'l Conduct pmb. ¶ 6 (2003) [hereinafter Model Rules].

16. Law students at several law schools, such as Cincinnati, University of Denver, George Washington, Harvard, Minnesota, Northwestern, University of Pennsylvania, University of Tennessee, and Yale, started volunteer, non-credit legal aid bureaus or dispensaries in the latter part of the nineteenth and early part of the twentieth centuries. See John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174 (1930); Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1102-03 (1997); William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591, 591 (1917).

17. Respected legal educators such as John Bradway and Jerome Frank championed the need for clinical legal education during the first half of the twentieth century. See generally John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. CAL. L. REV. 252 (1929); John S. Bradway, *Legal Aid Clinic as a Law School Course*, 3 S. CAL. L. REV. 320 (1930); John S. Bradway, *The Legal Aid Clinic as an Educational Device*, 7 AM. L. SCH. REV. 1153 (1934); John S. Bradway, *Legal Aid Clinics in Less Thickly Populated Communities*, 30 MICH. L. REV. 905 (1932); John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173 (1930); John S. Bradway, *The Objectives of Legal Aid Clinic Work*, 24 WASH. U. L.Q. 173 (1939); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933). Despite the efforts of Bradway, Frank, and others, by 1947 only Duke and the University of Tennessee had full-fledged in-house clinical programs. See Barry, Dubin & Joy, *supra* note 3, at 8 n.23. By the late 1950s, only a handful of law schools had in-house clinical programs. See Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 941 (1997).

18. Barry, Dubin & Joy, *supra* note 3, at 18-19.

19. See, e.g., PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 1 (1998) (“Clinical legal education was born in the social ferment of the 1960s.”); Charles E. Ares, *Legal Education and the Problem of the Poor*, 17 J. LEGAL EDUC. 307, 310 (1965) (noting student demands for relevance in legal education and a desire “to help make the law serve the needs of the poor”); Symposium, *Clinical Legal Education: Reflections on the Past Fifteen Years and*

CLEPR and its predecessor programs at the Ford Foundation,<sup>20</sup> stated that “[p]rofessional responsibility must not abandon its long-standing concern with ethics and morality as general propositions and as guides for fair dealing with clients. But the challenge to the profession today is to make professional responsibility more a concern with justice for all.”<sup>21</sup> Although Pincus stressed the same access to justice dimension of professional responsibility that fueled the earliest clinical experiences, he and CLEPR formally acknowledged the role of clinical programs in teaching the broader ethical obligations in client-attorney relationships.

Second, the ABA promulgated a Model Student Practice Rule in 1969<sup>22</sup> with the express purpose to assist the bench and bar in “providing competent legal services for . . . clients unable to pay for such services and to encourage law schools to provide clinical instruction.”<sup>23</sup> Today, all fifty states, the District of Columbia, and most federal courts have adopted student practice rules that give law students the right, as certified students under the student practice rules in the jurisdictions, to represent clients under the close supervision of licensed attorneys.<sup>24</sup> Again, the student

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*Aspirations for the Future*, 36 CATH. U. L. REV. 337, 340 (1987) (remarks of Dean Hill Rivkin) (“It was the societal legacy of the sixties . . . that most shaped clinical [legal] education.”).

20. From 1959 through 1965, the Ford Foundation provided grants to nineteen law schools through a program entitled the National Council on Legal Clinics (NCLC), which William Pincus headed. See Orison S. Marden, *CLEPR: Origins and Programs*, in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 5 (1973) [hereinafter CLINICAL EDUCATION FOR THE LAW STUDENT]. In 1965, the Ford Foundation renamed the NCLC the Council on Education in Professional Responsibility (COEPR), and in 1968 the COEPR was renamed the Council on Legal Education for Professional Responsibility (CLEPR). Barry, Dubin & Joy, *supra* note 3, at 18-19. William Pincus remained the director of this program throughout its existence. *Id.*

21. William Pincus, *The Lawyer’s Professional Responsibility*, in CLINICAL EDUCATION FOR LAW STUDENTS: ESSAYS 37, 37-38 (1980).

22. *Proposed Model Rule Relative to Legal Assistance by Law Students*, 94 REP. OF THE A.B.A. 290, 290 (1969). Colorado passed the first student practice rule in 1909, and other states, such as Massachusetts and Wyoming, adopted student practice rules well before the ABA established the model rule. See Joan Wallman Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, B. EXAMINER, Aug. 1994, at 40.

23. Wallman & Kuruc, *supra* note 22, at 40.

24. See Jorge deNeve, Peter A. Joy & Charles D. Weisselberg, *Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court’s Student Practice Rule*, 4 CLINICAL L. REV. 539, 549-50.

practice rule movement largely focused on the professional responsibility of providing access to justice for clients through law students in clinical programs.

Third, the United States Department of Education, through the Title IX Law School Clinical Experience Program, provided grants of over \$87 million to law schools from 1978 through 1997.<sup>25</sup> The express purpose of this funding was “[t]o continue, expand, and establish programs . . . that provide clinical experience in the practice of law, with absolute preference given to programs that provide legal experience in the preparation . . . of actual cases . . . and to programs providing service to persons who have difficulty gaining access to legal representation.”<sup>26</sup> This enormous influx of funding for clinical legal education did solidify and expand clinical programs at law schools that had originally received CLEPR funding, and helped to establish new clinical programs at law schools that had never received CLEPR funding.<sup>27</sup> Like the CLEPR program and the student practice rule movement, the Title IX program emphasized the professional responsibility of providing legal representation to those traditionally unrepresented by the legal profession.

Fourth, the ABA amended its accreditation standards in 1996 by stating that every ABA-approved law school “shall offer live-client or other real-life practice experiences.”<sup>28</sup> As a result of this standard, all ABA-accredited U.S. law schools have a clinical program, and most of the programs are in-house clinical programs or combinations of in-house and externship programs.<sup>29</sup> Unlike the other three factors that helped clinical programs and clinical legal education grow throughout the United States, the ABA standard does not stress the link between clinical legal education

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25. Barry, Dubin & Joy, *supra* note 3, at 19-20.

26. *Law School Clinical Experience Program*, at <http://www.ed.gov/pubs/Biennial/519.html> (last visited Aug. 17, 2003).

27. Barry, Dubin & Joy, *supra* note 3, at 19-20.

28. STANDARDS FOR APPROVAL OF LAW SCHOOLS, § 302(c)(2) (2002-03) [hereinafter ABA STANDARDS].

29. “By the end of 1999, there were 183 U.S. law schools with clinical programs . . . [and] approximately 80% of reporting clinicians indicate that they regularly teach in-house clinics.” Barry, Dubin & Joy, *supra* note 3, at 31; *see also* David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 236 (2003) (stating that 182 law schools offered clinics). Section 302 indicates that the clinical experience “might be accomplished through clinics or externships.” ABA STANDARDS, *supra* note 28, at § 302(c)(2).

and the provision of legal services to traditionally unrepresented persons. Like the other three factors, the ABA standard fails to stress the role of clinical legal education in immersing law students in the ethical practice of law.

As William Pincus indicated, a large, if not the largest, aspect of the professional responsibility underpinning in clinical programs is the provision of access to the courts or “justice for all.”<sup>30</sup> Yet, as Professor Charles Miller explained thirty years ago, it is the “student response to the challenge of situations of ‘professional responsibility’ while participating in the clinic . . . thinking of himself as a lawyer” that fully engages the student in learning how to become an ethical practitioner.<sup>31</sup> There is little doubt that at the same time thousands of low-income clients are being served by clinic students, students learn the lawyering values of how to provide competent representation and promote fairness. The focus on social justice by providing access to justice for traditionally unrepresented clients has a profound and beneficial effect on both clients and students.<sup>32</sup> Given the important lessons learned by students who become student-lawyers representing clients in the clinic,<sup>33</sup> however, it is all the more important that the clinic law office be a model ethical law office.

### III. THE IMPORTANCE OF DESIGNING CLINICS AS MODEL ETHICAL LAW OFFICES

The law school clinic is the best place for the student to become acculturated to the ethical practice of law. In the typical legal ethics or professional responsibility course, law students learn the rules of ethics, study related cases and ethics opinions, work through hypotheticals highlighting ethical dilemmas, and discuss lawyer obligations to clients, third parties, and tribunals. In clinical

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30. See *supra* note 21 and accompanying text.

31. Charles H. Miller, *Living Professional Responsibility: Clinical Approach*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 20, at 99.

32. See Barry, Dubin & Joy, *supra* note 3, at 12-13; Martin Guggenheim, *Fee Generating Clinics: Can We Bear the Costs?*, 1 CLINICAL L. REV. 677, 683 (1995).

33. Each jurisdiction grants clinic law students certified under its student practice rule the limited right to practice law under the supervision of a qualified lawyer, so students may provide legal advice and represent clients in role as lawyers. “Many student practice rules also refer to the ‘limited practice’ of law or the ‘limited license’ to practice law by law students.” Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 507 (2002) (citing the language of several state student practice rules).

courses, law students consider their ethical obligations in role as lawyers for clinic clients as they “grapple with the real-life demands of being a lawyer.”<sup>34</sup> And, as clinic students confront the same types of issues they will confront after becoming full-fledged lawyers, they do so under the supervision of faculty who engage the students in the process of critique, self-critique, and self-reflection.<sup>35</sup> As Donald Schön explains, this process of self-critique assists clinical students in developing their abilities to learn how to learn from experience—a process that Schön calls reflective practice or “reflection-in-action.”<sup>36</sup> Thus, “[i]n the clinic, students are provided with firsthand exposure to the actual mores of the profession.”<sup>37</sup>

Not only are clinic students in role as they confront ethical issues affecting clients, they “are [also] able to observe the faculty member modeling how she would address the professional responsibility issue in question, and to learn that competent professionals take ethical responsibilities seriously.”<sup>38</sup> As Professor Miller described in 1973:

[B]y doing and observing, [the clinic student] learns to strike a balance between the professional pulls and choices which will be his wont throughout his professional

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34. Peter A. Joy, *Clinical Scholarship: Improving the Practice of Law*, 2 CLINICAL L. REV. 385, 386 n.8 (1996). As Oliver Wendell Holmes once remarked, “We learn how to behave as lawyers . . . by being them. Life, not the parson, teaches conduct.” Letter from Oliver Wendell Holmes to Frederick Pollock (April 2, 1926), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 178 (Mark DeWolfe Howe ed., 1961).

35. Placing students in role as lawyers under the careful supervision of faculty in in-house clinical programs, or under the supervision of practicing lawyers and judges in externship programs that include substantial faculty input, enables students to develop the lawyering skills and values that will stay with them for the rest of their careers. The principal aspects of clinical legal education include students confronting “problem situations of the sort that lawyers confront in practice; the students deal with the problem in role; the students are required to interact with others in attempts to identify and solve the problem; and, perhaps most critically, the student performance is subjected to intensive critical review.” *In-House Clinic Report*, *supra* note 2, at 511.

36. DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER 31-36 (1987).

37. *In-House Clinic Report*, *supra* note 2, at 514.

38. *Id.* Professor Thomas Shaffer argues that students taking in-house clinical courses are more engaged when taking a companion ethics course because their discussions are informed by their experiences in the clinic and they are “genuinely interested in the topics we are discussing.” Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605, 608-09 (1996).

career. It is a balancing of loyalties and professional responsibilities that he cannot learn from a written problem, but only through the supervised daily practice of a multi-service clinic. The “coming of age” in the mature dedicated service to clients as well as the change in philosophy of practice is apparent. He becomes a concerned practitioner; not only for his client, but for his profession and the public. As an individual lawyer, he has a concern for the total administration of justice—how the law affects people. He has observed and lives the “responsibilities” of a lawyer.<sup>39</sup>

The clinic law office is where law students “come of age” as lawyers by putting their developing lawyering skills and professional values to use by representing clients. Clinic students engage in a number of activities in role as lawyers while supervised by clinical faculty. Thus, the clinic law office becomes an especially important site for law students to learn, observe, and practice legal ethics and professional responsibility.

Studies of lawyer ethics repeatedly demonstrate that the ethical culture in the law office is critical to the ethical behavior of lawyers.<sup>40</sup> A study of Chicago lawyers by Frances Kahn Zemans and Victor Rosenblum found that “both first and current jobs . . . are more likely to be credited with assisting in the area of professional responsibility,”<sup>41</sup> and “apprentice-like training” in the area of professional responsibility is still found in the modern law office.<sup>42</sup>

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39. Miller, *supra* note 31, at 99-100. While still a law student, Professor Charles Miller assisted Professor John Bradway in founding the Duke clinical program in 1931. Blaze, *supra* note 17, at 940-41. After graduation from Duke in 1933, Miller continued to work as an assistant at the Duke clinic until he left for the University of Tennessee, where he founded the University of Tennessee Legal Clinic in 1947. *Id.* at 939-40.

40. In a ground-breaking study of New York lawyers conducted in the 1960s, Jerome Carlin found that “[t]he longer a lawyer has been a member of the [law] office, and the more socially cohesive the office, the more likely it is that his behavior will be in line with the attitudes of his colleagues.” JEROME E. CARLIN, *LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 167 (1966). In a more recent survey of the legal profession in Chicago, researchers found that “after general upbringing, the source given the greatest credit for learning professional responsibility is the ‘observation of or advice from other attorneys in your own law office.’” FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 173 (1981).

41. ZEMANS & ROSENBLUM, *supra* note 40, at 173. The study indicated that the law office influence on lawyers’ professional responsibility is more important in private law firms, especially larger firms, than in government law offices. *Id.*

42. *Id.* at 176.

For many law students, the clinic law office is their first law office experience. For almost every law student in an in-house clinical course, the clinic is the first law office experience where they are in role as lawyers.<sup>43</sup>

[These] role-sensitive activities not only provide significant learning about the data that give meaning to many standards governing lawyer behavior, but they also hold out the greatest hope for replicating the best aspects of the apprenticeship system: those that produced the socialization of the moral lawyer through the influence of a supervisor-mentor who was better than the organized bar's rules assumed.<sup>44</sup>

Thus, clinical faculty serve a critical role and have a special responsibility to structure the clinic law office as a model ethical law office replete with the best ethical systems in place.

The state student practice rules that track the ABA Model Student Practice Rule require supervising clinical faculty to assume "personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work."<sup>45</sup> In addition, most state ethics rules track the ABA Model Rules of Professional Conduct, which require that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."<sup>46</sup> Even if the clinic law

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43. Although a clinic law student may have had his or her first law office experience as a law clerk or lawyer assistant outside of the clinic law office, it is unlikely that the law student would have been in role as a lawyer in the law office. Even for students who have externship experiences prior to an in-house clinic experience, it would be rare for the student to have been the "first chair" or primary lawyer for clients. See, e.g., Joy & Kuehn, *supra* note 33, at 494-95 n.5 (citing e-mails that indicate that most students in one externship program "do second-chair lawyer work" and only "approximately ten percent" of the students in another externship program do first-chair lawyer work).

44. Moliterno, *supra* note 13, at 2382.

45. *Proposed Model Rule Relative to Legal Assistance by Law Students*, *supra* note 22, at 291; see also David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 app. A at 1546-54 (1998) (compiling a chart that lists each jurisdiction's student practice rule and the "nature of the responsibility" of supervising faculty or lawyers); Joy & Kuehn, *supra* note 33, at 515 n.82 (describing the responsibility of supervising faculty or lawyers in several jurisdictions).

46. MODEL RULES, *supra* note 15, at R. 5.1(b). There is no counterpart to Model Rule 5.1(b) in the ABA Model Code of Professional Responsibility, but the Restatement of Law Governing Lawyers states that "[a] lawyer who has direct supervisory authority over another lawyer is subject to professional discipline for

student is not certified under the student practice rule or the jurisdiction considers certified students as nonlawyers,<sup>47</sup> the applicable Model Rule provides that “a lawyer having direct supervisory authority over the nonlawyer [assistant] shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”<sup>48</sup> Under either treatment of a clinic law student—as lawyer or nonlawyer—supervising faculty are responsible to ensure that clinic students act consistently with the ethical obligations of the lawyer.

The responsibility to create and maintain clinics that are model ethical law offices is greater than the professional obligations of clinical faculty under either their state student practice rule or the applicable ethical rules in their jurisdiction. As supervisor-mentors, clinical faculty have the responsibility to create an environment where law students understand and, where possible, are actively involved in the measures clinical faculty implement to ensure that everyone in the clinic—clinic students, faculty, and staff—follows the applicable rules of ethics. This requires clinical faculty to establish, and discuss with clinic students, procedures that ensure the clinic students understand and fulfill their ethical responsibilities, such as maintaining client confidentiality, avoiding conflicts of interest, expediting litigation, presenting meritorious claims and contentions, being truthful in statements to others, and exercising candor toward the tribunal.<sup>49</sup>

Both the law schools employing faculty to teach clinical courses and the students who take those courses have the right to expect that clinical faculty will model the best ethical behavior and not simply comply with the minimum requirements of the controlling ethical rules. The ethics rules usually establish minimum standards of conduct and do not reflect the aspirations

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failing to make reasonable efforts to ensure that the other lawyer conforms to applicable lawyer-code requirements.” RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11(2) (2000) [hereinafter RESTATEMENT].

47. Student practice rules do not specifically state whether or not certified students should be treated as lawyers or non-lawyers, but courts usually consider certified students as lawyers for the purpose of analyzing lawyer and judicial ethics issues. *See, e.g.,* Joy & Kuehn, *supra* note 33, at 507-11 (citing various student practice rules and court decisions).

48. MODEL RULES, *supra* note 15, at R. 5.3(b); MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(D), 7-101(J) (1980) [hereinafter MODEL CODE]; *see also* RESTATEMENT, *supra* note 46, at § 11(4)(a)(i).

49. These ethical duties represent just some of the ethical obligations of lawyers that law students are likely to confront in an in-house clinical course.

for the legal profession. For example, the ethics rule discussing a lawyer's commitment to provide pro bono representation to those unable to afford lawyers states that a "lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year."<sup>50</sup> For states following the ABA Model Rules, many of the comments to the rules use the term "should" to provide guidance to lawyers without imposing ethical obligation.<sup>51</sup> For states following the ABA Model Code, there are "Ethical Considerations" that are aspirational "representing the objectives toward which every member of the [legal] profession should strive."<sup>52</sup> Under either the Model Rules or Model Code approach, the aspirations of many of the ethics rules often reflect the best ethical behavior, a standard that all clinical programs should implement.

Although there are many reasons for clinical faculty to model the best ethical behavior, there are also some inherent tensions in clinical programs. First, clinical programs usually embrace a social justice or service mission to represent persons unable to hire attorneys.<sup>53</sup> Because the legal profession is currently meeting less than thirty percent of the legal needs of Americans living at or near the poverty line,<sup>54</sup> there is an enormous pressure on law school clinical programs to represent as many clients as possible. Large caseloads for clinic students with other law school obligations may result in clinic students and faculty cutting corners and failing to provide the best legal representation possible.

Clinical programs face another tension that is related to the first tension, and this second tension is the temptation to adopt an "ends justifies the means" mentality while providing access to justice for clients otherwise unable to hire lawyers. Because clinical programs are often the only place for some potential clients to find

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50. MODEL RULES, *supra* note 15, at R. 6.1.

51. *See id.* pmbl. ¶ 14.

52. MODEL CODE, *supra* note 48, at pmbl.

53. *See supra* note 15 and accompanying text.

54. *See, e.g.,* ALBERT H. CANTRIL, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 1-2 (1996) (citing survey results of households with combined annual incomes at or below 125% of the federally defined poverty level—approximately one-fifth of the U.S. population); LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 23 (1994) (stating that approximately 71% of situations containing legal issues that low-income households confront are not addressed by the legal system). The legal needs of moderate-income households are also underserved, with the legal profession addressing only 39% of the legal needs of households above 125% of the poverty level but below \$60,000 (approximately three-fifths of the U.S. population). CANTRIL, *supra*, at 2, 5.

legal assistance, a law school clinic may be the “last lawyer in town” for persons who would be turned away due to conflicts of interest problems.<sup>55</sup> Professor David Taylor has argued that rather than a zero-risk approach to conflicts, there should be an “actual prejudice” standard applied to conflicts for indigent legal services providers.<sup>56</sup> Although there may be reason to treat clinical programs and indigent legal service providers differently from private law firms because there is no issue of pecuniary gain factoring in decisions to take a client, the current ethics rules do not draw that distinction in this area.<sup>57</sup> Thus, clinical programs have to be vigilant to guard against conflicts of interest and to comply with the ethical rules even though the clinical faculty may believe that no real harm, and the potential of much good of increasing access to the legal process for some persons, may come from not following the applicable rules. Failure to adhere strictly to such ethics rules, however, sends a message to clinic students that lawyers may pick and choose which ethics rules to follow whenever the lawyer believes there are good reasons for ignoring them.

The third tension arises from the clinic’s educational mission that requires faculty to attempt to strike the right balance between the clinic student’s educational interests and the clinic client’s interest in quality legal representation. Clinical methodology relies on students being in role as lawyers for their clients, and the typical in-house clinical program is structured with clinic students in the role as the lead lawyers, or first-chair, for clinic clients. Clinical faculty have a critical responsibility to both clinic students and clients to strike the correct balance of freedom for and control of clinic students handling their cases.<sup>58</sup> “Clinical faculty must resist

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55. Professor David Taylor popularized the concept of free legal services providers often being the “last lawyer in town” for persons who are poor, and he has argued that “the presumption of prejudice inherent in conflict principles serves to unnecessarily deny the legal service[']s client access to the only available source of representation.” David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 ARIZ. L. REV. 577, 580 (1995).

56. *Id.* at 578-80.

57. Because of United States Supreme Court decisions, ethics rules today permit lawyers who are not primarily motivated by pecuniary gain to solicit clients with in-person or live telephonic communications, while the ethics rules may prohibit lawyers primarily motivated by pecuniary gain from engaging in the same in-person and live telephonic solicitation activity. *See In re Primus*, 436 U.S. 412, 431 (1978); *NAACP v. Button*, 371 U.S. 415, 429-30, 443-44 (1963).

58. In an article aimed at new clinical teachers, Professor William Quigley

the urge to exert so much control that they inhibit the student's learning process while still maintaining sufficient supervision that each student-lawyer is capable of performing at a level equal to or better than practitioners handling similar client matters."<sup>59</sup> This tension is most apparent when clinical faculty have to decide whether to intervene in the representation of a clinic client by "directly engaging the client, adversary party, or adjudicative process in a manner which replaces the teacher's authority and judgment for that of the student."<sup>60</sup> Clinical faculty struggle with this educational tension frequently, and it has been described as one of the "hardest questions" clinical faculty face.<sup>61</sup> Intervening too soon may deprive a clinic student of a valuable learning experience. But, declining to intervene when a mistake is being made may implicitly tell that student that her education is worth more than high-quality legal services to the client, and "[s]uch a message teaches and reinforces the idea that it is appropriate for the lawyer to care more about herself than the client."<sup>62</sup>

The fourth tension is related to the third tension, and it is the tension clinical faculty face in attempting to make a clinical experience available to as many law students as possible. Every prospective and current clinic student may present conflict of interest problems for a clinic based on the student's prior, current, or future employment with a legal employer. Although there may be ways to avoid many of these potential conflicts and to cure some of the actual conflicts,<sup>63</sup> the only ethical option that may exist in some instances will require a clinic student to terminate or forego

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states that "[d]ivining the appropriate mix of freedom and direction/control in the teacher-student relationship is one of the ongoing challenges of clinical educators." William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 485 (1995).

59. Joy & Kuehn, *supra* note 33, at 516 n.86. Professors Michael Meltsner and Philip Schrag describe this as "the tension between [clinical faculty's] . . . roles as facilitators of intern-oriented learning and as supervisors on cases affecting actual clients' interests." Michael Meltsner & Philip G. Schrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1, 24 (1978).

60. George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415, 419 (1990/1991).

61. James H. Stark, Jon Bauer & James Papillo, *Directiveness in Clinical Supervision*, 3 PUBLIC INT. L.J. 35, 35 (1993).

62. Moliterno, *supra* note 13, at 2388.

63. See, e.g., Joy & Kuehn, *supra* note 33, at 528-77 (discussing conflicts of interest issues in clinical programs and approaches for avoiding potential conflicts of interest).

concurrent legal employment.<sup>64</sup> For students who must work to support their legal education, having to choose between outside employment or a clinical course is a harsh result of the ethics rules, but “the ethical and fiduciary duties of client confidentiality and loyalty do not permit a student’s legal education to trump client rights.”<sup>65</sup>

Similarly, other student interests, client interests, or educational goals of clinical programs cannot trump the ethics rules and norms of the legal profession. Clinical faculty teach legal ethics and professional responsibility simply by being clinical teachers, and clinical faculty have a responsibility to structure in-house clinical programs as model ethical law offices.

#### IV. CONCLUSION

We expect a great deal of clinical programs and clinical faculty. Clinical programs are meant to teach lawyering skills and professional values, and therefore introduce clinical students to the norms of the legal profession by immersing them in the practice of law under the guidance of experienced clinical faculty who are “*in* the university but *of* the legal profession.”<sup>66</sup> The ethics rules and ethical aspirations for lawyers are integral aspects of the legal profession’s norms, and clinical faculty have a duty to instruct students as to their responsibilities, and structure clinics as model ethical law offices. Given the importance of clinical courses to the professional development of clinical students, we should expect no less.

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64. *Id.* at 542.

65. *Id.* at 542-43.

66. RICHARD A. POSNER, *OVERCOMING LAW* 82 (1995) (emphasis in the original). Historically, “law professors were *in* the university but *of* the legal profession,” moved “easily between the practical and academic worlds,” and were “viewed as [the] superior lawyer[s].” *Id.* at 82-83. This role for law faculty changed in the final decades of the twentieth century, with some commentators claiming a “disjunction” between legal education and the legal profession, particularly in the area of legal scholarship. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991); Judith S. Kaye, *One Judge’s View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989); Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421 (1995). Today, law faculty teaching clinical courses are most likely the members of the law faculty with feet in both academia and the practice of law.