

# Fordham Law Review

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Volume 67 | Issue 5

Article 24

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1999

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### Recommended Citation

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

Available at: <https://ir.lawnet.fordham.edu/flr/vol67/iss5/24>

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## In-House Live-Client Clinical Programs: Some Ethical Issues

### Cover Page Footnote

Vice Dean and Professor of Law, College of William & Mary School of Law. The author is grateful to Ann Luerssen for her research assistance on this project.

# IN-HOUSE LIVE-CLIENT CLINICAL PROGRAMS: SOME ETHICAL ISSUES

*James E. Moliterno\**

## INTRODUCTION

IN recent years, clinicians and classroom professional responsibility professors have found themselves in one another's company through several different conferences and related devices.<sup>1</sup> This crossover of interest in what one another does and the connections between and common interests of the two enterprises is healthy and overdue. As long as clinicians are the practice-teachers and professional responsibility professors teach about and study the law and culture of the practice, the crossover should be nurtured and developed. Some of those crossover occasions have given rise to concerns by classroom professional responsibility teachers that clinicians pay too little attention to the law of professional responsibility and to renewed concern by clinicians that classroom professional responsibility teachers are out of touch with the day-to-day rigors of practice, especially poverty practice.

Divisions between clinical faculty and classroom professional responsibility teachers are, in fundamental ways, not as sharp as they may appear. Some clinicians teach professional responsibility law in classroom settings; all clinicians teach professional responsibility in some form of that phrase's meaning; and all professional responsibility professors teach about the practice of law, the grist of the clinician's mill.

This paper is a small part of the continued crossover of interest. It is about ethical issues that attach themselves or arise with special frequency in law school and in-house clinical programs. It raises questions that need further discussion as much as it attempts to answer those questions.

I have broken the paper into two sections. The first identifies and examines broad, overarching questions about the ethics of clinical legal education: What is the moral/ethical value in clinical education?

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1. Occasions that come to mind, among many, are the 1995 AALS Joint Program of the Clinical and Professional Responsibility Sections; the Keck Foundation supported conference at Duke in October 1995 (papers and proceedings published in Symposium, *Teaching Legal Ethics*, Law & Contemp. Probs., Summer/Autumn 1995, at 1); and the March 1996 and March 1997 Keck Foundation supported conferences on teaching legal ethics at William & Mary (papers and proceedings published in Symposium, *W.M. Keck Foundation Forum on the Teaching of Legal Ethics*, 38 Wm. & Mary L. Rev. 1 (1996); and Symposium, *1997 W.M. Keck Foundation Forum on Teaching of Legal Ethics*, 39 Wm. & Mary L. Rev. 283 (1998)).

Is there an inherent conflict between the educational and the service missions of clinics? Can clinicians teach legal practice and, simultaneously, be the practice about which they teach (this is Professor Condlin's question)?<sup>2</sup>

The second section identifies and examines applications of the professional responsibility rules to law school clinics, selecting out a handful of situations that are either unique to law school clinical practice or that arise with special frequency or character in law school clinical practice such as: conflicts of interest among law students with other job commitments (either concurrent or summer), interclinic conflicts, and confidentiality applications.

### I. THE BROAD ISSUES

Clinical legal education has a combination of goals, among them, providing professional skills instruction,<sup>3</sup> teaching methods of learning from experience,<sup>4</sup> instructing students in professional responsibility,<sup>5</sup> serving clients (poor people in particular),<sup>6</sup> and critiquing the capacities and limitations of lawyers and the legal system.<sup>7</sup> This combination, especially the goals of providing client service (good lawyering) and critiquing the practice and profession of law, presents the rub that has long bedeviled thoughtful clinicians. Some might say this rub is too much for clinical legal education to bear; others might find the difficulties the rub presents are overwhelmed by the beneficial effects of active learning that are found in experiential education vehicles like clinics and by the services clinics provide.

The benefits of active learning devices such as clinics for the purposes of enhancing students' ethical and moral compass and their learning of professional responsibility law are significant for several reasons. In Aristotelian terms, clinical experiences allow students to develop virtue by the doing of virtuous acts. Clinical teaching lends itself to student enculturation into the profession. Clinical experience helps to develop the student's understanding of professional responsibility law because so much of that law concerns the relationships to which lawyers are parties.

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2. See Robert J. Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. Legal Educ. 604, 607 (1983); Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 Md. L. Rev. 223, 281-82 (1981) [hereinafter Condlin, *Socrates' New Clothes*]; Robert J. Condlin, *'Tastes Great, Less Filling': The Law School Clinic and Political Critique*, 36 J. Legal Educ. 45, 45 (1986) [hereinafter Condlin, *Tastes Great, Less Filling*];.

3. See *Report of the Committee on the Future of the In-House Clinic*, 42 J. Legal Educ. 508, 512-13 (1992) [hereinafter *Report*].

4. See *id.* at 513.

5. See *id.* at 513-14.

6. See *id.* at 515.

7. See *id.* at 516.

### A. *Clinical Teaching Has a Positive Moral-Ethical Value*

Whether done in clinics or classrooms, professional ethics teaching serves an arguably higher and unquestionably more elusive goal than is served by legal education generally. This goal has been characterized as the teaching of "character," "integrity," "virtue," and "values."<sup>8</sup> This goal, however characterized, is not uniformly regarded as being achievable.<sup>9</sup> Indeed, whether the law school experience generally, and course work in ethics specifically, can positively affect students' moral development *at all* has been the subject of considerable debate.<sup>10</sup> The empirical evidence that exists indicates that neither the standard first-year law experience nor the single semester, free-standing legal profession course has a measurable effect on students' values.<sup>11</sup> Those who argue that ethics and virtue can be taught to law students argue from an Aristotelian view—influenced by Kohlberg's

8. See James R. Elkins, *The Pedagogy of Ethics*, 10 J. Legal Prof. 37, 37-39 (1995) (discussing "virtue"); Donald C. Mulcahey, *A Plea for Moral Education in Law Schools*, 2 J.L. & Religion 101, 102 (1984) (discussing "values"); Terrance Sandalow, *The Moral Responsibility of Law Schools*, 34 J. Legal Educ. 163, 169 (1984) (discussing "character"); John V. Tunney, *Is the Bar Meeting Its Ethical Responsibilities?*, 12 San Diego L. Rev. 245, 247 (1975) (discussing "integrity"). There are obvious differences among the various characterizations, but all name a goal of teaching of a higher order than the mere conveyance of knowledge about a set of rules, whose violation may produce a penalty. They name a human character trait of higher order than obedience to authority.

9. The goal is also not uniformly regarded as desirable. For references to those who say that legal education should remain "value neutral," see *infra* note 10. In an interesting display of both candor and contemporaneous feelings of helplessness and hopefulness, Justice Tom C. Clark has said that even though many academics say that they cannot teach virtue, they must, because no one else can either. See Tom C. Clark, *Teaching Professional Ethics*, 12 San Diego L. Rev. 249, 253 (1975).

10. I leave aside the related question of whether the law school *should* attempt to teach values, see, e.g., Rand Jack & Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* 44 (1989) ("Only through training do most lawyers develop an 'indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance.'" (quoting Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, Hum. Rts., Fall 1975, at 1, 5)); Donald T. Weckstein, *Boulder II: Why and How*, 41 U. Colo. L. Rev. 304, 306 (1969) (stating that "law schools can make a small contribution to [teaching values], but [their] main concern should be directed to other areas"), and the argument that the overall law school experience is a negative teacher of ethics, see, e.g., Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 Yale Rev. L. & Soc. Action 71, 71 (1970) (criticizing the current "malaise" in law schools); Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 Yale L.J. 444, 487 (1970) (arguing that "talk about democratic values and social policy is just so much crap").

11. See Jethro K. Leiberman, *Crisis at the Bar: Lawyers' Unethical Ethics and What to Do About It* 226 (1978); Robert M. Ackerman, *Law Schools and Professional Responsibility: A Task for All Seasons*, 88 Dick. L. Rev. 202, 205-06 (1983); Jerome E. Carlin, *What Law Schools Can Do About Professional Responsibility*, 4 Conn. L. Rev. 459, 459 (1971-72); Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partnership*, 23 Vill. L. Rev. 957, 959 (1978). Sandelow writes:

Law schools are not, to be sure, well positioned to play a decisive role in forming their students' characters. Students come to law school as adults. The deplorable faculty-student ratio at all law schools largely precludes a

work<sup>12</sup>—that virtue can be learned by adults primarily through doing virtuous, role-sensitive acts. They argue that a student begins to develop a role-sensitive morality on the first day of the law school experience, and not before.<sup>13</sup> Certainly, to the extent that the would-be lawyer begins to develop “attitudes and insights” into the role of lawyer on the first day of law school,<sup>14</sup> the law school experience will affect, for good or ill, the student’s level of virtue.<sup>15</sup>

Nearly everyone who argues that virtue can be taught bases the argument on the Aristotelian view that virtue is learned by the *doing* of virtuous role-sensitive acts. Someone making the Aristotelian based argument expects both the standard first year of law school and the

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level of personal contact which might permit faculty members to become an important personal influence in the lives of their students.

Sandelow, *supra* note 8, at 169; see also Daniel S. Kleinberger, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 Conn. L. Rev. 365, 378 (1989) (stating that “the thrust of legal education runs counter to moral instruction” and that “legal education actually alienates students from whatever values they had when they entered [law] school”); Wagner P. Thielens, Jr., *The Influence of the Law School Experience on the Professional Ethics of Law Students*, 21 J. Legal Educ. 587, 591 (1969) (detailing a study that measured the change in law students’ ethical views as they progressed through law school); Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. Legal Educ. 306, 307 (1981) (providing an overview of developmental psychology to explore the ethical limits of teaching students to “think like lawyers”). Shaffer and Redmount seem to say that legal education neither nurtures nor impedes students’ moral development. See Thomas L. Shaffer & Robert S. Redmount, *Lawyers, Law Students and People* (1977).

12. See Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice* (1981). Kohlberg argues that people develop sequentially through a series of stages of moral reasoning, the development continues into adulthood, and only a small percentage of people ever reach the final stage. See *id.* at 101-89.

13. Implicit in every article arguing for a better way of teaching ethics in the legal profession is the position that it can be taught. For a sampling of such articles, see Michael J. Kelly, *Legal Ethics and Legal Education* 5-21 (1980); Elkins, *supra* note 8, at 81-83; David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 Md. L. Rev. 451, 451-56 (1981); David Luban, *Epistemology and Moral Education*, 33 J. Legal Educ. 636, 636-37 (1983) [hereinafter Luban, *Epistemology*]; Mulcahey, *supra* note 8, at 103; Sandelow, *supra* note 8, at 166-69; Thomas L. Shaffer, *Moral Implications and Effects of Legal Education or: Brother Justinian Goes to Law School*, 34 J. Legal Educ. 190, 191-98 (1984); Andrew S. Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. Mich. J.L. Reform 248, 249-52 (1975) [hereinafter Watson, *Lawyers and Professionalism*]; Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. Cin. L. Rev. 91, 104-06 (1968) [hereinafter Watson, *The Quest*]; Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. Legal Educ. 1, 7-10 (1963). For a full explication of this position, see Willging & Dunn, *supra* note 11.

14. See James P. White, *Professionalism and the Law School*, 19 Cumb. L. Rev. 309, 314 (1989).

15. Indeed, Watson suggests that the role-sensitive formation is suspended until entry to law school. See Watson, *Lawyers and Professionalism*, *supra* note 13, at 249-52; Watson, *The Quest*, *supra* note 13, at 124-37.

standard free-standing ethics-legal profession course, neither of which allow the students to *do* much of anything save read and think about legal issues and doctrine,<sup>16</sup> to be utter failures if their goal were to teach virtue. Even the apparent failure of the short-term clinical work to affect moral development<sup>17</sup> positively is explainable to the advocate of the Aristotelian view because students usually lack the opportunity to see the long-term results of their conduct on relationships, the quality of which form the basis for a system of ethics.<sup>18</sup> If virtue can be taught to law students, it is most likely to occur in long-term, experiential learning vehicles such as year-long clinics.<sup>19</sup>

### B. *Why Clinics are Good at Teaching the Role of Lawyer: Playing a Game*

Consider the respect in which the rules of ethics themselves (or more generally, the law of lawyering) are analogous to the rules governing a game: the game cannot be played without reference to the rules, but the performance by the players—while referenced to those rules—really “responds to a sense of quality that seems far removed from any set of rules.”<sup>20</sup> In this respect, learning to play the game well (learning to lawyer ethically) is accomplished not so much by learning the game’s rules, though learn them the players must, as by the activity of playing (the experiences with lawyering behavior). Learning the rules of the game can be separated from learning to play well in terms of teaching methodology: a player might well learn the text and basic meaning of the rules by reading and discussing them; but to learn the subtleties that define what it means to play well, the player must experience the play itself.

Teaching professional responsibility law by supervised experience in role-sensitive activities is especially advantageous for another reason. Unlike other law subjects, the law of professional responsibility is about lawyers’ relationships. Lawyer experience is a significant part

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16. Neither of these activities bear a close role-sensitive relationship to the *ethics* of lawyering except that the lawyer, to be ethical, must provide competent service, often requiring both reading and thinking about legal issues and principles.

17. See Eugene L. Smith, *Some Sociological and Psychological Problems in Education for Professional Responsibility*, in *Education in the Professional Responsibilities of the Lawyer* 295 (Donald T. Weckstein ed., 1970).

18. About 62% of in-house, live-client clinics are partial-year clinics (one quarter or one semester). See *Report*, *supra* note 3, at 512.

19. Alternatively, one might argue that teaching the law governing lawyers and the consequences of its breach will produce virtuous, or at least law compliant, acts. See O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897). This approach to producing enhanced moral behavior comports with behaviorist theories. See Albert Bandura & Richard H. Walters, *Social Learning and Personality Development* 168-200 (1963); see also B.F. Skinner, *About Behaviorism* 193 (1974) (“[W]hat we feel when we behave morally or ethically depends on the contingencies responsible for our behavior.”).

20. Elkins, *supra* note 8, at 41 (footnote omitted).

of the law governing lawyers. For example, when a student is negotiating in the role of lawyer, the student generates the data that gives meaning to the rules that prohibit making false statements of fact to others.<sup>21</sup> By doing so, the student may see and sense the conflicts between the literal meaning of the prohibition and the nature of negotiation as a process that implicates at least subtle techniques designed to mislead.<sup>22</sup> What makes the activity invaluable to learning is the unique role that lawyer conduct plays in the development of the relevant legal standards. The effect and operation of the substantive tort or contract law, for example, is experienced generally by members of the society governed by the legal rules under study; the lawyer generally experiences the effect and operation of law in a vicarious way through the direct encounters of the lawyer's clients with the law.<sup>23</sup> The lawyer experiences the law as an expert. Much of the substance of the law governing lawyers, on the contrary, is tied inextricably to the relationships between lawyer and client, lawyer and lawyer, lawyer and law makers or deciders, and lawyer and society.<sup>24</sup> In other words, much of the law governing lawyers is formed by a relationship that the lawyer experiences, unlike other fields in which the lawyer typically experiences the law only vicariously. As such, if they are so directed, clinics will be especially effective at teaching the law of professional responsibility.

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>25</sup>

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21. See, e.g., Model Rules of Professional Conduct Rule 4.1 (1998) (dealing with truth-telling).

22. See James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. B. Found. Res. J. 926, 931.

23. But see Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 Fordham L. Rev. 443 (1998) (discussing the direct encounters that lawyers themselves have with contract law); Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 Fordham L. Rev. 649 (1998) (discussing the direct encounters that lawyers themselves have with tort law).

24. This distinction in lawyer level of interaction with the law governing lawyers and the rest of the substantive law partly explains the anomaly noticed by William Simon between the general legal realist approach to law and the more formalist approach lawyers take to the "bounds of the law." See William H. Simon, *Should Lawyers Obey the Law?*, 38 Wm. & Mary L. Rev. 217 (1996), reprinted in William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* 77-108 (1998). Lawyers may be less comfortable with some indeterminacy when they are the "client" upon whose conduct the law operates than they are when they are merely the expert for some other person who is the client. See *id.*

25. See Thomas Shaffer, *The Profession as a Moral Teacher*, 18 St. Mary's L.J. 195, 217-18 (1986).

The conditions and timing of professional socialization have shifted in the last hundred years in American legal education. Office apprenticeship—the law school of an earlier era—introduced the neophyte to the principles of law and the principals-at-law simultaneously. In “reading” law, the apprentice combined theory and implementation in a gradually expanding responsibility. He became a lawyer as he saw and assisted in real cases, in concrete situations, and with specific personalities. Exposed to live models of practicing attorneys and clients, he possessed realistic bases for learning the lawyer role. He coupled this increasing awareness with the gradual assumption of the rights and obligations of a member of the bar. Technical knowledge, prevailing practices, and professional values were articulated one step at a time.<sup>26</sup>

Student role socialization is largely undeveloped at the time of entry to law school.<sup>27</sup> Taking advantage of this opportunity requires students to engage in role sensitive activities in a psychologically meaningful context,<sup>28</sup> preferably early in their law school careers.<sup>29</sup>

Over time, lawyers and the legal profession have lost something of value that the apprentice system once provided: the sense of the lawyer as a moral force in society. This sense can be replicated in a long-term, in-house clinic. Hopes for regaining this moral sense rest primarily with the law school.<sup>30</sup> For law schools to fulfill these hopes, they must take advantage of the opportunity to socialize students into the profession by presenting the student, acting in the role of lawyer, with the moral questions that face lawyers. Law schools can best facilitate this socialization by allowing students to face and reflect on these questions in the academic environment “without the heavy weight that self-interest [and modern law firm socialization] exerts on the practitioner . . . .”<sup>31</sup> Development of role and identity is the niche in which professional school training fits in the overall process of socialization of new members into the ethics of the profession. Legal education can be influential in that development,<sup>32</sup> because the resolution of role is delayed until at least the beginning of professional (especially

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26. Dan C. Lortie, *Laymen to Lawmen: Law Schools, Careers, and Professional Socialization*, 29 *Harv. Educ. Rev.* 352, 363-64 (1959) (footnote omitted).

27. See Lortie, *supra* note 26, at 363; Watson, *Lawyers and Professionalism*, *supra* note 13, at 249-50.

28. “[S]elf-concept crystallizes only where role performance is undertaken in a psychologically meaningful context.” Lortie, *supra* note 26, at 366.

29. See Clark, *supra* note 9, at 252-60; J. Michael Kelly, *Notes on the Teaching of Ethics in Law School*, 5 *J. Legal Prof.* 21, 27 (1980) (recommending a small-section “attorney-client relationship” class in the first year); White, *supra* note 14, at 316-317.

30. See Clark, *supra* note 9, at 253.

31. Andrew L. Kaufman, *Problems in Professional Responsibility* at xxix (3rd ed. 1989).

32. See Lawrence Kohlberg, *Indoctrination Versus Relativity in Value Education*, 6 *Zygon* 285, 305-08 (1972); David A.J. Richards, *Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism*, 31 *J. Legal Educ.* 359, 361 (1981).

legal) education.<sup>33</sup> In order to develop virtue, one must do virtuous things,<sup>34</sup> preferably under the guidance of a moral teacher.<sup>35</sup> One cannot morally develop by study alone.<sup>36</sup>

C. *The Potential Good of Modeling Lawyer Behavior and the Positive Moral-Ethical Contribution of Clinics*

The question of who in the law school is responsible for teaching ethics has occupied a considerable amount of legal educators' time over the years.<sup>37</sup> Although some of this attention has been focused on the "pervasive method" of teaching ethics,<sup>38</sup> most of the positive contributions have focused on the faculty and administration of the law school as role models.<sup>39</sup>

The notion of role modeling takes on several forms, from both positive and negative perspectives, live role models and storytelling. Generally, because student integration into the role of lawyer does not begin until the start of law school,<sup>40</sup> and because the development of an identity or sense of self "largely results from emulation of those who are respected,"<sup>41</sup> an opportunity exists to affect the development of students by the positive or negative<sup>42</sup> examples that faculty set.

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33. See Lortie, *supra* note 26, at 363; Watson, *Lawyers and Professionalism*, *supra* note 13, at 249-52.

34. See G.M. Dickinson, *Moral Development Theory and Clinical Legal Education: The Development of Professional Identity*, 22 U.W. Ont. L. Rev. 183, 186-96 (1984).

35. See Mark Twain, *Life on the Mississippi* (Samuel L. Clemens ed., Harper & Brothers Publishers 1903) (1883); Paul D. Carrington, *Of Law and the River*, 34 J. Legal Educ. 222, 224-27 (1984); Luban, *Epistemology*, *supra* note 13, at 650-651.

36. See Luban, *Epistemology*, *supra* note 13, at 653.

37. See David H. Vernon, *Ethics in Academe—Afton Dekanal*, 34 J. Legal Educ. 205, 211 (1984); see also James E. Moliterno, *Goodness and Humanness: Distinguishing Traits?*, 19 N.M. L. Rev. 203, 208 (1989) (arguing that the claim of moral superiority often raised by clinicians may reduce the pressure on other faculty to be positive role models).

38. See David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. Legal Educ. 485, 486-87 (1989); Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, Law & Contemp. Probs., Summer/Autumn 1995, at 139, 142; E. Wayne Thode & T.A. Smedley, *An Evaluation of the Pervasive Approach to Education for Professional Responsibility of Lawyers*, 41 U. Colo. L. Rev. 365, 366-68 (1969).

39. See Summary of Action Taken by the House of Delegates of the American Bar Association 21-22 (1989); Monroe H. Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 Vand. L. Rev. 275, 276 (1986); Richard Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. Legal Educ. 155, 160 (1984); White, *supra* note 14, at 313-17.

40. See Watson, *Lawyers and Professionalism*, *supra* note 13, at 250.

41. *Id.*

42. L.H. LaRue, *Teaching Legal Ethics by Negative Example: John Dean's Blind Ambition*, 10 Legal Stud. F. 315, 316 (1986).

This notion is not new,<sup>43</sup> and in some respects it is no more than an acknowledgment that legal educators endeavor to replace the best aspects of the apprentice system of law teaching, which university legal education displaced in the late nineteenth century.<sup>44</sup> Certainly, this is the aspect that is implicated by the socialization of lawyers into the profession.

Although many faculty members may hesitate to serve as role models because of a legitimate fear of exploiting a captive audience<sup>45</sup>—because “[t]he universal human need to have objects for modeling and identity formation may be the single most important psychological factor in the educational process[ ]”<sup>46</sup>—the effect of both the presence and absence of positive models is too great to ignore. Example-teaching, through active role modeling and storytelling, aims at instilling the more elusive qualities of the ideal lawyer. Only the generic form of the desired character traits, however, is likely to be transferred from faculty to students because the law teacher is not typically modeling lawyering behaviors.<sup>47</sup> Nonetheless, considerable learning occurs when students observe model behavior that expresses integrity, commitment to quality, concern for the human condition, and a sense of community.<sup>48</sup>

While there is value in the modeling of all of these traits, the sense of community is the one trait that is perhaps most uniquely within the power of law faculty as an entity to accomplish. The others might more profitably come from exposure to models of lawyering behavior. Lawyering models produce more readily transferable learning for the students from the law school to law practice, and are not as easily criticized as being virtuous in the ivory tower. On the other hand, the faculty either has or does not have a sense of community, and the faculty either does or does not convey it by its collective presence, its attitude about the common enterprise, and its actions toward one another and toward students.

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43. “[T]eaching ethics is good; living ethics before one’s class is incomparably better.” John C. Townes, *Organization and Operation of a Law School*, 2 Am. L. Sch. Rev. 436, 439 (1910).

44. For a history of the process of apprentice system replacement with university legal education, see William R. Johnson, *Schooled Lawyers: A Study in the Clash of Professional Cultures 42-57* (1978), and a letter from Harvard Dean Ephraim Gurney to University President Charles Eliot lamenting the earliest moments of the Langdellian revolution in Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, at 187-90 (1967).

45. Indeed, one reason said to oppose the pervasive method is that a single legal-ethics professor might subvert the students. See Thode & Smedley, *supra* note 38, at 371.

46. Watson, *Lawyers and Professionalism*, *supra* note 13, at 250.

47. To the extent they *are* modeling such behaviors, they usually do so only in the context of the lawyer’s rigorous legal analysis.

48. Professor Shaffer is perhaps the foremost advocate for a better developed sense of community among lawyers and law schools. See Thomas L. Shaffer, *The Legal Ethics of Belonging*, 49 Ohio St. L.J. 703, 712 (1988).

The closer the model is to the role that must be learned, the more effective it will be.<sup>49</sup> As such, the most effective modeling of lawyer behaviors will be done by those modeling the role of lawyer. Students may be exposed to those acting the role of lawyer in two ways: indirectly, through storytelling and case studies of lawyers; and directly, by working with a lawyer in either actual or simulated client service.

Clinical education provides the student the opportunity to work directly with a lawyer—one whose express goal is the modeling of virtuous lawyer behavior. Such role modeling is direct with respect to student involvement and emotional proximity, and it is more closely connected to the behaviors to be modeled.<sup>50</sup> Clinical faculty are likely to have great influence on the moral development of their students through their actions and their policy choices.

#### D. *Moral and Ethical Questions Remain*

Despite these positive contributions of clinics to students' moral and ethical development, nagging questions remain to be explored further.

Robert Condlin sent clinicians scrambling in the early eighties with a series of critical articles.<sup>51</sup> Professor Condlin raised a category of moral failing in the in-house clinic: clinic teachers are reinforcing undesirable characteristics with controlling, dominating behavior. Condlin has persuasively argued that a combination of in-house clinic attributes make it a less than ideal place for students to learn the ethics of the legal profession. Among these attributes is the tension of the co-counsel relationship between faculty and student that drives the faculty supervisor toward dominating behavior and diminishes the opportunity for critique of practice. Essentially, Condlin argued that while engaged in the practice being critiqued, clinicians are poorly positioned to critique,<sup>52</sup> causing them to rationalize their own practice activities and, in the process, model "persuasion mode" domination of students.<sup>53</sup> The clinic teaches students to dominate clients because students essentially pattern their interactions with clients after the clinician's interactions with the student. Some critics of Condlin argued that his objections were against the adversarial system within which clinicians (and all lawyers) operate.<sup>54</sup> Others confessed guilt to self-reduced "charges" and argued that Condlin's complaint is about poor

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49. The implication of this phenomenon is that "ideas about professional behavior gathered from practicing lawyers will be eagerly grasped and emulated by the student." Watson, *Lawyers and Professionalism*, *supra* note 13, at 251 (emphasis added).

50. See Michael Meltsner & Philip G. Schrag, *Scenes from a Clinic*, 127 U. Pa. L. Rev. 1, 54 (1978).

51. See *supra* note 2 (listing articles by Condlin).

52. See Condlin, *Tastes Great, Less Filling*, *supra* note 2, at 51, 55.

53. See Condlin, *Socrates' New Clothes*, *supra* note 2, 233-35.

54. See Norman Redlich, *The Moral Value of Clinical Legal Education: A Reply*, 33 J. Legal Educ. 613, 614 (1983).

execution of in-house clinical education.<sup>55</sup> If Condlin is correct in asserting that the clinician's ego and the pressures of co-practice with inexperienced students lead to manipulating and dominating behavior, then he is also correct to say a dominating clinician is more dangerous than a dominating classroom teacher because the clinician is easily recognized by the student as the model of practice.<sup>56</sup> Like it or not, while some clinicians claim their teaching is the place for students to learn the gentler arts,<sup>57</sup> Professor Luban may be correct in observing that clinicians are drawn predominantly from former careers in poverty law where one can be excessively adversarial and "on the side of angels" simultaneously, a combination rich with negative ethics teaching implications.<sup>58</sup>

There are underlying moral questions in the use of actual clients as the means for the laudable end of lawyer training.<sup>59</sup> The lives and welfare of real people are at risk in the in-house clinic setting. This fact underlies the clinic's value and simultaneously forces clinic supervisors frequently to intervene. For students to learn effectively the skills of problem solving inherent in identifying and treating ethical issues, they must form the mental pathways that will later be useful in their lifelong adventure in decision making.<sup>60</sup> They must have a free hand in forming and nurturing a relationship with others. They are far less likely to get this free hand for mental experimentation in a setting in which the supervisor frequently intervenes or is, at least figuratively, over the student's shoulder at all times.

The model of the clinic, its inherent tension between educational interests and service interests, and the clinic's policies on supervisor intervention may communicate a great deal.<sup>61</sup> Consider the situation when the clinician observes the student making an error in judgment. The error may be labeled serious or less so, and the evaluation will often determine whether or not the clinician intervenes. For example:

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55. See Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. Legal Educ. 619, 620 (1983).

56. Redlich takes a different view: the classroom teacher is a more dominant figure than the clinician because of the presence of other players in the student's clinical experience. See Redlich, *supra* note 54, at 615-16.

57. See, e.g., Gilda M. Tuoni, *Teaching Ethical Considerations in the Clinical Setting: Professional, Personal and Systemic*, 52 Colo. L. Rev. 409, 413 (1981) (noting that clinics are well-suited to explore personal values).

58. See Luban, *Epistemology*, *supra* note 13, at 660.

59. See generally Immanuel Kant, *Foundations of the Metaphysics of Morals* 26-72 (Lewis White Beck trans., Bobbs-Merrill 1969) (1785) (confronting the moral conundrum of acting on "pure duty" and the true motivations behind human actions).

60. See Marvin Minsky, *The Society of Mind* 82 (1986); Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. Legal Educ. 461, 462 (1987); James E. Moliterno, *The Secret of Success: The Small-Section First-Year Skills Offering and Its Relationship to Independent Thinking*, 55 Mo. L. Rev. 875, 877-78 (1990).

61. For the philosophy of non-intervention, see Meltsner & Schrag, *supra* note 50, at 22-24.

(1) Student has researched the claims that a civil clinic client may have and plans to draft and file a complaint on Client's behalf following the upcoming spring break. Supervisor realizes that Student has failed to account for the statute of limitations on one of Client's claims that will run before Student plans to file the complaint; (2) In doing research on Client's claim, Student has misinterpreted a case that, if properly interpreted, would help Client more than Student thinks it does. The interpretive error might arguably make a difference in an upcoming hearing at which Student will represent Client; (3) As Supervisor observes, Student treats Client with disdain and insensitivity. Would most clinic supervisors intervene in any of these three situations? How grave, immediate, and irreversible must the harm to the client be before the supervisor intervenes to prevent or ameliorate such harm?

Declining to intervene and giving students the free hand, which will enhance their learning, can be dangerous to the client and send unintended messages about the relative importance of the client and the student's learning. When the clinician declines to intervene, and instead allows the student to learn from the mistake either by letting the situation play out in its entirety or by counseling with the student after the bad performance, the clinician implicitly says to the student: "Your education was more valuable than good service was to the client." Such a message teaches and reinforces the idea that it is appropriate for the lawyer to care more about herself than the client.

Although in the run of cases clinic clients probably receive excellent service, it is disturbing to read descriptions—which some seem to regard as a triumph of clinical education—of a "disastrous [client] interview . . . [which] provided [the clinic] student with . . . valuable insight into the 'whys' of his behavior<sup>62</sup> and the avenues for change."<sup>63</sup> The

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62. The full description of the behavior follows:

He presents a videotape of a student-conducted interview with a distraught young woman seeking a divorce. The woman has never seen a lawyer before, does not have much money, and is not completely sure that she wants a divorce. To even the most naive observer, it appears that the student, reputed to be academically capable, is incredibly deficient in the interpersonal skills of interviewing and counseling his young client. During the course of the interview, the law student is unable to depart from strict academic orientation and authoritatively attempts to secure only the hard and cold facts upon which his client could be granted a divorce, while contemporaneously ignoring the very personal nature of his client's problems. While it appears that the client is emotionally unprepared and unwilling to commit herself to an immediate separation from her husband and to registration on welfare rolls, the law student seems to view such legal consequences as inevitable and directs all discourse toward those ends.

One could argue that the student's ineptitude in interviewing skills resulted not only from a lack of training in client counseling, but also from his general aversion, however unconscious, to the emotional matters before him. While the student may have been skilled in discovering and analyzing the legal facts of his client's predicament, he was unable to recognize emotional factors. In this regard, the question arises whether the legal profession, "concerned with providing services to clients who are often struggling

clinic supervisor of this student undoubtedly intervened more carefully to counsel about alternatives with the client who was "emotionally unprepared and unwilling to commit herself to an immediate separation from her husband and to registration on the welfare rolls, . . . [although the student had] direct[ed] all discourse toward those ends"<sup>64</sup> as inevitable legal consequences. Almost surely, the clinic supervisor would not allow the "young" client who had "never seen a lawyer before" to be pushed into actions by the "incredibly deficient . . . interviewing and counseling"<sup>65</sup> of the student. Despite best efforts, however, it is less certain the supervisor could provide the emotional repair to the client as easily as the repair of the purely legal aspects of the representation.<sup>66</sup> If the same teaching of interpersonal skills can happen without the infliction of human suffering, then it is fundamentally immoral to use real clients as tools of training, hurting people in the process with precisely the same sharp instrument that the teaching is designed to blunt.

#### E. *A Semester's Work May Be Ethically Misleading*

Most live-client clinical experiences are one semester in length.<sup>67</sup> Often, cases are carried over from previous students' work; new students, unfamiliar with the nature of the relationship begun by the earlier students except for what little can be gleaned from the file notes,<sup>68</sup> are unlikely to have a well-developed relationship with the client. In any event, the nature of the relationship may be cloudy for the students for reasons that they have no real hope of discovering. Under such circumstances, what little the students may learn about client relationships may be misleading, having resulted more from the previous, unknowable actions of prior student-lawyers. A similar absence of learning or mislearning occurs when students begin a relationship

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with difficult circumstances should perpetuate a selection process which produces practitioners who are disinclined, relative to others in the population, to respond with sympathy and understanding to emotional conflicts." In spite of the seemingly disastrous interview conducted by the law student, the videotaped clinical experience provided that student with an opportunity to evaluate his actions and characteristic motivations in interviewing and advising his client. Inasmuch as the deficiencies of the interview were commented on and analyzed by the clinical supervisor, the law student may have acquired valuable insight into the "whys" of his behavior and the avenues for change. It is in this respect that clinical education further aids in the personal as well as professional development of law students.

Tuoni, *supra* note 57, at 416 (footnotes omitted).

63. *Id.*

64. *Id.*

65. *Id.*

66. For another example of the possible ill-effects of non-intervention, see Meltner & Schrag, *supra* note 50, at 25-29.

67. See *Report*, *supra* note 3, at 520.

68. The file notes may be well done in terms of their rendition of the factual underpinnings of the case, but are unlikely to reveal the nuances of the relationship.

with a client and pass the case on to the next group of students. Often, the realization of results from the quality of the early part of the client relationship is delayed until much later activity for the client is undertaken. As such, the lessons learned from the quality of early aspects of the client relationships are lost for the students who engaged in those early activities. Although, as Pincus said, "there is no substitute for personally living through the circumstances which create the ethical dilemma and for having personally to face the consequences of the action or inaction which is used as a response to the moral challenge,"<sup>69</sup> very little facing of personal consequences occurs in the few months of a semester's work in an in-house clinic. More often the real consequences are passed along to others who have little appreciation for their source, and those who created circumstances that later produce bad consequences may be left to think that nothing of consequence resulted from their poor lawyering.

## II. PROFESSIONAL RESPONSIBILITY LAW ISSUES

There are two primary areas where professional responsibility law issues arise in clinics: conflicts and confidentiality. Naturally, there is some overlap between the two.<sup>70</sup>

Authority specific to law school clinical programs on most of these issues is sparse or non-existent. Some of the authority cited in this paper refers to law firms, some to government and corporate law offices, and some to legal aid offices. For different topics, each is probably the best analogy to a law school clinic. None of the three is a perfect match on all issues, in part because none of the three has an explicit education mission, in part because of each one's particular differences from the law school clinical practice setting. Although little has been written specifically about professional responsibility law applications to law school clinics, some analogies can be drawn from the treatment of such issues in legal aid offices.<sup>71</sup>

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69. William Pincus, *One Man's Perspective on Ethics and the Legal Profession*, 12 San Diego L. Rev. 279, 285 (1975).

70. Some law schools' clinical programs have waded into these issues in a very constructive way, creating thoughtful policy documents. See, e.g., Memorandum from Debbie Maranville, Associate Professor of Law, University of Washington School of Law, to File (November 30, 1994) [hereinafter Maranville Memorandum] (on file with author) (developing University of Washington School of Law Conflicts of Interest Policy for the Clinical Law Program). Recent Clinical Section programs on conflicts issues and policies show that many others have an interest in these issues.

71. See, e.g., Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. Rev. 337, 354-62 (1978) (rejecting any model which calls for a standard of lawyering for poor persons different from that which governs private lawyers); Marshall J. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U. L. Rev. 1115, 1116 (1982) (arguing that attorneys who represent legal aid clients should be subject to the same ethical obligations as members of the private bar because the fiduciary relationship between lawyer and client demands loyalty to one's client); David H. Taylor,

Let us take as an example a law school with a fairly well-developed clinical program with four components: a criminal defense clinic, a general civil practice clinic, a domestic violence clinic, and a housing issues clinic. I say "components" because I might think of them that way, as the clinical part of the curriculum and each clinic as a component of the clinical part of the curriculum. The nature of the conflicts and confidentiality issues, however, largely turn on the question of treating each clinic as its own law office entity, or as a part of the larger law school clinic law office, or broader still as if the clinics were all a part of the law school's law office. This choice determines which of the conflicts questions are thorniest, what sort of policies regarding confidentiality and conflicts the clinics ought to have in place, and indeed, what some of the educational value of the clinic will be.

#### A. *Lawyer Interests v. Client Interests Conflicts*

Unlike the general lawyer population, a small portion of which is on the job hunt at any given moment, nearly all law students are actively searching for permanent and temporary (either summer or part-time during the academic year) employment. When clinic students seek employment in their community, potential conflicts develop between the student's interests and the interests of the clients the student represents. A criminal clinic student who interviews with the opposing prosecutor's office, a civil practice clinic student who interviews with an opposing law firm or institutional defendant (a bank opposing the student's client in a consumer law case, for example), or even a civil practice clinic student who represents a spouse in a domestic relations action and has accepted post-graduation employment with the local legal services provider that represents the opposed spouse all present conflicts issues under Model Rule 1.7(b).<sup>72</sup> Such a conflict must be disclosed to the student's client and the representation may only proceed if the client consents after consultation.<sup>73</sup>

One might argue that the student's interests would be aligned with rather than opposed to the client's in such a circumstance: the student would want to impress the prospective employer with her diligent, effective representation of the client. In some instances, students may well react that way, but the argument ignores the very real possibility that the student will want to curry favor with the prospective em-

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*Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 Ariz. L. Rev. 577, 577-619 (1995) (suggesting alteration of ordinary professional ethics rules for the legal aid practice setting); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. Rev. 1101, 1129-56 (1990) (discarding the "individual zeal model" as applied to legal services practice because of the need to allocate limited resources to worthy cases and legal services' unique mission in serving the local community).

72. See Model Rules of Professional Conduct Rule 1.7(b) (1998).

73. See *id.* Rule 1.7(b)(2); Committee on Prof'l Ethics, Association of the Bar of the City of New York, Formal Op. 79-37 (1979).

ployer by compromising the client's interests. Under the circumstances, the client ought to be the one to determine whether the risks are too great to bear.

This prohibition should not restrict the representation activities of students merely because they have made mass mailings to a wide range of prospective employers with whom this sort of conflict would exist. Rather, the conflicts should only be a matter of consequence when a student actively pursues a particular job opportunity, usually denoted by the offer and acceptance of a job interview.<sup>74</sup>

### B. *Multiple-Client Conflicts and Related Confidentiality Issues*

Several types of multiple-client conflicts may arise because of students' multiple commitments during law school and because of the overlap of caseloads of multi-part clinics. As would any law firm, a clinical program must have conflicts check procedures in place to avoid such occurrences.<sup>75</sup> Otherwise, the supervising lawyers risk discipline.

If a law school treats its clinics as one large law office or as if the entire law school was a single law office, conflicts may exist between "branches" of the same<sup>76</sup> office.<sup>77</sup> For example, the civil practice clinic may find itself representing a battered spouse in a divorce action while the criminal practice clinic is representing the batterer with respect to criminal charges; a criminal clinic may represent a trespass defendant, while the housing clinic represents the non-profit that set up the housing facility at which the trespass defendant allegedly trespassed.<sup>78</sup> Treated as if they are a single law office, this multiple-part clinic has a multiple-client conflict, and a gross one at that. Such conflicts would plainly violate Model Rule 1.7(a). Indeed, in many such instances, the conflict would not be waivable by the clients because the lawyers could not "reasonably believe[] the representation will not adversely affect the relationship with the other client."<sup>79</sup>

The simplest fix for these issues is a painful one for in-house clinics: they must treat each clinic (or at least those that seem likely to develop inter-office conflicts) as separate entities. That means, unfortunately, separate office space,<sup>80</sup> support staff, fax machines, and

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74. See Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1991-1 (1991).

75. See Model Rules of Professional Conduct Rule 5.1(a) (1998).

76. See *id.* Rule 1.7(a).

77. See *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1385 (2d Cir. 1976).

78. See Maranville Memorandum, *supra* note 70, at 2.

79. Model Rules of Professional Conduct Rule 1.7(a)(1).

80. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 995 (1967) (suggesting that two lawyers sharing office space can have a conflict of interest in representation); Ethics Advisory Panel, Rhode Island Supreme Court, Op. 93-66 (1993) (stating that four lawyers who "share secretarial and office expenses" are considered a law firm); *cf.* ABA Comm. on Ethics and Professional Responsibility,

certainly separate faculty supervisors who may not consult one another unless they ensure that they are not communicating client confidences and are not creating conflicts. This is an odd circumstance for an academic, and it is bound to diminish clinical faculty members' development and breadth of experience.

It also means, and this may be most painful of all to some clinical programs, that students must meet in separate seminar components and must not share information about their cases and experiences. This reality will reduce the educational value of what could otherwise be interconnected in-house clinics. Clinical students have relatively small caseloads<sup>81</sup> and a correspondingly small range of interactions with clients, courts, opposing lawyers, and others. Much of the value of the experience is found in the opportunity to share their experiences with other clinic students in their seminar meetings, get others' reactions to their impressions, hear other students's experiences, and share in the critique of them as well.<sup>82</sup> Operating each clinic as a separate entity limits the range of other student experiences that each clinic student will be able to hear about and discuss.

Even when a clinical program treats each clinic as its own entity, multiple client conflicts arise. Students often have multiple jobs during law school, even while working in a clinic. They also move fairly readily from job to job, from year to year, and summer to summer. These multiple commitments create the likelihood of students being exposed to opposing parties in the same matter (for example, criminal defense clinic student who works in the prosecutor's office),<sup>83</sup> multiple parties nominally on the same side of litigation but with differing interests (for example, environmental law clinic student works part-time in a law firm that represents other environmental plaintiffs from those represented by the clinic),<sup>84</sup> successive employment and clinic work on opposite sides of a matter (for example, civil practice clinic student worked in a law firm the prior summer that represents Bank, now civil practice clinic represents consumers against Bank in a Truth-in-Lending matter).<sup>85</sup> The examples and possibilities are limitless.

If careful screening is done, some of these multiple-client issues may be avoidable. But in the context of an in-house clinic, what does screening mean? It means, of course, all the usual things, such as requiring lawyers (the students) to refrain from communicating with a

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Formal Op. 88-356 (1988) (recognizing that two practitioners can share office space and not be "regarded as constituting a firm" unless "they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm").

81. See *Report*, *supra* note 3, at 546-48.

82. See Christine M. Venter, *Encouraging Personal Responsibility—An Alternative Approach to Teaching Legal Ethics*, *Law & Contemp. Probs.*, Summer/Autumn 1995, at 287, 290-93.

83. See Model Rules of Professional Conduct Rule 1.7(a).

84. See *id.* Rule 1.7(b).

85. See *id.* Rule 1.9.

conflicted member of the community about the conflicting matter, maintaining files in a way that prevents a conflicted member from having access to them, and so on.<sup>86</sup> Moreover, in an academic setting, it also means requiring conflicted students to absent themselves from class when the discussion turns to the conflicting matter. Again, this is a rather strange, but necessary, circumstance in an academic course.

Many law school clinics work closely with the local legal aid programs, and that is undoubtedly constructive in many ways. It does, however, increase multiple-client conflict potential. In one state, for example, "all intake for [legal services in] the state . . . [is] done by law students in the Clinic."<sup>87</sup> This collaboration is a marvelous educational experience for the students, but, because confidentiality attaches when a prospective client begins communicating with a lawyer, conflicts can exist between prospective clients and either current or former clients.<sup>88</sup> Being exposed to every legal aid intake interview in the state dramatically increases the likelihood of confidentiality breaches and conflicts. The conflict check mechanism needed to protect against such possibilities needs to be a sophisticated one.

### C. Confidentiality Issues Unrelated to Conflicts of Interest

Confidentiality issues attach to in-house clinics that are unrelated to conflicts concerns, and may be somewhat more troubling than similar issues in post-law school practice. Students who form short-term relationships with clients may be less protective of client confidences. Special effort must be given to instructing students that they may not use examples from clinic experiences in other classes. That concern aside, when seminar components of clinical courses permit enrollment of non-clinic students, special protections must be adopted. The very purpose of such a class is to have students discuss their cases among their colleagues. Students who are not members of the clinical "firm" are not entitled to hear the confidences of the clinic's clients.

The fix for this problem may be a requirement that clinic students use fictitious names and slightly altered facts when describing their

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86. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980) (finding no imputed disqualification of a firm in a security fraud derivative suit where a former SEC employee was properly screened for all participation in the case and the SEC turned over applicable information before the firm was retained); Model Rules of Professional Conduct Rule 1.10 (disqualifying a law firm for the conflict of interest of its attorney through imputation).

87. E-mail from Christine M. McDermott, Supervising Attorney of the Delaware Civil Clinic at Widener University, to multiple recipients of list at <lawclinic@lawlib.wuacc.edu> (June 4, 1997) (on file with author).

88. See, e.g., *Rosman v. Shapiro*, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (holding that attorneys were disqualified from representing a party against a former client when both parties were previously joint clients); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990) (stating that a lawyer, without waiver of confidentiality, must withdraw or decline representation of prospective client when imparted information affects the representation of other clients).

cases.<sup>89</sup> But that fix diminishes the educational value of the seminar and is unlikely to be a useful experience for any of the students involved.<sup>90</sup> Even at that, the fix may be unsuccessful at protecting client confidences. Control over the range of outside work activities of the non-clinic students is unlikely. Scattered throughout the community in various legal work environments, merely hearing the basic fact pattern may be enough to reveal confidences to students who are familiar with the dispute from their own workplace. The risks are just too great. Imagine having a law firm discussion of pending matters, even with an effort to disguise client identities, among a group of colleagues outside the firm who work at the full range of other legal employers in the community from legal aid programs, law firms, corporate law offices, and government agency offices. The individuals in such a class will lack the sense of common mission that is shared by lawyers who work for the same organization and will have a wide range of divergent interests and commitments. The risk of confidentiality breaches in such a setting is unacceptably high.

D. *The Danger of Saying, "The Education Mission Trumps the Professional Norms."*

Clinics are meant to teach professional norms and critique them. It would certainly be appropriate to challenge the application of those norms to the clinical setting. No one should criticize an effort to construct a reasonable argument that different norms should apply to law school clinics than apply in other practice settings. But these arguments are unlikely to succeed in this context. The norms that underlie the issues discussed in this paper are central to the profession: protection of client confidences, loyalty to clients, avoidance or fair resolution of conflicts of interest. Each is critical to the lawyer's role in all settings, even if the interpretation of particular applications may vary from practice setting to practice setting. A successful assault on their application in law school clinics may be based on the proposition that education is more valuable than these fundamental norms. That is a dangerous message to deliver to students, and it is likely to produce self-serving rationalizations for all manner of client abuses.

#### CONCLUSION

Clinical legal education generally and in-house clinics particularly have great value for students, legal education, the legal profession, and the public. The overarching issues discussed in this Article exist, however, and need further study and consideration.

None of the law governing lawyers' issues that arise with frequency regarding in-house clinics is fatal to their operation, but they must be

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89. See Venter, *supra* note 82, at 293.

90. See *id.* at 293-94.

attended to just as law firms and government law offices attend to such issues. Just as in other law offices, the issues can be confronted, guarded against, and resolved thoughtfully when best efforts to avoid them fail. The complication in the clinical setting is the educational mission of the programs. Some of the measures taken to comply with professional ethics rules diminish the educational value of the clinic. That is unfortunate but necessary. Failing to be sensitive to the governing norms of the profession teaches students exactly the wrong thing, particularly if they observe the disregard given the professions' norms by their clinic supervisor.