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AN ETHICS CRITIQUE OF INTERFERENCE IN LAW SCHOOL CLINICS

Robert R. Kuehn and Peter A. Joy***

Law school clinics play an increasingly important role in training future lawyers and providing legal assistance to traditionally under-represented individuals and groups. In addition to facing the legal issues present in any law practice, law clinic students and faculty often confront ethical issues that lawyers representing poor and unpopular clients sometimes face—outside interference in case and client selection. This article explores the ethical considerations raised by interference in law school clinic case and client selection and limitations on the means of representation lawyers may employ in representing their clients. The article’s analysis provides a useful framework for responding to interference with not just law school clinics, but also with legal services lawyers and other attorneys representing poor or unpopular clients and causes.

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I. INTRODUCTION

Law school clinics play an increasingly important role in training future lawyers and providing legal assistance to traditionally under-represented individuals and groups.¹ Recognizing this importance, the American Bar Association (ABA) amended its accreditation standards in 1996 to require that every ABA-approved law school “shall offer live-client or other real-life practice experiences.”² Thus, all accredited U.S. law schools—as well as some non-ABA accredited law schools—have a clinical program, and most full-time law clinic

1. See Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, *Legal Education and Professional Development—An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 236-39 (1992) [hereinafter *MacCrate Report*] (noting the growth and importance of clinics in the law school curriculum); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 *SMU L. Rev.* 1461, 1475, 1505 (1998) (arguing that the need for law school clinic programs to provide free legal representation to needy clients has scarcely been greater); Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 *Wash. U. J.L. & Pol'y* 33, 36 n.14 (2000) (reporting that five of the eight law clinics at Tulane Law School provided over 65,000 hours of free legal services in 1997 compared to fewer than 100,000 hours reportedly donated by all of the members of the Louisiana state bar in 1998); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 *Cal. L. Rev.* 209, 236 (2003) (estimating that law school clinics provide millions of hours each year of free student legal work for needy clients). Supreme Court Justice Sandra Day O'Connor advocates mandatory clinical education for all law students as a way to address unmet legal needs. Dubin, *supra*, at 1475 n.73 (citing Justice O'Connor's 1991 speech at the ABA's annual meeting).

2. Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, *Standards for Approval of Law Schools*, Standard 302(c)(2) (2002), available at <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Mar. 24, 2003). “The terms ‘live-client’ or ‘real-client’ refer to clinics where students provide representation to real clients with legal problems. These clinics are to be distinguished from clinics that are simulation based and use hypothetical clients.” Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 *Clinical L. Rev.* 401, 403 n.9 (1994).

faculty supervise law students representing clients through in-house clinical programs.³ In addition, many law schools have externship programs in which students are supervised by practicing lawyers or judges—often referred to as field supervisors. In-house clinics, as well as externship programs, provide law students with opportunities to learn essential lawyering skills and professional values by doing.⁴ In most in-house clinical programs, and in some externship programs, students represent clients under student practice rules as the primary lawyer—or first-chair—for clients.⁵ Law students practicing under a law student practice rule are able to meet with clients and witnesses to gather facts, analyze clients' legal problems and provide legal advice, negotiate matters on behalf of clients with opposing parties, and represent clients before courts and administrative tribunals.⁶ In other words, student practice rules empower law students to become “student-lawyers.”⁷

3. “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.” Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 *Clinical L. Rev.* 1, 30 (2000); see also Luban, *supra* note 1, at 236 (“Today, 182 American law schools offer clinics in more than 130 different subject areas, staffed by more than 1,400 clinical instructors.”). 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 2, at 403 n.8.

4. Law clinic students’ “hands-on work for real clients in real cases is essential to the learning process.” Brief for Amici Curiae, The Association of American Law Schools, The American Association of University Professors, and the Clinical Legal Education Association, at 4, *S. Christian Leadership Conference v. Supreme Court of La.*, 252 F.3d 781 (5th Cir. 2001) (No. 99-30895) (on file with authors).

5. At many schools, one of the distinctions between in-house clinical programs and externship programs is the opportunity for the law student to be the primary lawyer for clients. Many externship programs only offer a small percentage of first-chair experiences for law students. See, e.g., E-mail from Sandy Ogilvy, Director, Catholic University School of Law Externship Program, to Peter A. Joy (Sept. 9, 2001) (on file with authors) (stating that approximately ten percent of over 200 students a year in Catholic’s externship program receive first-chair experiences); E-mail from Mary Jo Eyster, Director, Brooklyn Law School Externship Program, to Peter A. Joy (Sept. 10, 2001) (on file with authors) (stating that most students in Brooklyn’s externship program do second-chair lawyer work).

6. Student-lawyers are able to perform all of the essential lawyering functions under the student practice rules in the jurisdictions where they practice. Without student practice rules, law students would not be able to provide primary representation for clients as part of their legal education; “rather, professional skills instruction would be limited to classroom courses, scripted simulations and externships [as lawyer or judge assistants] with law offices, government agencies, and judges.” Jorge de Neve et al., *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, 548 (1998).

7. Only clinical law students admitted to practice under a jurisdiction’s or federal court’s student practice rule or order are legally and ethically able to claim to be “student-lawyers” or to function as lawyers. Students enrolled in clinical programs

Working as lawyers on behalf of clients, student-lawyers and law clinic faculty experience the legal ethics issues lawyers face every day, such as client confidentiality, conflict of interest, and competency issues. In addition, the work of student-lawyers and faculty in clinical programs sometimes brings them in contact with ethical issues often faced by lawyers representing poor and unpopular clients—interference in case and client selection and restrictions on the means of representing a client. The interests of politicians and of university alumni and donors add an additional level of outside interest and potential interference in law school clinic activities.

Although there is a history of outside interference in law school clinic case and client decisions, there is a dearth of scholarship examining these matters. This article fills that gap by exploring the ethical considerations, as defined by accepted norms of professional conduct,⁸ raised by interference in law school clinic case and client selection or limitations on the means of representation clinic lawyers may employ in representing their clients.⁹ Some of the analysis of the ethical issues implicated by interference in law school clinical programs also serves as a useful framework for analyzing restrictions on or interference with legal services lawyers and private practitioners representing poor or unpopular clients and causes. This article does not address case and client representation issues once a case has been accepted, except to discuss how limitations on how an attorney may represent a client influence decisions concerning whether or not to proceed with the representation.¹⁰

Part II of this article discusses political interference in law school clinic case and client selection, tracing the history and types of interference. It also explores the ethical underpinnings of the right of clinic lawyers to choose clients and cases, and their obligations to represent unpopular or controversial clients and causes. Further, it

but who are not admitted to the limited practice of law under a student practice rule or court order function as law clerks or lawyer assistants. See Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 *Clinical L. Rev.* 493, 497 (2002).

8. This article does not address moral or political arguments that commentators have made against attacks on legal services programs and other lawyers representing poor or unpopular clients or why clinical programs should represent clients in controversial cases. See, e.g., David Luban, *Lawyers and Justice: An Ethical Study* 302-04, 358-91 (1988) (arguing that restrictions on legal services programs frustrate social justice and interfere with a democratic way of life); Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 *Clinical L. Rev.* 545, 546, 556-57 (1996) (arguing that law clinic programs should take controversial cases because of their pedagogical value and because law students can imagine themselves handling hard, controversial cases in practice).

9. The term "clinic lawyers" is used throughout this article to refer to law clinic student-lawyers and their supervising lawyer faculty.

10. Once a case has been accepted by a law school clinic, clinic lawyers have the same obligations as any other lawyer to provide competent, ethical representation to their clients.

analyzes a clinic lawyer's ethical obligations to act independently of third-party interests, and how interference by other lawyers is contrary to the interfering lawyer's pro bono responsibilities, to the lawyer's duty not to prejudice the administration of justice, and to the prohibition on using means that have no substantial purpose other than to embarrass, harass, or delay a third person.

Part III explores restrictions imposed by third parties on how a law school clinic may represent a client, such as prohibitions on attorney's fees or on seeking class action status. It addresses both the legality of these practice restrictions and whether those restrictions may breach rules of professional conduct.

Part IV concludes that identification of the ethical concerns raised by such interference and a discussion of the consequences for those who seek to meddle in a clinic lawyer's case and client decisions provide a framework for discouraging such interference. This framework may be utilized not only by law school clinics but by any lawyer facing interference with client and case decisions, particularly when seeking to provide access to the courts for poor or unpopular clients.

II. OUTSIDE INTERFERENCE IN LAW SCHOOL CLINIC CASE AND CLIENT SELECTION

An initial ethics consideration in law clinic case and client selection is the independence of the law clinic supervising attorney to choose cases and clients that meet the clinic's educational and public service goals.¹¹ Scarce clinical program resources and pedagogical objectives require some limits on who may be represented or what cases may be handled. A recurring ethical issue is the propriety of politically, economically, or ideologically-motivated efforts by persons and organizations outside the law school clinic to limit the clinic's choice of clients and cases. While rules of professional responsibility strictly prohibit interference with an attorney's exercise of professional judgment once a case has been accepted, the independence of a law clinic attorney's choice of clients and cases is less clearly safeguarded.¹²

11. See *Proposed Model Rule Relative to Legal Assistance by Law Students*, 94 Annual Rep. of the A.B.A. 290, 290 (1969) (stating that the purpose of the ABA Model Student Practice Rule is 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 in trial work of varying kinds").

12. By focusing on the ethical issues implicated in a law clinic supervising attorney's choice of clinic clients and cases we do not mean to suggest that clinic students should not also play a role in case and client selection. See Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 Clinical L. Rev. 109, 148-51 (1996).

A. *History and Types of Interference in Clinic Case and Client Selection*

Since at least the late 1960s, politicians, attorneys, business interests, and university officials have attacked law school clinics for their choices of clients and cases.¹³ Among the first, if not the first, was the 1968 attack on the law clinic program at the University of Mississippi School of Law. Under pressure from local bar association members and state legislators because of the clinical program's involvement in a school desegregation suit, the law school dean conditioned the law clinic faculty's continued employment on ceasing all part-time work with the legal services program responsible for the civil rights litigation.¹⁴ A university policy similarly prohibited outside employment bringing "discredit" to the institution or bringing the employee into "antagonism" with the community or state.¹⁵ The professors filed suit challenging the employment conditions. After reviewing evidence that other members of the law faculty were allowed to engage in part-time work without restrictions on whom they could represent, the United States Fifth Circuit Court of Appeals held that where the reason for treating the law clinic professors differently was that they wished to represent unpopular clients, the distinction could not be constitutionally upheld under the Equal Protection Clause.¹⁶ With the law school also facing possible expulsion from the Association of American Law Schools ("AALS"),

13. This article does not address the influence of judges on a law clinic's case and client selection, including the ability of a judge to withhold court appointments as a means of expressing displeasure with a clinic's policies or litigation strategies. See E-mail from Don Duquette, Professor, University of Michigan Law School, to Robert R. Kuehn (Apr. 16, 2002) (on file with authors) (explaining the actions of juvenile court judges in denying court appointments to the school's Child Advocacy Clinic). See generally Model Code of Judicial Conduct Canon 3C(4) (1999) ("A judge shall exercise the power of appointment impartially and on the basis of merit.").

14. Francis B. Stevens & John L. Maxey, II, *Representing the Unrepresented: A Decennial Report on Public-Interest Litigation in Mississippi*, 44 Miss. L.J. 333, 345 (1973); *The University of Mississippi*, AAUP Bulletin, Spring 1970, at 75, 76-78; Elizabeth M. Schneider & James H. Stark, Political Interference in Law School Clinical Programs: Report of the AALS Section on Clinical Legal Education, Committee on Political Interference 1 n.1 (1982) (unpublished report, on file with authors). Legislative proposals to restrict the law clinic's activities included moving the law school to Jackson, denying full-time professors the right to engage in private practice, and stripping away the diploma privilege accorded to graduates of the University of Mississippi School of Law. *The University of Mississippi*, *supra*, at 77.

15. *The University of Mississippi*, *supra* note 14, at 76.

16. *Trister v. Univ. of Miss.*, 420 F.2d 499, 504 (5th Cir. 1969). The court found that the law school had imposed "upon [the law clinic professors'] activities restrictions that are different and more onerous than those imposed upon other professors in the same category" and held that the university, as an agency of the state, could not "arbitrarily discriminate against professors in respect to the category of clients they may represent." *Id.* at 502, 504.

the university agreed to offer re-employment to the clinical law professors and to rescind or amend its employment policy.¹⁷

In the early 1970s, Governor Meskill of Connecticut and members of the local bar objected to the University of Connecticut's law school clinic representing war protestors and other unpopular clients.¹⁸ This resulted in a threat to cut off state funding as well as a proposal that the dean and a law school faculty committee screen law clinic cases.¹⁹ In response, the clinic professor requested and received ABA Informal Ethics Opinion 1208, which found that case-by-case prior approval by the dean or a faculty committee would violate the professional ethics of the dean and clinic director.²⁰ Soon after the ABA opinion was issued, the law school abandoned the oversight process.²¹ In the early 1980s, a high-ranking Connecticut state official threatened to introduce legislation to limit the activities of the school's criminal clinic after the clinic successfully challenged a provision of the state's death penalty statute.²²

A 1975 Arkansas appropriations law, passed in response to civil rights litigation handled by a University of Arkansas at Fayetteville law professor in his private capacity, made it unlawful for law school faculty members in certain positions to handle or assist in any lawsuit in Arkansas state or federal courts.²³ In a lawsuit filed by twenty-one members of the law school faculty, the Arkansas Supreme Court struck down the restriction.²⁴ The court held that because the appropriations law only applied to certain categories of members of the law faculty and only to the law school in Fayetteville and not also to the law school in Little Rock, it violated the Equal Protection Clause.²⁵

The early 1980s also saw attacks on law clinic programs at state-funded law schools in Colorado, Idaho, Iowa, and Tennessee over lawsuits filed against the state. In Colorado, legislation that

17. *The University of Mississippi*, *supra* note 14, at 85.

18. E-mail from Joseph D. Harbaugh, Dean, The Law Center, Nova Southeastern University, to Robert R. Kuehn (Nov. 11, 2002) (on file with authors); E-mail from Joseph D. Harbaugh, Dean, The Law Center, Nova Southeastern University, to Robert R. Kuehn (Mar. 20, 2001) (on file with authors). Dean Harbaugh was the clinical professor at the University of Connecticut under attack from the governor.

19. E-mail from Joseph D. Harbaugh (Mar. 20, 2001), *supra* note 18. The governor labeled the law school's clinic as "nothing more than an agency designed to destroy our government and its institutions." Elizabeth M. Schneider, *Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom*, 11 J.C. & U.L. 179, 184 (1984).

20. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

21. E-mail from Joseph D. Harbaugh (Mar. 20, 2001), *supra* note 18.

22. Schneider & Stark, *supra* note 14, at 2 n.4; Schneider, *supra* note 19, at 186.

23. Schneider, *supra* note 19, at 184.

24. *Atkinson v. Bd. of Trs. of the Univ. of Ark.*, 559 S.W.2d 473 (Ark. 1977).

25. *Id.* at 475-77. Finding the argument purely speculative, the court refused to reach the plaintiffs' First Amendment argument that the law had been passed for the purpose of silencing a particular professor. *Id.* at 476.

prohibited “law professors at the University of Colorado from assisting in litigation against a governmental unit or political subdivision” was vetoed by the governor in 1981 and passed only one house in 1982.²⁶ The legislation was in reaction to a lawsuit filed by a University of Colorado law professor, with the help of constitutional litigation seminar students, challenging a nativity scene.²⁷

Angry over a lawsuit filed by the University of Idaho College of Law’s law clinic that challenged the proposed expansion of a scenic highway, the Idaho House of Representatives passed a bill in 1982 that prohibited higher education faculty members and students from participating in actions against the state and prohibited any institution from offering “courses, clinics or classes in which a student assists or participates in any suit or litigation against the State, its agencies or its political subdivisions.”²⁸ The legislation was defeated in the state senate.²⁹

Proposed legislation in Iowa in 1981 prohibited the expenditure of any state funds for the representation of clients in litigation against the state or any political subdivision.³⁰ The bill, which was defeated both in committee and in an Iowa House of Representatives floor vote, was filed in retaliation against the University of Iowa College of Law’s law clinic’s successful representation of prisoners in lawsuits against the state.³¹

26. Schneider, *supra* note 19, at 185-86; Schneider & Stark, *supra* note 14, at 2. In 1997, the Texas legislature and Texas A&M University administration adopted prohibitions analogous to Colorado’s. The policies prohibited state employees and university professors from serving as an expert witness or consultant in litigation against the state. The Fifth Circuit U.S. Court of Appeals struck down the policies as a violation of the First Amendment, noting that there was no evidence that such testimony or advice would adversely affect the efficient delivery of educational services by the faculty members affected and that the policies drew an unconstitutional distinction between state employees based on the content of the employee’s speech. *Hoover v. Morales*, 164 F.3d 221, 226 (5th Cir. 1998).

27. Schneider & Stark, *supra* note 14, at 2 n.3; Schneider, *supra* note 19, at 185. In 1980, the law school’s Natural Resources Litigation Clinic came under criticism from James Watt, then the director of the Mountain States Legal Foundation. Telephone Interview with Bob Golten, former Director, National Wildlife Federation Natural Resources Litigation Clinic (Apr. 2, 2001); E-mail from Bob Golten, former Director, National Wildlife Federation Natural Resources Litigation Clinic, to Robert R. Kuehn (Apr. 4, 2001) (on file with authors). The dean of the law school successfully deflected this criticism. Telephone Interview with Bob Golten, *supra*.

28. Schneider, *supra* note 19, at 186 & n.33; Telephone Interview with Neil Franklin, Professor, University of Idaho College of Law (Apr. 26, 2002).

29. Schneider, *supra* note 19, at 186. In 1997, state legislators threatened to introduce similar legislation but did not do so once it was learned that the case at issue had been referred to the clinic by the U.S. Ninth Circuit Court of Appeals. E-mail from Maureen E. Laflin, Professor, University of Idaho College of Law, to Robert R. Kuehn (Mar. 28, 2001) (on file with authors).

30. Schneider & Stark, *supra* note 14, at 1; Schneider, *supra* note 19, at 185 & n.30.

31. Schneider, *supra* note 19, at 185 n.30; E-mail from Barbara Schwartz, Professor, University of Iowa College of Law, to Robert R. Kuehn (Mar. 22, 2001) (on file with authors). In 1996, while an age discrimination lawsuit by the law clinic

In Tennessee, university officials were successful in restricting the ability of the law clinic at the University of Tennessee College of Law to sue the state.³² In 1981, the law clinic sought attorney's fees after successfully suing a state agency on behalf of prison inmates.³³ The state attorney general filed a motion to deny the fees on the ground that it would be illegal to transfer payment of money from one state agency to another outside of the legislative appropriations process, but the fee dispute was amicably resolved by directing the fees to the local legal aid office that housed the clinic.³⁴ Nonetheless, the university's board of trustees forced the clinic to separate from the local legal aid office and directed that "no suits of significance shall be brought by the UT Legal Clinic on behalf of any litigant against the State."³⁵

Elected officials have twice challenged the ability of the law clinics at Rutgers School of Law-Newark to bring suit against the state and its political subdivisions. In *In re Executive Commission on Ethical Standards*, the New Jersey Supreme Court held that a clinical law professor was not a "state employee" for purposes of the New Jersey Conflicts of Interest Law when representing clients before a state administrative agency and, therefore, rejected a claim that such

against a large local employer was awaiting a decision by the jury, counsel for the defendant corporation called the university's general counsel and threatened to withdraw the corporation's funding of the university's engineering department unless the case was resolved. Telephone Interview with John Allen, Professor, University of Iowa College of Law (Dec. 11, 2001). The university's general counsel informed the complaining lawyer that he would not do anything other than inquire into the status of the case. *Id.*

32. Earlier, the Tennessee Valley Authority ("TVA") and the lieutenant governor pressured the University of Tennessee's law clinic to withdraw from a 1977 lawsuit filed against the TVA for violations of federal air pollution standards. Telephone Interview with Dean Rivkin, Professor, University of Tennessee College of Law (Apr. 5, 2001). The clinic professor ended up handling the lawsuit in his private capacity. *Id.*

33. Memorandum from the Clinic Advisory Committee to the Faculty of the University of Tennessee College of Law 11-12 (May 22, 1981) (on file with authors).

34. *Id.* In the year following the Tennessee attorney general's attempt to prohibit the law clinic from receiving attorney's fees in suits against the state, the U.S. Third Circuit Court of Appeals held that a provision in a contract between a Pennsylvania state agency and a legal services office prohibiting the legal services office from requesting or accepting attorney's fees in lawsuits against the state was void as contrary to the public policy underlying the federal Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. *Shadis v. Beal*, 685 F.2d 824 (3d Cir. 1982). *But see Evans v. Jeff D.*, 475 U.S. 717, 737-38 (1986) (holding that the Civil Rights Attorney's Fees Awards Act did not embody a general rule prohibiting settlements of cases conditioned on the waiver of attorney's fees).

35. Minutes of Meeting of Board of Trustees, University of Tennessee 6-7 (Sept. 25, 1981) (on file with authors); see also Douglas A. Blaze, *Deja Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 Tenn. L. Rev. 939, 960 & n.180 (1997); Julia P. Hardin, *Polishing the Lamp of Justice: A History of Legal Education at the University of Tennessee, 1890-1990*, 57 Tenn. L. Rev. 145, 193 (1990). This policy prevents the law clinic from handling cases against the state where attorney's fees would likely be available. E-mail from Douglas Blaze, Professor, University of Tennessee College of Law, to Robert R. Kuehn (Mar. 29, 2001) (on file with authors).

representation violated the conflicts of interest statute.³⁶ More recently, and less well publicized, the Rutgers Environmental Law Clinic successfully defeated a claim by the City of Bayonne that use of university resources to pursue litigation on behalf of a non-profit public interest organization was an improper donation of state funds under the New Jersey constitution.³⁷ The court held that by advancing the hands-on education of law students and helping enforce environmental laws, the clinic served a public interest, even though it might also benefit private parties.³⁸

Politicians repeatedly attacked the law clinic at Arizona State University College of Law during the 1980s and 1990s because of clinic litigation over state ownership of riverbeds and the state prison system's failure to provide adequate access to law library resources.³⁹ Around 1995, the Republican caucus of the state legislature inserted a rider into the university's budget to cease all funding of the law school's clinics.⁴⁰ After a major lobbying effort, the rider was dropped, but the budget bill did contain language that prohibited the school's law clinic from representing prisoners in litigation against the state, a prohibition that the clinic still observes today.⁴¹

Although not triggered by a particular action of the state's law clinics, in 1987 Governor Schaefer of Maryland made receipt of state funding of any legal services for the poor contingent on an agreement that state agencies not be sued.⁴² At the time, the University of

36. *In re* Executive Commission on Ethical Standards, 561 A.2d 542, 549 (N.J. 1989).

37. Transcript of Motion at 5, 11, N.J. Dep't of Env'tl. Prot. v. City of Bayonne, No. C-118-97 (N.J. Super. Ct. Ch. Div., Hudson County, June 11, 1999). The city alleged that the clinic's representation violated Article VIII, Section II, Paragraph 1 ("The credit of the State shall not be directly or indirectly loaned in any case.") and Article VIII, Section III, Paragraph 3 ("No donation of land or appropriation of money shall be made by the state or any county or municipal corporation to or for the use of any society, association or corporation whatever.") *Id.*

38. *Id.* at 23, 36-37 (citing *Roe v. Kervick*, 199 A.2d 834 (N.J. 1964), and *Township of Mt. Laurel v. Dep't of Pub. Advocate*, 416 A.2d 886 (N.J. 1980)).

39. E-mail from Robert Bartels, Professor, Arizona State University College of Law, to Robert R. Kuehn (Apr. 30, 2001) (on file with authors); E-mail from Douglas Blaze, former Professor, Arizona State University College of Law, to Robert R. Kuehn (Mar. 22, 2001) (on file with authors); E-mail from Gary Lowenthal, Professor, Arizona State University College of Law, to Robert R. Kuehn (Apr. 2, 2001) (on file with authors). Four state legislators called for the firing of the clinic professor supervising the filing of the riverbeds lawsuit but that effort passed "without major problems." E-mail from Douglas Blaze (Mar. 22, 2001), *supra*.

40. E-mail from Catherine O'Grady, Professor, Arizona State University College of Law, to Robert R. Kuehn (Dec. 3, 2001) (on file with authors); E-mail from Gary Lowenthal (Apr. 2, 2001), *supra* note 39.

41. E-mail from Gary Lowenthal (Apr. 2, 2001), *supra* note 39; E-mail from Gary Lowenthal, Professor, Arizona State University College of Law, to Robert R. Kuehn (Apr. 3, 2001) (on file with authors).

42. Retha Hill, *Md. Moves to Head Off Suits by Poor*, Wash. Post, June 25, 1987, at D1. Although press accounts described Governor Schaefer's plan as "the first by any state to make funding of legal services for the poor contingent on an agreement

Maryland law school's legal clinic had contracts with several state agencies to provide legal assistance to needy state residents.⁴³ After a firestorm of public criticism, the governor dropped the restrictions in favor of a requirement that, prior to filing suit against the state, organizations receiving state funds must notify the state and provide an opportunity to resolve the litigation without going to court.⁴⁴ Reacting to assistance provided to inmates suing over conditions of confinement, the Bureau of Prisons similarly prohibited law school clinics at the University of Southern California and Washington and Lee University, which receive federal funds for prison legal assistance programs, from assisting inmates in filing suit against the United States or its employees.⁴⁵

Few clinics have been more severely attacked than the University of Oregon Law School's Environmental Law Clinic. In 1981, shortly after the National Wildlife Federation and the law school entered into an agreement to operate jointly an environmental law clinic, development interests objected and convinced the president of the university to sever the arrangement.⁴⁶ The university president rationalized that the National Wildlife Federation sponsorship violated the university's policy of institutional neutrality.⁴⁷

Starting again in 1982 and continuing unabated through the early 1990s, timber interests and their attorneys attacked Oregon's Environmental Law Clinic and urged university officials to terminate the program.⁴⁸ In an unsuccessful attempt to get the clinic disqualified

that state agencies not be sued," the restriction on the University of Tennessee's law clinic predates the Maryland governor's action. *Id.*

43. *Id.*

44. Robert Barnes, *Gov. Schaefer Patches Spat With Lawyers*, Wash. Post, July 23, 1987, at B5; Telephone Interview with Susan Leviton, Professor, University of Maryland School of Law (Oct. 15, 2001).

45. Letter from C. Elizabeth Belmont, Professor, Washington and Lee University School of Law, to Robert R. Kuehn (Jan. 27, 2003) (noting the prohibition preventing the clinic from assisting prisoners in filing suits against the United States pursuant to the Federal Tort Claims Act or against its employees in their individual capacities); Telephone Interview with C. Elizabeth Belmont, Professor, Washington and Lee School of Law (Jan. 24, 2003); Telephone Interview with Michael Brennan & Carrie Hempel, Professors, University of Southern California Law Center (Jan. 28, 2003) (noting the prohibition preventing the clinic from giving legal advice or providing legal representation in any action against current or former employees of the Bureau of Prisons).

46. Report of the Ad Hoc Study Committee for the Environmental Law Clinic, University of Oregon School of Law 4 (Nov. 30, 1988) (unpublished report, on file with authors).

47. *Id.* at 4. A report by university professors and Oregon attorneys on the Oregon clinic concluded that the fact that a law clinic takes on clients with certain kinds of problems does not violate the university policy of institutional neutrality, noting: "Institutional neutrality applies to the institution as a whole. Individual professors and students are free to advocate their own political and social views." *Id.* at 11.

48. Memorandum from John E. Bonine, Professor, University of Oregon Law School, to Faculty, University of Oregon Law School (Dec. 18, 1987) (on file with

from a lawsuit, attorneys for timber interests argued that the university, law school, and environmental law clinic were the “real parties in interest” and were permitted to depose two law clinic instructors, the dean of the law school, two former clinic students, and university officials for information on the clinic’s financial and decision-making processes.⁴⁹ In response to complaints about the clinic’s use of public funds, the attorney general issued an opinion holding that, in representing private plaintiffs, the clinic was providing a substantial public benefit that is not defeated just because a private purpose also is served.⁵⁰ Finally, facing increasingly negative reaction to the clinic’s filing of a lawsuit to protect the habitat of the endangered northern spotted owl and a proposed bill in the legislature to withdraw state funding of the law school, the Environmental Law Clinic voluntarily moved its litigation activities off campus in 1993 and reorganized as an independent not-for-profit public interest law organization.⁵¹

Another highly publicized effort to restrict the case and client selection activities of an environmental law clinic involved Tulane University. In 1993, Governor Edwin Edwards of Louisiana, an attorney, called the president of Tulane University to complain about public comments by the Tulane Environmental Law Clinic’s director that were critical of the governor’s proposal to reduce a state tax on the generation of hazardous waste.⁵² The governor demanded that

authors).

49. Schneider & Stark, *supra* note 14, at 2; Schneider, *supra* note 19, at 187; Memorandum from Joe Harbaugh, to Executive Committee, Association of American Law Schools (Dec. 8, 1982) (on file with authors).

50. Letter from Donald C. Arnold, Chief Counsel, Oregon Department of Justice, to William E. Davis, Chancellor, Oregon State System of Higher Education, and Max Simpson, Oregon State Representative (July 11, 1983) (on file with authors) (responding to Opinion Request OP-549B).

51. Peter A. Joy & Charles D. Weisselberg, *Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege*, 4 *Clinical L. Rev.* 531, 534 (1998); Alan Pittman, *UO Environmental Law Clinic Funding Axed, What’s Happening* (Eugene, Or.), Sept. 2, 1993, at 1; Posting of John Bonine, Professor, University of Oregon School of Law, to lawclinic@lawlib.wuacc.edu (Mar. 31, 1998) (on file with authors).

Legislation was proposed, but never introduced, by the president of the Wyoming Senate in 2000 to eliminate the University of Wyoming College of Law because of the pro bono activities of environmental law professor Mark Squillace and the publication of a controversial book on Western grazing practices by his law school colleague Debra Donahue. Tom Kenworthy, *A Discouraging Word in Tome on the Range*, USA Today, Mar. 3, 2000, at 3A; Deirdre Stoelzle, *Ag Officials Slam Prof’s Use of UW Stationery*, Casper Star, Feb. 15, 2000, at A1.

52. Michael Dehncke, *Life in Louisiana*, Tulane Law School Dicta (New Orleans, La.), Oct. 25, 1993, at 1 (on file with authors); Josh Landis, *State and Industries Pressure Environmental Law Clinic*, Tulane Hullabaloo (New Orleans, La.), Nov. 19, 1993, at 1 (on file with authors); see Brett Barrouquere, *Edwardes’ Licenses Suspended*, Advocate (Baton Rouge, La.), July 1, 2000, at 4A (reporting the suspension of former Governor Edwin Edwards’ law license after his felony conviction for conspiring to corrupt the state’s riverboat licensing process).

Tulane “shut [the clinic director] up or get rid of him” or else face the loss of state financial support for a new downtown arena for the Tulane basketball team, denial of state financial assistance to Louisiana residents who attend Tulane, and a prohibition on Tulane medical students working in state hospitals.⁵³ The university president declined to intervene or restrict the clinic director’s actions.⁵⁴

Undeterred, the attorney heading the governor’s Department of Environmental Quality then sent a letter to the Louisiana Supreme Court complaining of the Tulane clinic’s “political conduct” and requesting that the court exercise its oversight to determine if the clinic was complying with the intent and provisions of the Louisiana law student practice rule.⁵⁵ The court promptly responded with a one-page letter stating that the justices found no need either to create an oversight committee or develop standards different from those already provided in the student practice rule.⁵⁶

Four years later, upset with the Tulane Environmental Law Clinic’s success in presenting a lower-income, minority community’s opposition to the proposed Shintech chemical plant, business interests and a different governor attacked the clinic and pressed Tulane University officials to intervene and restrict the clinic’s advocacy activities.⁵⁷ Led by attorneys, and a governor who aspired to be an attorney, the attacks took the form of not just public criticism but also threats to revoke Tulane University’s tax-exempt status, proposals to deny the university access to state education trust fund money, an economic boycott of the university, and the refusal of some Louisiana employers to interview or hire university students for law and non-law

53. Dehncke, *supra* note 52; Landis, *supra* note 52; *see also* Marcia Coyle, *Governor v. Students in \$700M Plant Case*, Nat’l L.J., Sept. 8, 1997, at 1; Susan Hansen, *Backlash on the Bayou*, Am. Law., Jan.-Feb. 1998, at 50.

54. Dehncke, *supra* note 52; Landis, *supra* note 52.

55. Letter from Kai David Midboe, Secretary, Louisiana Department of Environmental Quality, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Oct. 15, 1993) (on file with authors); *see also* Bob Anderson, “Politics” Prompted Protest of TU Law Clinic, *Official Says*, Advocate (Baton Rouge, La.), Oct. 19, 1993, at 1B. The letter also alleged that the clinic had violated four rules of professional conduct: Rule 3.3(a) (“Candor Toward the Tribunal”) by not including in its request to create an administrative record on appeal of a landfill permitting decision a copy of a letter by the agency on a different landfill; Rule 4.2 (“Communication with Person Represented by Counsel”) by communicating by letter with agency officials, with a copy to agency attorneys, rather than directly with the agency’s attorneys; and Rules 4.1 (“Truthfulness in Statements to Others”) and 4.4 (“Respect for Rights of Third Persons”) by criticizing the governor’s proposed reduction of the state’s hazardous waste tax. Letter from Kai David Midboe, *supra*.

56. Letter from Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court, to Kai David Midboe, Secretary, Louisiana Department of Environmental Quality (Nov. 18, 1993) (on file with authors); *see also* Bob Anderson, *High Court Rejects Midboe Request on Law Clinic Restraints*, Advocate (Baton Rouge, La.), Feb. 4, 1994, at 12C.

57. Kuehn, *supra* note 1, at 55-65.

jobs.⁵⁸ When this pressure proved unsuccessful, clinic opponents, again directed by members of the bar, successfully persuaded a majority of the elected justices of the state's supreme court to impose new restrictions on the operations of the state's law clinics.⁵⁹ These restrictions include strict limits on client income, a virtual ban on student representation of any non-profit community organization, a ban on any contact with potential clients, and a prohibition on any student appearing in a representative capacity before a legislature.⁶⁰ Though challenged on constitutional grounds, federal courts upheld the Louisiana Supreme Court's student practice rule restrictions.⁶¹

58. Kuehn, *supra* note 1, at 55-59, 61-62, 74; see Steve Ritea, *School Bent Rules to Admit Governor*, Times-Picayune (New Orleans, La.), Sept. 7, 2000, at 1 (reporting that Governor Murphy J. "Mike" Foster, Jr., was admitted to Southern University Law Center). The governor's legal counsel complained about the legal actions taken by the clinic in the ongoing Shintech case and even sought to get Tulane officials to intervene to curb the clinic's representation. Kuehn, *supra* note 1, at 58-59. In addition, state agencies, with the governor's approval, used taxpayer funds to develop dossiers on and to track the activities of the Tulane Environmental Law Clinic and its clients. *Id.* at 57-58.

In another instance of apparent discrimination against hiring students who participate in controversial law school clinics, students at the University of Houston Law Center recently alleged that the local Harris County District Attorney's office is refusing to allow students to intern in their office and leading students to fear that they will be discriminated against in later hiring decisions if the law students participate in the law school's Innocence Network, a clinic that attempts to get convictions of wrongly accused prison inmates overturned. Rebecca Luczycki, *DA Hiring Policy Questioned*, Nat'l Jurist, Oct. 2002, at 27; John Suval, *Innocence Lost*, Houston Press, July 4, 2002, at 13. The district attorney's office denies it has a policy of discriminating in hiring against students who have participated in the law school's innocence clinic, but admits that students interning for its office would not be allowed to work simultaneously for organizations, such as the Innocence Network, that work on behalf of criminal defendants. Suval, *supra*. The director of the Innocence Network counters that there is no possible conflict of interest because the cases in the clinic are not focused just on Harris County and the clinic's cases are not trying to overturn convictions based on claims of prosecutorial misconduct or other courtroom irregularities. *Id.*

59. Kuehn, *supra* note 1, at 65-69, 77-94; see also Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 Tul. L. Rev. 235 (1999); Giancarlo Panagia, *A Man, His Dream, and His Final Banishment: A Marxian Interpretation of Amended Louisiana Student Practice Rule*, 17 J. Envtl. L. & Litig. 1 (2002); Adam Glaser, Note, *The Implications of Changes to Louisiana's Law Clinic Student Practice Rule*, 12 Geo. J. Legal Ethics 751 (1999); Kerryann B. Hamill, Comment, *Strict Student Practice Rules Impose Substantial Burden on Disadvantaged Groups Seeking Environmental Justice*, 7 U. Balt. J. Envtl. L. 1 (1999); Jennifer L. Jung, Comment, *Federal Legislative and State Judicial Restrictions on the Representation of Indigent Communities in Public Interest and Law School Clinic Practice in Louisiana*, 28 Cap. U. L. Rev. 873 (2000); Frances M. Nicastro, Comment, *Southern Christian: A Call for Extra-Constitutional Remedies, Legal Clinical Education, and Social Justice*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 333 (2001).

60. La. Sup. Ct. R. XX ("Limited Participation of Law Students in Trial Work") (2002).

61. *S. Christian Leadership Conference v. Supreme Court of La.*, 61 F. Supp. 2d 499 (E.D. La. 1999), *aff'd*, 252 F.3d 781 (5th Cir.), *cert. denied*, 122 S. Ct. 464 (2001). For a critique of the Fifth Circuit's opinion, see Luban, *supra* note 1, at 238-40, and

Critics of the Tulane Environmental Law Clinic have unsuccessfully sought to export the Louisiana Supreme Court's restrictive student practice rule to other courts. During the appeal of the decision upholding the new Louisiana student practice rule, the United States Fifth Circuit Court of Appeals tentatively approved and forwarded to its Lawyer's Advisory Committee a student practice rule that would have allowed law clinic students to appear before the court "on behalf of any party."⁶² The Lawyer's Advisory Committee amended the draft rule to allow a law student to appear only on behalf of an "indigent party" and only if the "applicable state law permits law students to appear as counsel in court under the circumstances."⁶³ Though not disclosed to the Fifth Circuit judges, the six-person Lawyer's Advisory Committee that inserted the restrictive language included the lead attorney representing the Louisiana Supreme Court in the pending appeal.⁶⁴ When this conflict of interest was revealed, the Louisiana Supreme Court's lawyer resigned from the committee, citing "other commitments," and the Fifth Circuit withdrew the proposed rule.⁶⁵ Similarly, attorneys for an oil company recently were unsuccessful in persuading a United States District Court in Louisiana to impose the state's restrictive law student practice rules on law clinics representing parties in federal district courts in Louisiana.⁶⁶

Recently, attorneys and politicians attacked the University of Pittsburgh's new Environmental Law Clinic. The Pittsburgh clinic first came under fire in the summer of 2001 after the clinic's director, on his own time and at no cost to the clients, filed a lawsuit on behalf

Alison A. Bradley, Recent Developments, *Rigid Justice is the Greatest Injustice: The Fifth Circuit Disregards Political and Economic Realities in Southern Christian Leadership Conference v. Supreme Court*, 76 Tul. L. Rev. 1173 (2002).

62. Memorandum from Bill Zapalac, U.S. Court of Appeals for the Fifth Circuit, to Judge James Dennis, U.S. Court of Appeals for the Fifth Circuit (Sept. 24, 1999) (on file with authors) (including approved draft of student practice rule); Telephone Interview with Suzanne Dickey, Instructor, Tulane Environmental Law Clinic (April 9, 2001).

63. United States Court of Appeals, Fifth Circuit, Notice of Proposed Revisions to 5th Cir. R. (June 1, 2000) (including proposal to amend Rule 46 to allow appearances by law students).

64. Joe Gyan Jr., *Rules Allow Law Students to Appear in Court for Poor*, Advocate (Baton Rouge, La.), July 13, 2000, at 5B; see also Letter from David S. Udell et al., Brennan Center for Justice at NYU School of Law, to Charles R. Fulbruge, III, Clerk, U.S. Court of Appeals, Fifth Circuit (Aug. 1, 2000) (on file with authors) (commenting on proposed Fifth Circuit Rule 46.4 and noting the "obvious conflict of interest" created by the participation of the Louisiana Supreme Court's lead attorney on the Lawyer's Advisory Committee).

65. Tom Stabile, *Die-Hard Law Students*, Nat'l Jurist, Mar. 2001, at 18, 19. At the time of the action by the Lawyer's Advisory Committee to restrict the participation of law students, the Louisiana Supreme Court's lead attorney also was the president of the Fifth Circuit and Louisiana State Bar Associations. Martindale-Hubbell Law Directory LA59B (2001) (listing for Michael H. Rubin).

66. See Elizabeth Amon, *Law Clinic Battles It Out on Bayou*, Nat'l L.J., Oct. 7, 2002, at A5.

of a coalition of environmental organizations seeking to block a timber sale in the Allegheny National Forest.⁶⁷ Angry Pennsylvania state legislators threatened to reduce the University of Pittsburgh's appropriation by \$6.34 million, the alleged economic loss from logging contracts that were affected by a 1997 lawsuit by two other university law professors that stopped a similar timber sale.⁶⁸ As a compromise to the university, which receives twenty percent of its revenue from state appropriations, the legislature inserted language into the state's budget, which was signed into law by the governor, prohibiting the use of any taxpayer funds to support the Environmental Law Clinic.⁶⁹ Because the clinic is funded by foundation endowment money and other private funding sources, the spending prohibition did not appear, at first, to have any effect on the clinic's operations.⁷⁰

However, when the Environmental Law Clinic later provided free legal assistance to a local community organization concerned about the environmental effects of a proposed highway, state legislators, local business leaders, and a justice of the Pennsylvania Supreme Court protested that it was inappropriate for any university entity to assist groups opposed to the project.⁷¹ The leader of a development

67. *Senator Wants to Punish Pitt for Logging Suit*, Pa. L. Wkly., May 28, 2001, at 9. The clinic initially planned to represent the environmental organizations but dropped the groups, with the clinic director instead privately handling the case, when timber interests objected to the clinic's involvement. Bill Schackner, *Law Clinic Sparks Debate*, Pittsburgh Post-Gazette, Nov. 18, 2001, at B-1. When the clinic's director arrived on his first day at the new clinic, his telephone voice mail light was already blinking with complaints about possible clinic cases. Elizabeth Amon, *School Law Clinics Spark Hostility*, Nat'l L.J., Apr. 1, 2002, at A5.

68. Letter from Senator Joe Scarnati, Pennsylvania Senate, to Representative Jim Lynch, Pennsylvania House of Representatives (May 24, 2001) (on file with authors); Memorandum from G. Reynolds Clark, Director, Community and Governmental Relations, University of Pittsburgh, to Mark A. Nordenberg, Chancellor, University of Pittsburgh (May 22, 2001) (on file with authors); see also Jim Eckstrom, *Scarnati Prepared to Hit U. Pittsburgh Where it Counts—Budget*, Bradford Era (Bradford, Pa.), May 23, 2001; Letter from John Peterson, Representative, U.S. House of Representatives, to Tom Buchele, Professor, University of Pittsburgh School of Law (May 29, 2001) (on file with authors) (stating “[a]s I have said in the past, the University of Pittsburgh should be prepared to bear its share of the responsibility for the losses suffered in jobs, by industry, people and communities” and arguing that the previous litigation forced fifteen small timber mills out of business).

69. *State Senator Gets Symbolic Rebuke of Pitt Professor*, Associated Press Newswires, June 23, 2001, WESTLAW, PANEWS library.

70. *Id.*

71. Don Hopey, *Law Clinic at Pitt Feeling Pressure*, Pittsburgh Post-Gazette, Oct. 17, 2001, at B-1; Johnna A. Pro, *Road Group Targets Law Clinic at Pitt*, Pittsburgh Post-Gazette, Aug. 24, 2001, at B-4; Memorandum from Joe Kirk, Chairman, Mon Fayette Expressway and Southern Beltway Alliance, to Jim Roddey, Chief Executive, Mon Fayette Expressway and Southern Beltway Alliance (July 12, 2001) (on file with authors) (“I have some problems with the University of Pittsburgh School of Law, part of an institution that would directly benefit from the Expressway, using university and foundation resources to assist groups opposed to the Expressway project. I view the relationship of University of Pittsburgh's Environmental Law Center with CANTR [Citizens Against New Toll Roads] as a credible threat to

organization called for the university to dismiss the clinic director and to sever the clinic's relationship with the community organization.⁷² The Supreme Court justice, an alumnus of the law school and the chair of the school's Board of Visitors, argued that the law school clinic's efforts to force the state department of transportation to comply with the planning requirements of the National Environmental Policy Act constituted "the teaching of rudimentary social activism rather than law" and "constitutes a real and present danger to the well-being of the law school."⁷³

Responding to this renewed pressure, the university chancellor, a former dean of the law school, announced that the university was going to interpret the legislative prohibition on spending state funds on personnel or operations of the Environmental Law Clinic to require the clinic to pay the university \$62,559 per year for indirect administrative and overhead costs.⁷⁴ Because the clinic's annual budget was approximately \$102,000, the clinic director alleged that the requirement would bankrupt the clinic within eighteen months.⁷⁵ The university also prevented the law clinic from approaching certain funders until, as the law school's dean put it, "we could assure the provost that the clinic will not take on any clients that will cause controversy in Harrisburg and draft some guidelines that would ensure this."⁷⁶

continued progress on the Expressway project.")

72. Frank Irey Jr., *Pitt Should Drop Client that Opposes Expressway*, Pittsburgh Post-Gazette, Sept. 19, 2001, at E-2 (letter to editor from a local contractor and President, Mon Valley Progress Council). The president of the development organization argued that the attack on the environmental law clinic "is not an issue of academic freedom, as the clinic director claims, but it is an issue of Pitt failing to use its resources to the best possible benefit of its own organization and the community it serves." *Id.*

73. Letter from Ralph J. Cappy, Justice, Supreme Court of Pennsylvania, to William V. Luneburg, Professor, University of Pittsburgh School of Law (Oct. 2, 2001) (on file with authors).

74. Hopey, *supra* note 71; see University of Pittsburgh, *Profile: Mark A. Nordenberg, Chancellor of the University of Pittsburgh*, at <http://www.umc.pitt.edu/chancellor/profile.html> (last visited Jan. 23, 2003) (explaining that the chancellor was on the University of Pittsburgh School of Law faculty from 1977 to 1995 and dean of the law school from 1985 to 1993).

75. Hopey, *supra* note 71. In response to the university's claim that it was simply following the law and not interfering in the operations of the clinic, a former dean of the law school noted that if the law school were willing to budget the environmental law clinic as it does the school's other programs "then there should be a way of fulfilling the state's mandate without putting undue or inappropriate pressure on the environmental law program." *Id.* (quoting Professor Peter M. Shane, dean of the law school from 1994 to 1998). Professor William Luneburg, director of the school's environmental law program, argued that the university's levy was not proportional to the twenty percent state tax support to the university but instead assessed the clinic for 100 percent of the clinic's administrative and overhead costs. *Id.*

76. Bruce Steele, *Controversy Threatens Funding of Pitt Environmental Law Clinic*, University Times (Pittsburgh, Pa.), Oct. 25, 2001, at 1 (quoting an e-mail from Law School Dean David Herring to Professor William Luneburg). The director of

After six months of pressing the Environmental Law Clinic to separate from the law school, and after the university faculty senate's Tenure and Academic Freedom Committee found that the administration's actions clearly infringed upon principles of academic freedom,⁷⁷ the University of Pittsburgh administration unexpectedly announced that the clinic would remain in the law school and be fully funded by the school through private funds.⁷⁸ The law school dean explained the turnabout: "At some point you have to stand by your principles. You have to stand up for academic freedom and the principles of our profession and teach your students by model behavior."⁷⁹ He asked, "What are we teaching law students when we decided not to represent people who otherwise would not have a voice because of this legislative pressure?"⁸⁰

St. Mary's University School of Law is in the midst of a controversy regarding its International Human Rights Clinic. In 2000, after more than two years of fieldwork and research, the law clinic filed a complaint under a labor side agreement to the North American Free Trade Agreement (NAFTA) alleging that the Mexican government failed to enforce occupational health and safety laws, thereby violating numerous international human rights and labor treaties.⁸¹ Prior to filing the complaint on behalf of a coalition of more than fifty religious, human rights and labor groups, the clinic director wrote a detailed memorandum to the law school's dean and received his approval to proceed with the case.⁸²

the Environmental Law Clinic also explained that on multiple occasions he was called into the dean's office so that the dean could express concerns about particular case matters. E-mail from Thomas Buchele, Director, Environmental Law Clinic, University of Pittsburgh School of Law, to All Teaching Faculty (Dec. 5, 2001) (on file with authors). On one occasion, the dean told the clinic director it would be "incredibly stupid" to take a case; on another, that dean stated that taking a case would "have grave consequences for the Clinic's future." *Id.*

77. University of Pittsburgh Senate, Report of the Tenure and Academic Freedom Committee on the Environmental Law Clinic (Jan. 28, 2002) (on file with authors); Don Hopey & Bill Schackner, *Faculty Rips Pitt, Defends Law Clinic*, Pittsburgh Post-Gazette, Jan. 29, 2002, at B-1.

78. Don Hopey & Bill Schackner, *In Reversal, Pitt Decides to Keep Law Clinic Going*, Pittsburgh Post-Gazette, Mar. 15, 2002, at A-1.

79. Amon, *supra* note 66 (quoting Dean David Herring). The dean noted that the decision to maintain the clinic within the law school was not risk free and hoped that legislators would understand the academic freedom and legal profession principles of the university. Hopey & Schackner, *supra* note 78. He stated: "In terms of those principles, this becomes a reasonable risk." *Id.* (quoting Dean Herring).

80. Terry Carter, *Law Clinics Face Critics*, A.B.A. J., July 2002, at 24, 26.

81. Gary MacEoin, *Dissent Simmers at St. Mary's Law School*, Nat'l Catholic Rep., Feb. 16, 2001, at 6; Memorandum from Monica Schurtman, Former Director, Clinical Professor and Supervising Attorney, International Human Rights Clinic, St. Mary's University School of Law, to Clinical Committee, St. Mary's University School of Law at 4 (Aug. 8, 2000) (on file with authors).

82. Memorandum from Monica Schurtman, *supra* note 81, at 4-5; Megan Kamerick, *Law School Finds Itself in the Thick of International Dispute*, San Antonio Business J., Aug. 11, 2000, at 16.

One week after the complaint was filed, the dean and associate dean, without prior discussion with the law clinic director, called the clinic's client and informed her that the law school was withdrawing from the case.⁸³ Shortly thereafter, the associate dean came to the clinic's file room and, without permission from the client or clinic director, began to review files on the case.⁸⁴ The dean later sought to justify these actions by arguing that the filing had not been properly approved by the dean and that there were insufficient funds to handle the case.⁸⁵ Critics refute these allegations and contend that the dean's intervention reflects a desire to avoid controversy and to dismantle the school's social justice programs.⁸⁶

As a result of these multifaceted public attacks on law school clinics, clinics at other schools have refused to represent certain controversial cases or clients because of fears that taking such cases could result in threats to their continued operation.⁸⁷ Many other clinics have had to respond to phone calls and letters, or to defend their case and client selection decisions before meetings with law school and university officials, because of complaints from legislators, alumni, opposing counsel, and university donors.⁸⁸ Although the frequency and severity of such informal and indirect pressure is not

83. Memorandum from Monica Schurtman, *supra* note 81, at 6.

84. *Id.*

85. *Id.*; Kamerick, *supra* note 82.

86. Tony Canto, *Out of Order*, San Antonio Current, Nov. 1-7, 2001, at 6; MacEoin, *supra* note 81; Memorandum from Monica Schurtman, *supra* note 81, at 7.

87. See, e.g., David E. Rovella, *Law Students Urged to Take Death Cases*, Nat'l L.J., Dec. 7, 1998, at A9 (referencing the attack on the Tulane Environmental Law Clinic, the dean of Northwestern University School of Law expressed concern about a backlash if law school clinics agree to handle appeals of death row inmates); see also Frank Askin, *A Law School Where Student's Don't Just Learn the Law; They Help Make the Law*, 51 Rutgers L. Rev. 855, 857 (1999) ("[T]he recent experience of the Tulane environmental law clinic counsels some measure of caution to public law school faculties using institutional resources for advocacy purposes.").

88. See, e.g., *Doe v. Roe*, 958 F.2d 763, 766-67 (7th Cir. 1992) (documenting pressure from opposing party and prominent alumnus on Northwestern University officials to order the law school's clinic to withdraw from a lawsuit); E-mail from Lawrence M. Grosberg, New York Law School, to Robert R. Kuehn (Nov. 14, 2001) (on file with authors) (explaining complaint to dean of Columbia Law School because of activities of law clinic); E-mail from Paul D. Reingold, University of Michigan Law School, to Robert R. Kuehn (Mar 20, 2001) (on file with authors) (documenting complaints to the dean about law clinic activities); E-mail from Rep. Jim Kasper, North Dakota House of Representatives, to Laura L. Rovner, Professor, University of North Dakota School of Law (Jan. 26, 2003) (on file with authors) (expressing concern over the use of taxpayer money to fund clinic litigation challenging the constitutionality of the City of Fargo's placement of a Ten Commandments monument on city property and requesting citations for the state laws that allow such expenditures); Posting of John Bonine (Mar. 31, 1998), *supra* note 51 (documenting attacks on law clinics); see also Joy & Weisselberg, *supra* note 51, at 531 & n.1 (observing that law clinic faculty, law school deans, and university presidents receive inquiries from people outside the law school asking why the law school is involved in a particular case).

documented, such efforts also have the potential to influence a law clinic supervisor's professional decisions.

This history of outside interference in law school clinic decisions reveals a number of patterns. While early attacks were often defended on the unfounded belief that clinics were interfering with the ability of members of the bar to compete for paying clients,⁸⁹ or motivated by a desire to prevent lawsuits against the state, more recent attacks, such as those on environmental law clinics, appear to be motivated by a desire to protect the financial interests of clients, alumni, and university donors. As one observer argued, the true concern of law clinic critics is that clinics are "bringing suits that wouldn't be brought at all if the clinic didn't do it."⁹⁰

State-funded law schools have been the predominant target for such interference. This is due to their vulnerability to the political views of elected officials, the perceived impropriety of a state-funded school suing to require another state entity to spend taxpayer moneys, concerns that law clinic lawsuits against important industries might undermine the economic base of the state, disagreement with the use of taxpayer money to fund legal services for the poor, or a desire to avoid "taking sides" on controversial social or political issues.⁹¹ Nonetheless, the attacks on Tulane Law School demonstrate that private law schools are not immune from such attacks.

Attorneys often play a prominent, and sometimes dominant, role in interfering in law school clinics. Lawyers prodded the University of Mississippi to take action against its law clinic professors and were active in the attacks on the Connecticut, Tennessee, Oregon, Tulane, and Pittsburgh clinics.⁹² Interference in clinic activities by university administrators has often, as in the case of Mississippi, Pittsburgh and St. Mary's, come from officials who are themselves attorneys. Among the justifications given by these attorneys for such interference are the alleged inappropriateness of a clinic opposing the interests of law

89. *The University of Mississippi*, *supra* note 14, at 76 (noting concerns about possible competition between the University of Mississippi's law clinic services and local attorneys); E-mail from Kris Shepard, Department of History, Emory University, to Robert R. Kuehn (Jan. 12, 1999) (on file with authors) (observing that local lawyers felt the University of Mississippi law clinic would be unfair competition); see also Thomas Scheffey, *The Calm Within the Storm*, Conn. L. Trib., June 12, 1995, at 1 (reporting the observation of the executive director of Connecticut Legal Services "that most of the battles that we fought in the early days—survival battles—were against lawyers, who thought we were getting in their way.").

90. A. F. Conard, "Letter From the Law Clinic", 26 J. Legal Educ. 194, 204 (1974); Alfred F. Conard, *Letter From the Law Clinic*, 18 U. Mich. L. Quadrangle Notes, Fall 1973, at 16, 22.

91. For a response to some of these arguments in the context of attacks on legal services programs, see Luban, *supra* note 8, at 302-04, 358-91; Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 Vill. L. Rev. 521, 531-43, 551-56 (1981).

92. Kuehn, *supra* note 1, at 120 & n.413; *The University of Mississippi*, *supra* note 14, at 76; *supra* note 18 and accompanying text.

school alumni or their clients and the alleged desire to protect the school from the financial harm and loss of public good will that the clinic's involvement in controversial cases might bring.⁹³

Courts, however, generally have been protective of law school clinics and their supervising attorneys. The courts in *Trister, Atkinson, Hoover, In re Executive Commission on Ethical Standards*, and *City of Bayonne* rejected attempts to limit the ability of university employees to provide legal services to persons or causes that might be controversial or contrary to the position of the state.⁹⁴ The Louisiana Supreme Court, as upheld on appeal, remains the only court that has responded to clinic critics by restricting the cases and clients that law clinics may handle.

With the exception of Louisiana, court amendments to student practice rules over the past two decades have expanded, rather than contracted, eligible cases and clients.⁹⁵ The refusal of federal courts to adopt the Louisiana student practice rule restrictions,⁹⁶ as well as criticism of the Louisiana Supreme Court's action by judges in other states,⁹⁷ suggest that, contrary to the desire of critics of law school

93. See, e.g., Kuehn, *supra* note 1, at 74-75 & n.203 (reporting the justification given by a Tulane law school alumnus for restricting the school's environmental law clinic); *The University of Mississippi*, *supra* note 14, at 83 (containing the chancellor of the University of Mississippi's justifications for prohibiting law school clinical professors from working with the local legal services program).

94. See *supra* notes 16, 24-26, 36-38 and accompanying text. Although not addressing law school clinical programs, two recent Supreme Court cases suggest that legislative restrictions on law school clinic funding, particularly those restrictions that seek to limit suits by state-funded law schools against state agencies, may implicate the First Amendment. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001), the Court noted: "We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." Regarding the implications of government funding restrictions on academic freedom, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court observed:

Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment. *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603, 605-606 (1967).

Id. at 200.

95. Kuehn, *supra* note 1, at 143 & n.500; Joan Wallman Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, Bar Exam'r, Aug. 1994, at 40, 46 ("States that have amended their rules since the middle 1970s . . . allow practical exposure to a greater variety of clients, legal activities and substantive bodies of law, and prepare students to assume professional roles in many different practice settings and environments.").

96. See *supra* notes 62-66 and accompanying text.

97. See, e.g., Kuehn, *supra* note 1, at 134 n.469 (noting a Maryland judge's criticism of the actions of the Louisiana Supreme Court). While most observers outside of Louisiana criticized the actions of the Louisiana Supreme Court, the

clinics, Louisiana's narrow view of the appropriate role of law schools in providing legal services to needy clients and causes is not typically shared by other members of the judiciary.

However, given the frequency and severity of attacks on law clinics over the past two decades, outside efforts to influence a clinic supervisor's case and client selection are likely to continue in one form or another. Moreover, the breadth of clinical programs that have been attacked demonstrates that no law clinic program is immune from such assaults. Any law school clinic is just one controversial case, one unpopular client, one angry legislator, alumnus or opposing attorney, or one unsupportive dean or university official away from attempts to interfere in its case and client selection. The remainder of this part of the article addresses the propriety of such interference under rules of professional conduct.

B. *A Lawyer's Freedom To Choose Clients and Cases . . . and Even Solicit*

Clinic lawyers, like all lawyers, are customarily free to choose clients and cases, but rules of professional conduct and anti-discrimination laws may impose limits on this traditional freedom.

1. The Traditional Freedom To Choose

Custom holds that lawyers are better advocates when they have the freedom to choose clients and cases.⁹⁸ Thus, although English lore describes the barrister as ethically bound to accept any case or client upon the tendering of a proper fee, in the United States lawyers have been free to refuse their services to any client for any reason.⁹⁹ Ethics

Washington Legal Foundation, in conjunction with the George Mason University School of Law's Economic Freedom Clinic, filed an amicus brief in support of the Louisiana Supreme Court's restrictions, at the same time publicly criticizing law clinics as "repositories for activist professors." *Id.* at 147 & n.516; Brief of Amici Curiae, Washington Legal Foundation and Economic Freedom Law Clinic, *S. Christian Leadership Conference v. Supreme Court of La.*, 252 F.3d 781 (5th Cir. 2001) (No. 99-30895) (on file with authors); *A One-Sided Paper Chase*, N.Y. Times, Feb. 28, 2000, at A23.

98. With clinic lawyers, there is the additional argument that providing the clinical professor with unfettered discretion to choose clients and cases of interest will stimulate and motivate the professor to be a better lawyer and teacher and, in turn, provide a better learning experience for the students. O'Sullivan et al., *supra* note 12, at 145-46; Reingold, *supra* note 8, at 556-57.

99. Charles W. Wolfram, *Modern Legal Ethics* 571-72 (1986). One commentator put forth six arguments for why lawyers should have absolute discretion in client selection: discrimination does not violate existing law; lawyers are so sophisticated that they could circumvent any constraining rules; forcing lawyers to represent clients against their will may violate the First Amendment; professional autonomy is so essential to the administration of justice that the need for absolute discretion offsets the public policies underlying anti-discrimination laws; it is not in the client's best interests to force a lawyer to represent a potential client when the lawyer has strong

rules reflect this freedom, observing that “[a] lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client.”¹⁰⁰ Professor Charles Wolfram stated the traditional rule:

[A] lawyer may refuse to represent a client for any reason at all— because the client cannot pay the lawyer’s demanded fee; because the client is not of the lawyer’s race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.¹⁰¹

Although this dogma supports the right of the law school clinic professor to choose cases and clients, two exceptions may constrain the clinic lawyer’s discretion: court appointments and anti-discrimination rules and laws. Courts often find it necessary to appoint law clinics to represent clients with unpopular causes or without the ability to pay for an attorney. The ABA Model Rules of Professional Conduct (“Model Rules”) provide that a lawyer shall not seek to avoid a court appointment except for good cause.¹⁰² Examples of good cause arise when an appointment is likely to result in a violation of the rules of professional conduct or other law, when the appointment is likely to result in an unreasonable financial burden on the lawyer, or when the lawyer finds the client or cause so repugnant as likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.¹⁰³ The ABA Model Code of Professional

feelings against doing so; and under the doctrine of separation of powers, legislatures may not regulate the practice of law. Robert T. Begg, *The Lawyer’s License to Discriminate Revoked: How a Dentist Put Teeth in New York’s Anti-Discrimination Disciplinary Rule*, 64 Alb. L. Rev. 153, 156 (2000).

100. Model Code of Prof’l Responsibility EC 2-26 (1980) [hereinafter Model Code]; accord Model Rules of Prof’l Conduct R. 6.2 cmt. 1 (2002) [hereinafter Model Rules]; see also Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* 1-53 n.2 (3d ed. 2001) (“It is clear under the Model Rules that a lawyer is under no legal or ethical duty to represent any particular client or cause, except in the case of a valid court appointment, in which case Model Rule 6.2 is applicable.”); Restatement (Third) of Law Governing Lawyers § 14 cmt. b (2000) [hereinafter Restatement] (“Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant.”).

101. Wolfram, *supra* note 99, at 573.

102. Model Rules, *supra* note 100, at R. 6.2. More than forty states and the District of Columbia have adopted some version of the Model Rules. See Stephen Gillers & Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* xxvi (2002 ed.); Richard A. Zitrin & Carol M. Langford, *Legal Ethics in the Practice of Law* 6 (2d ed. 2002); ABA/BNA Lawyers’ Manual on Prof’l Conduct 01:3 (2002). In February 2002, the ABA adopted certain amendments to the Model Rules that had been proposed by the ABA’s Ethics 2000 Commission. *Ethics 2000—February 2002 Report*, available at http://www.abanet.org/cpr/e2k-202report_summ.html (last visited Jan. 23, 2003). Most of these amendments have yet to be adopted by the states.

103. Model Rules, *supra* note 100, at R. 6.2. Model Rule 1.16 similarly provides that a lawyer shall not represent a client if the representation will result in a violation

Responsibility ("Model Code") likewise instructs lawyers not to seek to be excused from undertaking appointed representation except for compelling reasons, which do not include the repugnance of the subject matter of the proceeding or the identity or position of the person involved unless the intensity of the lawyer's personal feelings, as distinguished from community attitude, may impair effective representation of the client.¹⁰⁴

An ethics opinion by the Tennessee Board of Professional Responsibility illustrates the limited ability of an attorney to avoid a court appointment. An attorney who routinely practiced in juvenile court was appointed to represent minors who petitioned the court for waiver of the parental consent requirement to obtain abortions.¹⁰⁵ The attorney inquired whether he could decline to accept the appointment for moral or religious reasons, arguing that he was a devout Catholic and advocating a right to abortion would be contrary to his ethical and moral beliefs. While directing the attorney to address his request to withdraw to the court, the ethics committee noted that where there is a conflict between the moral and ethical beliefs of counsel and those of the client, the attorney's moral beliefs must yield to the beliefs and rights of the client.¹⁰⁶ Thus, mere disagreement with the client's cause or moral beliefs is insufficient for a lawyer or law school clinic to avoid a court appointment.¹⁰⁷ An attorney's beliefs or repugnance towards the client or the cause must be so compelling that they will impair the attorney's independent professional judgment and ability to represent the client.¹⁰⁸

of the rules of professional conduct or other law and may withdraw from representing a client if the representation will result in an unreasonable financial burden on the lawyer or if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. *Id.* at R. 1.16(a)(1), (b)(4), (b)(6); *accord* Restatement, *supra* note 100, § 32(2)-(3); *see also* Model Rules, *supra* note 100, at R. 1.7(a) (stating that a lawyer shall not represent a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer); *accord* Restatement, *supra* note 100, § 125.

104. Model Code, *supra* note 100, at EC 2-29, 2-30. The ABA identifies California, Iowa, Nebraska, New York, Ohio, and Oregon as not having adopted the Model Rules. ABA Center for Professional Responsibility, *Dates of Adoption of the Model Rules of Professional Conduct*, <http://www.abanet.org/cpr/mrpc/alpha-states.html> (last visited Jan. 22, 2003) (on file with authors). Those states primarily rely on the Model Code, although California never adopted the Model Code or Model Rules but has its own code of professional responsibility. Zitrin & Langford, *supra* note 102, at 6-7.

105. Tenn. Bd. of Prof'l Responsibility, Formal Ethics Op. 96-F-140 (1996).

106. *Id.*

107. *See* Model Rules, *supra* note 100, at R. 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."); Model Code, *supra* note 100, at EC 2-29 ("Compelling reasons for [seeking to be excused from a court appointment] do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case . . .").

108. *See* Model Rules, *supra* note 100, at R. 6.2(c) ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such

Though most law school clinics welcome court appointments, and indeed some clinics obtain clients exclusively by court appointments, there is continuing uncertainty over the power of courts to assign counsel without compensation. Many federal district court rules require members of the district court bar to accept limited court appointments without compensation as part of the bar's duty to provide representation to indigents.¹⁰⁹ In *Mallard v. United States District Court for the Southern District of Iowa*, the Supreme Court held that where a federal statute provides that a court may request an attorney to represent an indigent client, the statute did not authorize a court to compel an unwilling attorney to represent an indigent litigant in a civil case.¹¹⁰ The Court made clear that it was not expressing an opinion on whether federal courts possess inherent authority to require lawyers to assist those who are too poor to afford counsel.¹¹¹ In looking at how state courts have ruled on the inherent authority of a court to order uncompensated representation, one commentator reported:

Until recently, the vast majority of jurisdictions upheld court appointment of counsel, whether full compensation was provided or not, considering such service part of an attorney's traditional duty as an "officer of the court." . . .

Recently, however, many jurisdictions have struck down or significantly limited the court appointment of attorneys, unless adequate compensation is provided.¹¹²

as . . . the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."); Model Code, *supra* note 100, at EC 2-30 ("Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client.").

109. ABA/BNA Lawyers' Manual on Prof'l Conduct, *supra* note 102, at 91:6006-07; Deborah L. Rhode & David Luban, *Legal Ethics* 792 (2d ed. 1995).

110. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 310 (1989).

111. *Id.* A number of state supreme courts have limited *Mallard* to the federal statute involved and found that courts possess the inherent authority to assign counsel to serve without compensation. The Florida Supreme Court held "that every lawyer of this state who is a member of The Florida Bar has an obligation to represent the poor when called upon by the courts and that each lawyer has agreed to that commitment when admitted to practice law in this state." *In re Amendments to Rules Regulating the Florida Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid)*, 573 So. 2d 800, 806 (1990). The New York Court of Appeals held that "courts have a broad discretionary power to assign counsel without compensation in a proper case." *In re Smiley*, 330 N.E.2d 53, 58 (N.Y. 1975). The court observed:

Inherent in the courts and historically associated with the duty of the Bar to provide uncompensated services for the indigent has been the discretionary power of the courts to assign counsel in a proper case to represent private indigent litigants. Such counsel serve without compensation. Statutes codify the inherent power of the courts.

Id. at 55; *accord* *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965).

112. Jerry L. Anderson, *Court-Appointed Counsel: The Constitutionality of*

Because law school clinics generally do not charge or expect compensation, objections to a court appointment on the ground that appointment without compensation is improper would not be well founded. Nonetheless, a clinic lawyer, like all lawyers, has a duty to decline a court appointment where the representation may result in a violation of ethical responsibilities (such as where the case has no substantial purpose other than to embarrass, delay, or burden a third person or would create a conflict of interest),¹¹³ where the claims are frivolous,¹¹⁴ where the clinic attorneys or their students lack, and will be unable to attain, competence,¹¹⁵ or where the clinic's limited budget would prevent it from adequately funding the extensive litigation needed to represent a client competently.¹¹⁶

There are two emerging exceptions to the lawyer's traditional freedom to choose clients and cases—the application of anti-discrimination statutes to attorneys and state rules of professional responsibility that prohibit attorneys from discriminating in the practice of law. Many lawyers have established law firms to protect the rights of racial minorities, religious groups, women, or gays and lesbians. In the process, these lawyers choose to represent certain classes of people or certain points of view and refuse to represent others. When attorney Judith Nathanson advised a potential male client, Joseph Stropnick, that she would only represent women in divorce proceedings, Stropnick filed a complaint with the Massachusetts Commission Against Discrimination (“Commission”).¹¹⁷ Nathanson could have simply stated that she was

Uncompensated Conscriptio, 3 Geo. J. Legal Ethics 503, 503-04 (1990); see also Begg, *supra* note 99, at 155 n.15 (citing law review articles and cases addressing the constitutionality of uncompensated court appointments); Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 Geo. J. Legal Ethics 915, 925 n.66 (1998) (citing cases holding uncompensated representation unconstitutional under the Fifth, Thirteenth, or Fourteenth Amendments or state constitutions). “The United States Supreme Court has never spoken directly to the issue of constitutional bars to compulsory court appointment. However, in dicta and in one summary dismissal, it has implied that uncompensated court appointment is permissible for criminal cases.” Rhode & Luban, *supra* note 109, at 805 (citing *Ex Parte Sparkes*, 444 U.S. 803 (1979), *Hurtado v. United States*, 410 U.S. 578, 588-89 (1973), and *Powell v. Alabama*, 287 U.S. 45, 73 (1932)).

113. See Model Rules, *supra* note 100, at R. 4.4(a), 1.7-1.10; Model Code, *supra* note 100, at DR 7-102(A)(1), 5-101, 5-105; Restatement, *supra* note 100, §§ 106, 121-35.

114. See Model Rules, *supra* note 100, at R. 3.1; Model Code, *supra* note 100, at DR 7-102(A)(2); Restatement, *supra* note 100, § 110.

115. See Model Rules, *supra* note 100, at R. 1.1; Model Code, *supra* note 100, at DR 6-101(A)(1); Restatement, *supra* note 100, § 16(2).

116. See Model Rules, *supra* note 100, at R. 1.1 cmt. 5 (“Competent handling of a particular matter includes . . . use of methods and procedures meeting the standards of competent practitioners.”).

117. *Stropnick v. Nathanson*, 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997), *aff'd*, No. 91-BPA-0061 slip op. (MCAD July 26, 1999) (as reported in Jennifer Tetenbaum Miller, Note, *Free Exercise v. Legal Ethics: Can a Religious Lawyer*

too overworked to take the case or did not care for Stropnick's tone of speech or haircut, or perhaps could have argued that the representation would create a conflict of interest with the legal positions taken on behalf of other present or past clients.¹¹⁸ However, by rejecting him because he was a man, she exposed herself to a charge of sex discrimination. The Commission rejected Nathanson's argument that a law office that selectively accepts clients is not a public place as defined by the Massachusetts discrimination statute and it fined her \$5,000 for refusing to represent men in divorce proceedings.¹¹⁹ A 1996 New York case involving the refusal of a dentist to treat patients whom he believed to be HIV-positive similarly held that health care offices that provide services to the public are subject to the state's anti-discrimination laws.¹²⁰ Thus, law school clinics, or at least those holding themselves out as open to the public, may be viewed as places of public accommodation and subject to various federal and state anti-discrimination laws.¹²¹

Some state rules of professional responsibility further restrict discrimination in case and client selection. An increasing number of states provide that a lawyer or law firm shall not unlawfully discriminate in the practice of law on the basis of age, race, national origin, sex, disability, religion, or sexual orientation.¹²² Some state ethics rules require a showing that the lawyer has violated a law

Discriminate in Choosing Clients?, 13 *Geo. J. Legal Ethics* 161, 164-65 & n.26 (1999).

118. See Model Rules, *supra* note 100, at R. 1.7 cmt. 24 (addressing positional or issue conflicts of interest); Restatement, *supra* note 100, §§ 128 cmt. f, 132 cmt. d (same). See generally ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 377 (1993); John S. Dzienkowski, *Positional Conflicts of Interest*, 71 *Texas L. Rev.* 457 (1993); Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. Rev.* 1, 61-62 (1988); Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 *Fordham L. Rev.* 2279 (1999).

119. Professor David Wilkins argues that Nathanson's rejection of all male clients is not justified:

[R]espect for a lawyer's personal integrity requires that he not be forced to advocate causes that he finds morally reprehensible. It is quite another matter, however, to assert that an attorney may decline to represent individuals on the basis of their status. Such conduct violates the overarching moral injunction against treating people differently on the basis of morally irrelevant characteristics such as gender or skin color.

David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 *Md. L. Rev.* 1502, 1577 (1998) (footnotes omitted).

120. *Cahill v. Rosa*, 674 N.E.2d 274 (N.Y. 1996).

121. See Begg, *supra* note 99, at 170-74 (noting the similarities between the practice of law and the business elements of dentistry and arguing that most law practices will be viewed as places of public accommodation).

122. See, e.g., Cal. Rules of Prof'l Conduct R. 2-400(B) (2002); N.Y. Code of Prof'l Responsibility DR 1-102(a)(6) (2001); Ohio Code of Prof'l Responsibility DR 1-102(B) (2002); Wash. Rules of Prof'l Conduct R. 8.4(g) (2002). Some state anti-discrimination rules only apply to employment decisions and not to the entire practice of law. See, e.g., D.C. Rules of Prof'l Conduct R. 9.1 (2002); Vt. Rules of Prof'l Conduct R. 8.4(g) (2001).

prohibiting discrimination before the disciplinary rule is applicable.¹²³ Some rules even require a prior adjudication of the discrimination complaint by a tribunal other than the disciplinary committee.¹²⁴ However, other rules of professional responsibility impose an independent obligation not to discriminate.¹²⁵ A comment to Model Rule 8.4 states that a lawyer's manifestation by words or conduct of bias or prejudice based on race, sex, religion, national origin, disability, sexual orientation, or socioeconomic status is professional misconduct when such behavior is prejudicial to the administration of justice, although this prohibition is not applicable to client selection because it only applies where the discrimination was manifest "in the course of representing a client."¹²⁶

These anti-discrimination statutes and ethics rules may be of particular relevance where a law school clinic, either because of the clinical teacher's choice or because of restrictions imposed by a funder or other third party, chooses to represent only certain classes of clients. Thus, a domestic violence clinic that represents only battered women and refuses to represent any male clients must consider whether that limitation is proscribed by anti-discrimination measures or whether there is a permissible basis for the denial of representation.¹²⁷

123. See, e.g., Cal. Rules of Prof'l Conduct R. 2-400(B) (2002); N.Y. Code of Prof'l Responsibility DR 1-102(a)(6) (2001); Ohio Code of Prof'l Responsibility DR 1-102(B) (2002); Wash. Rules of Prof'l Conduct R. 8.4(g) (2002).

124. See, e.g., Cal. Rules of Prof'l Conduct R. 2-400(C) (2002); N.Y. Code of Prof'l Responsibility DR 1-102(a)(6) (2001).

125. See, e.g., Idaho Rules of Prof'l Conduct R. 4.4(a) (2002); N.J. Rules of Prof'l Conduct R. 8.4(g) (2002); R.I. Rules of Prof'l Conduct R. 8.4(d) (2002).

126. Model Rules, *supra* note 100, at R. 8.4 cmt. 3; *accord* Colo. Rules of Prof'l Conduct R. 1.2(f) (2002); Idaho Rules of Prof'l Conduct R. 4.4(a) (2002). Texas prohibits bias or prejudice in connection with an adjudicatory proceeding but specifically exempts "a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding." Tex. Rules of Prof'l Conduct R. 5.08 (2002). Although comments to the Model Rules have not been explicitly adopted in all of the states that follow the Model Rules, even courts in Model Rule states that have not adopted the comments rely on them in interpreting and applying the state's rules of professional conduct. See, e.g., *Farrington v. Law Firm of Sessions, Fishman*, 687 So. 2d 997, 999 (La. 1997); *Cronin v. Eighth Judicial Dist. Court*, 781 P.2d 1150, 1153 (Nev. 1989).

127. For example, representation of the client may create a conflict of interest because of the clinic's ongoing duties to current or former clients, including the duty to avoid creating a decision favoring one client that will create a precedent likely to seriously weaken the position taken on behalf of another client. See Model Rules, *supra* note 100, at R. 1.7 & cmt. 24, R. 1.9. One commentator has advanced the notion of "conditional representation," where attorneys would be prohibited from discriminating in client selection yet permitted to use professional judgment in selecting the issues they are willing to address. Samuel Stonefield, *Lawyer Discrimination Against Clients: Outright Rejection—No; Limitations on Issues and Arguments—Yes*, 20 W. New Eng. L. Rev. 103, 126-28 (1998).

2. The Limited Right To Solicit Cases and Clients

In most instances, law school clinic attorneys not only have the freedom to choose cases and clients but also to solicit potential clients. Although a lawyer generally may not solicit professional employment from a prospective client by in-person, live telephone, or real-time electronic contact, the Model Rules permit such solicitation when the lawyer's pecuniary gain is not a significant motive for the contact or when the lawyer has a family, close personal, or prior professional relationship with the potential client or the potential client is a lawyer.¹²⁸ The Model Code similarly permits a lawyer to solicit employment from a close friend, relative, or former client, but states that a lawyer cannot initiate in-person contact with a non-client "for the purpose of being retained to represent [the person] for compensation."¹²⁹ Because very few law school clinics obtain compensation from the client for the representation,¹³⁰ rules of professional responsibility authorize a clinic lawyer to solicit prospective clients.¹³¹

In addition to rules of professional responsibility, the First Amendment protects the right of a law school clinic to solicit certain

128. Model Rules, *supra* note 100, at R. 7.3(a). Rules against solicitation also do not "prohibit[] communications authorized by law, such as notice to members of a class in class action litigation." *Id.* at R. 7.2 cmt. 4.

129. Model Code, *supra* note 100, at EC 2-3; *see also id.* at DR 2-104(A). "A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter." *Id.* at EC 2-4.

130. *But see* Gary Laser, *Significant Curricular Developments: The MacCrate Report and Beyond*, 1 *Clinical L. Rev.* 425, 437-42 (1994) (describing Chicago-Kent College of Law's fee-generating law clinic); Richard A. Matasar, *The MacCrate Report*, 1 *Clinical L. Rev.* 457, 488-91 (1994) (same); Patricia Pierce & Kathleen Ridolfi, *The Santa Clara Experiment: A New Fee-Generating Model for Clinical Legal Education*, 3 *Clinical L. Rev.* 439, 466-67 n.75 (1997) (describing Santa Clara University School of Law's contingency fee employment law clinic); *cf.* Martin Guggenheim, *Fee-Generating Clinics: Can We Bear the Costs?*, 1 *Clinical L. Rev.* 677 (1994) (criticizing fee-generating clinics); Lisa G. Lerman, *Fee-For-Service Clinical Teaching: Slipping Toward Commercialism*, 1 *Clinical L. Rev.* 685 (1995) (same).

Where the salaries of in-house clinical professors are linked to the fees they generate, or where fees collected in excess of the clinical professor's salary will result in a bonus or pay raise to the professor, a significant motive for any solicitation by an attorney at such a fee-generating law clinic could be the attorney's pecuniary gain. *See Verbaere v. Life Investors Ins. Co.*, 589 N.E.2d 753, 755 (Ill. App. 1992) (explaining that law clinic faculty at Chicago-Kent College of Law receive a bonus and pay raise for fees exceeding 20% of their salary; if a clinical professor generates fees below her salary, she receives a pay cut the next year).

131. Of course, like all lawyers, clinic lawyers may also announce their services and seek prospective clients through advertisements, mailings, and other forms of non in-person or live-contact solicitation. *See* Model Rules, *supra* note 100, at R. 7.2; Model Code, *supra* note 100, at DR 2-101(B), EC 2-2, 2-9. Like other lawyers, clinic lawyers must ensure that communications concerning the law clinic's services are not false or misleading. *See* Model Rules, *supra* note 100, at R. 7.1; Model Code, *supra* note 100, at DR 2-101(A), EC 2-9, 2-10.

kinds of cases. In *NAACP v. Button*,¹³² a Virginia law prohibited the NAACP from soliciting a prospective client to participate in a civil rights lawsuit. The Supreme Court held that the law infringed on the First Amendment right of the NAACP and its lawyers to associate for the purpose of assisting persons seeking redress for infringements of their constitutionally guaranteed rights.¹³³ In the context of the objectives of the clients, “litigation is not a technique of resolving private differences It is thus a form of political expression.”¹³⁴ Later in *In re Primus*,¹³⁵ the Court reaffirmed that a state may not punish an attorney who, seeking to further political and ideological goals through litigation, advises a person of her legal rights and offers free legal assistance.¹³⁶ Subsequent cases by other courts hold that, provided the attorney is advancing associational interests, solicitation activities are protected even where the attorney’s primary motive is predominantly pecuniary, not ideological.¹³⁷ Thus, while a state may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in harm to the prospective client,¹³⁸ “collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.”¹³⁹ Accordingly, where a law clinic offers free legal

132. 371 U.S. 415 (1963).

133. *Id.* at 428.

134. *Id.* at 429.

We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics.

Id. at 428-29.

135. 436 U.S. 412 (1978).

136. *Id.* at 414, 439.

137. *See, e.g.,* *Great W. Cities, Inc. v. Binstein*, 476 F. Supp. 827, 834-35 (N.D. Ill.), *aff'd*, 614 F.2d 775 (7th Cir. 1979); *In re Teichner*, 387 N.E.2d 265, 271 (Ill. 1979); *In re Appert*, 315 N.W.2d 204, 213 (Minn. 1981).

138. *In re Primus*, 436 U.S. at 434 (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978)).

139. *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971). “Indeed, the justification for First Amendment protection is heightened where resort to the judicial branch—as for poor people and certain immigrants—‘may well be the sole practicable avenue open to a minority to petition for redress of grievances.’” *Committees on Civil Rights and Professional Responsibility, Ass’n of the Bar of the City of N.Y., A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 *Rec. of the Ass’n of the Bar of the City of New York* 13, 41 (1998) (quoting *NAACP v. Button*, 371 U.S. at 430).

Relying on the same line of Supreme Court cases, a federal court found that Tennessee’s “barratry” statute, which made it a crime to stir up litigation, unconstitutionally intruded on the First Amendment rights of attorneys advancing public interests. *Am. Civil Liberties Union v. Tennessee*, 496 F. Supp. 218 (M.D. Tenn. 1980); *see also* *Center for Prof’l Responsibility, Am. Bar Ass’n, Annotated Model Rules of Prof’l Conduct* 528 (4th ed. 1999) [hereinafter *Annotated Model Rules*] (“Barratry statutes are sometimes antiquated and frequently overly broad, particularly in the context of the Supreme Court decisions of the past twenty years.”).

assistance to aid a client seeking to further political or ideological goals or to advance associational values, the First Amendment protects the clinic's solicitation activities.¹⁴⁰

In-person contacts do not become proscribed solicitation for pecuniary gain simply because the clinic requests an award of attorney's fees in the case. Because such fees are generally awarded in the discretion of the court, are not drawn from the plaintiff's recovery, are usually premised on a successful outcome, and often do not correspond to the fees generally obtainable in private litigation, fee awards in cases seeking to advance the ideological and political goals of the clients are not comparable with the work of lawyers whose primary purpose for taking a case is financial.¹⁴¹ In addition, attorney's fees recovered by law clinics generally do not go to the clinic lawyer but instead are used to support the clinic attorney's salary or are deposited into a fund that supports the clinic's activities.¹⁴²

140. A 1979 Iowa ethics opinion held that a questionnaire mailed by the Prisoner Assistance Clinic at the University of Iowa College of Law soliciting inmates at a state penitentiary to join as plaintiffs in litigation over prison conditions was improper. Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct, Op. 79-11 (1979). The ethics opinion, however, pre-dated the Supreme Court's decision in *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), upholding the right of an attorney to solicit clients by direct mail. The Iowa opinion also noted that no First Amendment issue had been addressed by the ethics board since the law clinic had not argued that its actions were protected under *In re Primus*. Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct, *supra*.

141. *In re Primus*, 436 U.S. at 430-31. See generally Rev. Proc. 92-59, 1992-29 I.R.B. 11 (holding that a tax exempt public interest law firm may accept fees paid by opposing parties but may only accept fees paid directly by its clients if the fees do not exceed the actual cost incurred by the organization in the case; the likelihood or probability of a fee may not be a consideration in the selection of a case).

142. See *In re Primus*, 436 U.S. at 430 (noting that any award of attorney's fees would go to the central fund of the ACLU); *Loney v. Scurr*, 494 F. Supp. 928, 930 (S.D. Iowa 1980) (noting that the award of attorney's fees in a case brought by the University of Iowa College of Law's law clinic would not go to the law clinic supervising attorney but to a clinic expense fund); see also La. Sup. Ct. R. XX, § 6(f) (2002) (stating that funds from law clinic attorney's fee awards shall be deposited into a clinic special litigation expense account). As the Court observed in *NAACP v. Button*:

There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants

371 U.S. at 442-43.

Some authorities hold that an attorney may not ethically share, or be forced to turn over, court-awarded attorney's fees with a nonprofit organization, such as a law school or university, that employs the attorney or sponsors the litigation. See, e.g., *Am. Civil Liberties Union/Eastern Missouri Fund v. Miller*, 803 S.W.2d 592 (Mo. 1991); *Maine Bd. of Overseers of the Bar Prof'l Ethics Comm'n*, Op. 69 (1986). But see Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 38-1 & n.11 (2002) (reporting that after the Missouri Supreme Court's

Although allowed by rules of professional responsibility and protected by the First Amendment, some non-pecuniary solicitation of clients by law school clinics may be prohibited by other authorities. For example, Legal Services Corporation ("LSC") guidelines prohibit LSC-funded entities, or organizations operating without LSC funds that are not separate from the LSC recipient,¹⁴³ from representing a

decision in *American Civil Liberties Union/Eastern Missouri Fund v. Miller*, the ACLU won a court order in *Susman v. Missouri*, No. 91-4429-CV-C-5 (W.D. Mo., June 1, 1992), permanently enjoining the state from enforcing its ethics rules so as to invalidate the ACLU's fee-sharing agreements).

However, the February 2002 amendments to the Model Rules, as well as earlier cases and ethics opinions, permit a lawyer to share court-awarded legal fees with the nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter. Model Rules, *supra* note 100, at R. 5.4(a)(4); *accord* *Kean v. Stone*, 966 F.2d 119, 123 (3rd Cir. 1992) (noting that its holding was in accordance with Ninth and D.C. Circuit opinions); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 374 (1993); Va. Legal Ethics, Op. 1744 (2000); Bar Ass'n of Greater Cleveland Prof'l Ethics Comm., Op. 141 (1979); *see also* Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L.J. 1069, 1121 (1989) (arguing that the First Amendment protects fee-sharing arrangements with nonprofit groups). Many courts have held that the ethical propriety of such fee-sharing arrangements may depend on whether the court-awarded fees are directed back into the litigation programs that made their recovery possible in the first place, such as into a fund for the maintenance of a legal services program, rather than used by the nonprofit organization to fund general, non-litigation programs. *See, e.g.*, *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927, 938 (Fed. Cir. 2000); *Am. Fed'n of Gov't Employees Local 3882 v. Fed. Labor Relations Auth.*, 944 F.2d 922, 937 (D.C. Cir. 1991); *Curran v. Dep't of Treasury*, 805 F.2d 1406, 1409 (9th Cir. 1986); *Jordan v. United States Dep't of Justice*, 691 F.2d 514, 516 & n.14 (D.C. Cir. 1982) (upholding the award of attorney's fees to a law school clinical program on the assumption that any fee award beyond the program's own expenses would be deposited into a fund exclusively for litigation; where fees are not directed to such a fund, an entity is limited to recovery of its own financial outlay in the case "for otherwise it would participate in a long-prohibited division of fees with an attorney"); *see also* Restatement, *supra* note 100, § 10 cmt. f ("The Section allows a lawyer employed and compensated by a nonprofit public-interest organization or a union to remit court-awarded fees to the employing organization, provided that the organization uses the funds only for legal services."); ABA/BNA Lawyers' Manual on Prof'l Conduct, *supra* note 102, at 91:6406-07.

In addition to ethical questions, in some jurisdictions sharing attorney's fees with a nonprofit corporation may raise questions regarding the unauthorized practice of law if the fees are not directed into a fund used exclusively to support litigation activities. *See* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 Mo. L. Rev. 151, 194-96 (2000); Wayne Moore, *Are Organizations That Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 Fordham L. Rev. 2397, 2407-12 (1999); *see also infra* note 214 (noting additional restriction on nonprofit corporations).

143. In order not to lose its funding, an LSC-funded entity must have objective integrity and independence from any organization that engages in a restricted activity such as solicitation. *See* 45 C.F.R. § 1610.8(a) (2002). Thus, any law clinic that works with an LSC recipient must ensure, if the clinic wishes to engage in activities restricted by the Legal Services Corporation Act without disqualifying the recipient from receiving LSC funds, that its clinic operations meet the LSC's program integrity requirements. *See infra* notes 288-90 and accompanying text.

client as a result of in-person unsolicited advice.¹⁴⁴ Further, the Louisiana Supreme Court, in response to complaints by business interests, amended its student practice rule in 1999 to prohibit any student from appearing in a representative capacity if any law school clinical program lawyer, staff person, or student practitioner initiated contact for the purpose of representing the contacted person or community organization.¹⁴⁵ The court argued that the ban was necessary to ensure that law students are not encouraged to engage in solicitation,¹⁴⁶ even though such solicitation by members of the bar is allowed under applicable rules of professional conduct and the First Amendment.

C. *Obligation Not To Refuse Unpopular or Controversial Clients or Causes*

A lawyer's freedom to choose clients and cases, and right to solicit certain clients and cases, are tempered by ethical proscriptions on a lawyer's refusal to handle controversial clients or cases. These proscriptions provide powerful ethical arguments against efforts to prevent clinics from representing unpopular clients or causes, but do not make such efforts by attorneys grounds for disciplinary action.

A comment to Model Rule 1.2 states that "[l]egal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."¹⁴⁷ Indeed, a lawyer has a professional responsibility to accept a fair share of unpopular matters or indigent or unpopular clients.¹⁴⁸ The Model Code also provides that a lawyer "should not

144. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Sec. 504(a)(18), 110 Stat. 1321-56 (1996), 45 C.F.R. § 1638 (2002). On remand to the U.S. District Court, the plaintiffs in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2002), have challenged the Congressional ban on LSC grantees notifying prospective clients of their rights and then offering legal representation. See *infra* note 321 and accompanying text; see also Amy Busa & Carl G. Sussman, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 Harv. C.R.-C.L. L. Rev. 487, 512-15 (1999) (arguing that Congress's restriction on the use of private funds by LSC grantees for solicitation is unconstitutional).

145. La. Sup. Ct. R. XX, § 10 (2002).

146. Resolution Amending Rule XX, at 2 (La. Mar. 22, 1999) (Calogero, C.J.), reprinted in 74 Tul. L. Rev. 285, 288 (1999). But see Joy, *supra* note 59, at 260 (noting the lack of record before the Louisiana Supreme Court of any clinic client complaining about any alleged solicitation); D.C. Ethics Op. 64 (1978) (holding that law clinics may, without violating ethical restrictions against solicitation, hire a person to inform tenants about the availability of legal assistance offered by the clinics or have the law students themselves advise the tenants that such assistance is available).

147. Model Rules, *supra* note 100, at R. 1.2 cmt. 5.

148. *Id.* at R. 6.2 cmt. 1; see also *id.* at pmbl. ¶ 6 (stating that all lawyers should devote professional time and resources to ensure equal access to the justice system for those who, because of economic or social barriers, cannot secure legal representation).

decline representation because a client or cause is unpopular or community reaction is adverse," nor does the lawyer's preference to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community justify refusing to represent a client.¹⁴⁹

This obligation flows from the legal profession's responsibility to provide legal services to all in need and from the principle of professional detachment or nonaccountability—that representation of a client “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”¹⁵⁰ Likewise, the participation of law school clinical faculty in a lawsuit neither makes the university a party to the proceeding nor constitutes the university’s position on or endorsement of the underlying subject matter.¹⁵¹

Further, where an attorney is appointed to provide representation, the lawyer shall not decline to represent an unpopular client or refuse to accept representation of an unpopular matter because of the

149. Model Code, *supra* note 100, at EC 2-26, 2-27, 2-28.

150. Model Rules, *supra* note 100, at R. 1.2(b); *see also* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669, 673-74 (1978) (explaining the “Principle of Nonaccountability for the Advocate”); Wolfram, *supra* note 99, at 569 (explaining the “principal of professional detachment or nonaccountability”). As one author observed: “The professional obligation of the lawyer is to advocate the rights of the client, not the acts of the client. This necessary distinction separates actor and principal and, thereby, enables the representation that makes our system work.” Andre A. Borgeas, Note, *Necessary Adherence to Model Rule 1.2(b): Attorneys Do Not Endorse the Acts or Views of Their Clients by Virtue of Representation*, 13 Geo. J. Legal Ethics 761, 762 (2000).

151. Letter from Donald C. Arnold, *supra* note 50, at 5 & n.10; Report of the Ad Hoc Study Committee for the Environmental Law Clinic, University of Oregon School of Law, *supra* note 46, at 12; *see* Model Rules, *supra* note 100, at R. 1.2 cmt 5 (stating that “representing a client does not constitute approval of the client’s views or activities”); Restatement, *supra* note 100, § 125 cmt. e (“Moreover, it is a tradition that a lawyer’s advocacy for a client should not be construed as an expression of the lawyer’s personal views.”); *see also* Model Rules, *supra* note 100 at R. 6.4 (“A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer.”). The Model Code states:

The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. . . . he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

Model Code, *supra* note 100, at EC 7-17.

Some law school clinics have reiterated this institutional neutrality by inserting disclaimers in clinic documents indicating that the clinic does not purport to represent the law school’s or university’s position on the matter in dispute. *See, e.g.*, Letter from Donald C. Arnold, *supra* note 50, at 11 n.10 (noting that the University of Oregon environmental law clinic’s stationery includes a disclaimer); Memorandum from Robert Kuehn, Director, Tulane Environmental Law Clinic, to Clinic Students and Staff (Aug. 21, 1995) (on file with authors) (requiring the use of a disclaimer in the clinic’s oral and written communications).

identity of the person or cause involved or anticipated adverse community reaction.¹⁵² A lawyer should only seek to be excused from such representation where the attorney finds the client or cause so repugnant as likely to impair the lawyer-client relationship or the lawyer's ability to represent the client.¹⁵³

ABA ethics opinions reinforce this responsibility not to deny legal services to unpopular clients or causes. The ABA ethics committee ruled in Formal Opinion 324 that:

[A]n attorney member of a legal aid society's board of directors is under a similar obligation not to reject certain types of clients or particular kinds of cases merely because of their controversial nature, anticipated adverse community reaction, or because of a desire to avoid alignment against public officials, governmental agencies, or influential members of the community.¹⁵⁴

A later ABA ethics opinion addressed the propriety of law school clinic case selection guidelines that sought to avoid lawsuits against government agencies or officials. Informal Opinion 1208 equated a law school clinic with a legal aid office and defined the governing body of a clinic as a hierarchy consisting of the law school faculty and its committees, the law school dean, the university administration, and the university board of trustees.¹⁵⁵ The opinion admonishes the lawyer-members of the governing body of a law school clinic to avoid establishing guidelines that prohibit acceptance of controversial clients or cases or that prohibit aligning the clinic against public officials, governmental agencies, or influential members of the community.¹⁵⁶ Instead, the lawyer-members "should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases, and this is particularly true if laymen may be unable otherwise to obtain legal services."¹⁵⁷ Thus, subject matter priorities adopted by lawyers for a law clinic "must be based on a consideration of the needs of the client community and the resources available to the program. They may not be based on considerations such as the identity of the prospective adverse parties."¹⁵⁸ According to the ABA committee on ethics, all lawyers, not just those considered part of the

152. Model Rules, *supra* note 100, at R. 6.2 cmt. 1; Model Code, *supra* note 100, at EC 2-29.

153. Model Rules, *supra* note 100, at R. 6.2 & cmt. 2; Model Code, *supra* note 100, at EC 2-29, 2-30. This standard for avoiding an appointment mirrors the conflict of interest rule that a lawyer shall not represent a client if there is a significant risk that the representation of that client "will be materially limited . . . by a personal interest of the lawyer." Model Rules, *supra* note 100, at R. 1.7(a)(2); *see also* Model Code, *supra* note 100, at DR 5-101(A), EC 5-2; Restatement, *supra* note 100, § 125.

154. ABA Comm. on Prof'l Ethics, Formal Op. 324 (1970).

155. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

156. *Id.* (citing ABA Formal Op. 324).

157. *Id.*

158. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

governing body of a law clinic, should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services and should seek to remove such restraints where they exist.¹⁵⁹

While these ethical precepts prohibit any lawyer from imposing limitations on the representation of unpopular clients or causes, their utility in preventing such restrictions is limited. First, ABA ethics opinions are not binding on courts or disciplinary committees, although some state ethics opinions are binding.¹⁶⁰ Nevertheless, ABA opinions have significant influence on federal and state courts and disciplinary committees and provide an important source of ethics authority.¹⁶¹

In addition, the legal profession's rules of professional conduct only apply to lawyers.¹⁶² Lay members of the university administration or state government are not bound by the rules.

Moreover, the relevant provisions in the Model Rules and Model Code are couched in permissive terms such as "should," rather than imperatives such as "shall" or "shall not," and are found in the comments to the Model Rules and ethical considerations of the Model

159. *Id.* The blacklisting of law clinic students in hiring practices, as allegedly experienced by Tulane and University of Houston law students, also is contrary to the ethical precepts that representing a client does not constitute approval of the client's views or activities and that members of the legal profession are responsible to ensure that legal representation is available to those whose cause is controversial or unpopular. See *supra* note 58 and accompanying text; Kuehn, *supra* note 1, at 127. Such hiring discrimination also violates the National Association for Law Placement's ("NALP") principle that employers should use valid, job-related criteria when evaluating candidates and base hiring decisions "solely on *bona fide* occupational qualifications." National Association for Law Placement, Principles and Standards for Law Placement and Recruitment Activities at Part IV.E, available at <http://www.nalp.org/pands/pands.htm> (last visited Jan. 23, 2003). The AALS's Section on Clinical Legal Education has adopted a resolution urging the AALS to develop a rule prohibiting prospective employers from discriminating against law students because of their participation in an approved law school course or co-curricular activity. Executive Comm., AALS Section on Clinical Legal Education, *Resolution on Employment Discrimination Based on a Law Student's Participation in an Approved Course or Co-Curricular Activity* (Jan. 31, 2003) (on file with authors).

160. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1420 (1978) (explaining the purposes and intended effects of the Model Code and ABA ethics opinions); Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 *Geo. J. Legal Ethics* 313, 330-37 (2002).

161. Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 66 *UCLA L. Rev.* 67, 83-88 (1981).

162. Model Rules, *supra* note 100, at pmb1. ¶ 12 ("Every lawyer is responsible for observance of the Rules of Professional Conduct."); *id.* at R. 5.3 cmt. 1 (stating that nonlawyers "are not subject to professional discipline" under the Model Rules); Model Code, *supra* note 100, at Preliminary Statement ("Obviously, the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers . . ."); Wolfram, *supra* note 99, § 2.6 (noting that state ethics rules only regulate those licensed to practice law).

Code. Only imperatives define conduct for purposes of professional discipline, and comments and ethical considerations do not impose obligations but provide guidance and aspirations.¹⁶³ Thus, a lawyer's participation in the establishment of case or client selection guidelines that limit the representation of unpopular cases or causes, according to one ABA ethics opinion, is "not a matter involving the possibility of disciplinary action."¹⁶⁴

Although actions to limit the availability of legal assistance to unpopular clients or matters may not subject an attorney to professional discipline, this does not mean that the behavior is ethical under rules of professional responsibility.¹⁶⁵ At most, particularly where the language and intent of the ethical rules are clear, as in the case of deterring legal representation for unpopular clients, the absence of an imperative rule simply provides the offending attorney a safe harbor from disciplinary action.

A source of attorney professional obligations where noncompliance can result in disciplinary action is the oath given upon admission to the bar. In a number of states, the oath contains the affirmation that "I will never reject, from any consideration personal to myself, the cause of the defenseless or the oppressed."¹⁶⁶ A violation of the oath constitutes grounds for disciplinary action.¹⁶⁷ It is also professional misconduct to knowingly assist or induce another to violate rules of professional conduct or to violate the rules through the acts of another.¹⁶⁸ Thus, efforts by lawyers, or by nonlawyers who have been assisted or induced by the lawyer or are acting on the lawyer's behalf, to lead law school clinic attorneys to reject defenseless or oppressed clients could be viewed as an attempt to induce a violation of a clinic attorney's ethical responsibilities.¹⁶⁹

163. Model Rules, *supra* note 100, at Scope § 14; Model Code, *supra* note 100, at Preliminary Statement. *But cf.* Cal. R. Prof'l Conduct 1-100(A) (2002) ("The prohibition of certain conduct in these rules is not exclusive.").

164. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

165. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974). "To say, as we have sometimes done, that a particular restriction upon the staff of a legal services office is not forbidden by the disciplinary rules is not to say that such a restriction is wise or is consistent with applicable ethical considerations." *Id.*

166. *See, e.g.,* Cal. Bus. & Prof. Code §§ 6067, 6068(h) (2001); *In re* Amendments to Rules Regulating the Florida Bar—1.-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid), 573 So. 2d 800, 803 (1990) (reprinting Florida's oath); Louisiana State Bar Association, *The Lawyer's Oath*, available at http://www.lascba.org/lawyers_oath.asp (last visited Jan. 23, 2003); Mich. State Bar R. 15 § 3 (Procedure for Admission; Oath of Office) (2001).

167. *See, e.g.,* Cal. Bus. & Prof. Code § 6103 (2001); Mont. Code Ann. § 37-61-301(2)(b) (2002); Wash. Rev. Code § 2.48.220(3) (2002).

168. Model Rules, *supra* note 100, at R. 8.4(a) & cmt. 1; Restatement, *supra* note 100, § 5(2) & cmts. e, f; *see also* Model Code, *supra* note 100, at DR 1-102(A)(2) (stating that a lawyer shall not "circumvent a Disciplinary Rule through the actions of another").

169. Further, efforts by an attorney to deny a person the ability to obtain legal

There is no reported case of an attorney being sanctioned for failing to uphold the aspect of the attorney oath that prohibits a lawyer from rejecting the representation of an oppressed or defenseless client or for seeking to induce another attorney to do so. However, where the motive for denying representation is apparent, such professional misconduct could form the basis for an ethics complaint and disciplinary action.¹⁷⁰

One further limit on the utility of ethical precepts prohibiting an attorney from refusing to represent an unpopular client or cause is the argument that the proscription only forbids the attorney from refusing to represent someone who requests that particular attorney's assistance and does not prohibit an attorney from seeking to impose restrictions on the ability of another attorney to provide such assistance. Thus, lawyers outside the governing body of a clinic who seek to impose restrictions on the clinic's representation of unpopular cases and clients could argue that they have not rejected the client but only required that of other lawyers to reject that client.

However, ABA Formal Opinion 334 states that "all lawyers" should seek to avoid imposing restraints on the availability of legal services for indigents. Furthermore, an attorney's responsibility to ensure that those unable to afford an attorney have access to legal representation implies a corresponding duty not to interfere in pro bono representation provided by others, especially when that attorney's donated services may be the client's sole opportunity for legal representation. Nevertheless, the ethical rules do not explicitly impose an obligation of non-interference.¹⁷¹ But, again, the failure of rules of professional responsibility to make attorney conduct subject to discipline does not mean that the attorney's actions are ethical under the rules.¹⁷²

representation where that person has no other alternative source of representation could be viewed as prejudicial to the administration of justice and sanctionable misconduct under both the Model Rules and Model Code. *See infra* notes 246-64 and accompanying text.

170. *See generally* Model Rules, *supra* note 100, at R. 8.3(a) (requiring a lawyer having knowledge that another lawyer has committed a violation that raises a substantial question as to that lawyer's fitness as a lawyer to inform the appropriate professional authority); Model Code, *supra* note 100, at DR 1-103(A) (requiring a lawyer possessing unprivileged knowledge of conduct of another lawyer that is prejudicial to the administration of justice or that adversely reflects on fitness to practice law to report such knowledge); Restatement, *supra* note 100, § 5(3) (paralleling language in Model Rule 8.3(a)).

171. *See* Kuehn, *supra* note 1, at 131-32 (arguing for rules of professional responsibility that state that a lawyer's duty not to deny legal services based on a person's views or causes also means that an attorney should not seek to interfere with the efforts of other attorneys to provide representation to unpopular clients).

172. As Abe Fortas argued:

Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute or defend. . . . Rapists, murderers, child-

As a final matter, lawyer-members of the governing body of a law clinic, as well as those outside of the law school, should respect the ethical standards of the law school teaching profession. As the ABA reported, “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. Therefore, the highest standards of ethics and professionalism should be adhered to within law schools.”¹⁷³ “Professionalism ideals can either be enhanced or undermined by the behavior of faculty in and out of the classroom.”¹⁷⁴

The ABA’s MacCrate Report on legal education and professional development identified “Striving to Promote Justice, Fairness, and Morality,” which includes ensuring that adequate legal services are provided to those who cannot afford to pay for them, as one of the four fundamental values of the legal profession.¹⁷⁵ “Law school deans, professors, administrators and staff should be concerned to convey to students that the professional value of the need to ‘promote justice,

abusers, General Motors, Dow Chemical—and even cigarette manufacturers and stream-polluters—are entitled to a lawyer; and any lawyer who undertakes their representation must be immune from criticism for so doing.

Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 Yale L.J. 988, 1002 (1970); see also *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1217 (1958) (“No member of the Bar should indulge in public criticism of another lawyer because he has undertaken the representation of causes in general disfavor. Every member of the profession should, on the contrary, do what he can to promote a public understanding of the service rendered by the advocate in such situations.”); Madeleine C. Petrara, *Dangerous Identification: Confusing Lawyers with Their Clients*, 19 J. Legal Prof. 179, 206 (1994) (concluding that “lawyers are agents, not principals, and they should not be criticized for the clients whom they represent. The lawyer’s job is to make the legal system work. That happens when legal services are afforded to all.”); Schwartz, *supra* note 150, at 673 (stating “the generally accepted notion that as long as a lawyer is acting as an advocate to maximize the client’s likelihood of prevailing, the lawyer will incur neither civil or criminal liability nor professional criticism or sanction”). *But cf.* W. William Hodes, *Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 U. Kan. L. Rev. 977, 982, 984 (2000) (arguing that because lawyers have almost unlimited discretion as to which clients and causes to accept or reject, other lawyers have a right to criticize lawyers for their choice of clients but conceding that the last lawyer in town is entitled to a kind of moral immunity from criticism).

173. Comm’n on Professionalism, American Bar Ass’n, “. . . In the Spirit of Public Service:” A Blueprint for the Rekindling of Lawyer Professionalism 19 (1986).

174. 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 explains:

Law school is where most law students first come into contact with issues relating to legal professionalism. Their 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.

For most students law school professors are their first and most important role models of lawyers.

Id.

175. MacCrate Report, *supra* note 1, at 140.

fairness and morality' is an essential ingredient of the legal profession"¹⁷⁶

The AALS's statement of good practices similarly states: "Because of their inevitable function as role models, professors should be guided by the most sensitive ethical and professional standards."¹⁷⁷ These heightened responsibilities include "an enhanced obligation to pursue individual and social justice."¹⁷⁸ Considering the importance of role modeling as a clinical teaching technique and of law professors adhering to the very highest standards of professional responsibility, lawyers involved in law clinic case and client selection decisions have a heightened duty to ensure that they do not discourage the acceptance of unpopular or controversial clients or causes.¹⁷⁹

176. *Id.* at 333. The MacCrate Report also recommended that law schools "stress in their teaching that examination of the 'fundamental values of the profession' is as important in preparing for professional practice as acquisition of substantive knowledge." *Id.* at 332.

177. Association of American Law Schools, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, at I (Nov. 17, 1989), available at <http://www.aals.org/ethic.html> (last visited Jan. 23, 2003) [hereinafter Statement of Good Practices]. In explaining the decision of the University of Pittsburgh to reject pressure to move its environmental law clinic off-campus, the dean of the University of Pittsburgh School of Law emphasized the importance of standing by academic freedom and legal profession principles and of teaching students by modeling appropriate professional behavior. See *supra* notes 79-80 and accompanying text.

178. See Statement of Good Practices, *supra* note 177. The AALS' statement of good practices argues:

As teachers, scholars, counselors, mentors, and friends, law professors can profoundly influence students' attitudes concerning professional competence and responsibility. Professors should assist students to recognize the responsibility of lawyers to advance individual and social justice. . . .

The fact that a law professor's income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to which practicing lawyers may be more inhibited. With that freedom from economic pressure goes an enhanced obligation to pursue individual and social justice.

Id. at I, V. Professor Thomas Morgan argues that there should not be any serious disagreement about the importance of law professors modeling dedication to justice and the public good: "The sense that professors are uniquely situated to model a commitment to justice and the public interest—and their moral obligation to do so—should be largely beyond dispute." Thomas D. Morgan, *Law Faculty as Role Models*, in Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, Teaching and Learning Professionalism: Symposium Proceedings 37, 47 (1996).

179. Professor David Barnhizer argues that the law clinic teaching method "is the only presently available means of consistently facilitating learning of 'professional responsibility' in a meaningful, internalized way sufficient to form an affirmative structure capable of guiding behavior in a manner consistent with the stated public norms of the legal profession." David G. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. Legal Educ. 67, 71-72 (1979).

D. *Obligation To Act Independently of Third-Party Interests*

Efforts to influence law clinic case and client selection decisions also threaten the ethical duty of a clinic attorney to exercise independent professional judgment on behalf of the client.

1. Third-Party Interference in a Lawyer's Professional Judgment

A fundamental value of the legal profession is an attorney's fiduciary duty of undivided loyalty to the client. This duty manifests itself in the requirement that the lawyer act with commitment and dedication to the client's cause and to assert zealously the client's position under the rules of the adversary system.¹⁸⁰ As the client's representative, the lawyer "has a duty to use legal procedure for the fullest benefit of the client's cause" and to urge, provided the position is not frivolous, any permissible construction of the law favorable to the client, regardless of the attorney's professional opinion of the likelihood of success.¹⁸¹

Under rules of professional responsibility, the client has the ultimate authority to determine the objectives of the representation and shall be consulted as to the means to be employed by the attorney.¹⁸² Even as to means, while the lawyer may exercise professional discretion regarding technical and procedural issues, the attorney should provide the client with sufficient information to participate in decisions concerning both objectives and means and should usually defer to the client on questions of expenses and concerns for third persons.¹⁸³ A client may agree to limit the scope of the lawyer's services, although any such agreement must comply with rules of professional conduct and other laws.¹⁸⁴ Accordingly, a client

180. Model Rules, *supra* note 100, at pmbl. ¶ 2, R. 1.3 cmt. 1; Model Code, *supra* note 100, at Canon 7, EC 7-1; Restatement, *supra* note 100, § 16 & cmt. d.

181. Model Rules, *supra* note 100, at R. 3.1 cmt. 1; Model Code, *supra* note 100, at DR 7-101(A)(1), EC 7-4, 7-5.

182. Model Rules, *supra* note 100, at R. 1.2(a); Model Code, *supra* note 100, at EC 7-7; Restatement, *supra* note 100, §§ 16, 20-22; *see Graves v. P.J. Taggares Co.*, 616 P.2d 1223, 1227 (Wash. 1980) (holding that while an attorney is impliedly authorized to enter into stipulations and waivers concerning procedural matters, an attorney has no authority to waive any substantial rights of the client unless specifically authorized by the client).

183. Model Rules, *supra* note 100, at R. 1.4(a)(2) & cmts. 3, 5, R. 1.2 cmts. 1, 2; Model Code, *supra* note 100, at EC 7-8, 9-2. "However, some courts have found that in the event of a disagreement, the client's judgment should prevail even in matters of tactics, procedure, or the drafting of documents." Annotated Model Rules, *supra* note 139, at 16.

184. Model Rules, *supra* note 100, at R. 1.2(c) & cmt. 8; Restatement, *supra* note 100, § 19. For example, an agreement limiting the scope of representation does not exempt a lawyer from the duty to provide competent representation. *See* Model Rules, *supra* note 100, at R. 1.2 cmts. 7, 8.

can agree that the lawyer will handle only certain claims, only represent the client at the trial level, or only seek certain remedies.¹⁸⁵

As part of the duty of loyalty, a lawyer “shall exercise independent professional judgment and render candid advice.”¹⁸⁶ Thus, an attorney may not represent a client if there is a significant risk that the representation will be materially limited by the lawyer’s personal interests or responsibilities to a third party, unless the lawyer reasonably believes that she will be able to provide competent and diligent representation and the client gives informed consent.¹⁸⁷ One way rules of professional responsibility guard against any interference with the lawyer’s judgment is through rules addressing possible conflicts of interest.¹⁸⁸

Another safeguard against interference is the prohibition of third parties from interfering in the attorney-client relationship. Where an attorney’s services are paid for by a person or organization other than the client, there is a heightened concern that the attorney may feel accountable to the third-party or that the third-party may seek to exert economic, political, or social pressure on the attorney’s professional judgment.¹⁸⁹ Model Rule 5.4(c) provides that a lawyer “shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”¹⁹⁰ Rule 1.8(f) similarly prohibits a lawyer from accepting compensation from one other than the client unless there is no interference with the lawyer’s independence of professional judgment or the attorney-client relationship.¹⁹¹

The Model Code contains the same restriction—a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services to another to direct or regulate the lawyer’s professional judgment.¹⁹² The Model Code explicitly allows a lawyer

185. Annotated Model Rules, *supra* note 139, at 21-22 (listing cases addressing ways in which representation may or may not be limited).

186. Model Rules, *supra* note 100, at R. 2.1; *accord* Model Code, *supra* note 100, at Canon 5.

187. Model Rules, *supra* note 100, at R. 1.7(a)(2), (b).

188. *See id.* at R. 1.7-1.10; Model Code, *supra* note 100, at DR 5-101(A), DR 5-105(A), EC 5-1, 5-2; Restatement, *supra* note 100, §§ 121, 125.

189. Model Code, *supra* note 100, at EC 5-22, 5-23.

190. Model Rules, *supra* note 100, at R. 5.4(c); *see also* Restatement, *supra* note 100, § 134.

191. Model Rules, *supra* note 100, at R. 1.8(f); *see also id.* at R. 1.7 cmt. 13 (“A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client.”).

192. Model Code, *supra* note 100, at DR 5-107(B). The Restatement permits a lawyer to represent indigent clients as a staff attorney of a legal aid or similar non-profit organization, with the lawyer’s professional conduct directed by someone other than the client and compensation in the form of a salary paid by the organization, provided the direction does not interfere with the lawyer’s independence of

to be employed by a legal aid or public defender office operated or sponsored by a duly accredited law school, provided there is no interference with the exercise of independent professional judgment on behalf of the lawyer's client.¹⁹³ Where the potential for such third-party pressures may be present, the lawyer should make full disclosure to the client, obtain the client's informed consent to representation, and only proceed if the lawyer believes that her independent professional judgment will not be impaired by the existence of the relationship with the third party.¹⁹⁴

The ABA's ethics committee has cautioned against the influence of third parties on a lawyer's independent professional judgment, particularly where that influence may be motivated by an attempt to avoid the handling of controversial clients or cases. ABA Formal Opinion 324 holds that the governing board of a legal aid organization has an obligation to set priorities in the allocation of limited resources and to determine the types or kinds of cases staff attorneys may undertake and the types of clients they may represent.¹⁹⁵ However, there is a fear that in making case or client selection decisions, the governing body may seek to avoid cases that are unpopular or that would align the organization against influential members of the community. Thus, in determining which clients or cases its attorneys may undertake, the governing board should set broad guidelines regarding client eligibility, suitable case matters, and program priorities, rather than acting on a case-by-case or client-by-client basis.¹⁹⁶ Those broad guidelines must be based on the needs of the

professional judgment, the direction is reasonable in scope and character, and the client gives informed consent. Restatement, *supra* note 100, § 134 & cmt. g.

193. Disciplinary Rule 2-103(D)(1)(a) states:

A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

Model Code, *supra* note 100, at DR 2-103(D)(1)(a); *see also id.* at EC 2-33.

194. Model Rules, *supra* note 100, at R. 1.8(f)(1), (f)(2), cmts 11, 12; Model Code, *supra* note 100, at DR 5-107(A)(1), EC 5-21; Restatement, *supra* note 100, § 134. *See generally* Mo. Office of Chief Disciplinary Counsel, Informal Advisory Op. 960198 (1996) ("In representing any client who may have a claim against the state, Attorney should disclose that legal services [program] receives funds from the state and obtain a waiver."). Arrangements for third-party payment must also conform with confidentiality and conflicts of interest rules. Model Rules, *supra* note 100, at R. 1.8(f)(3) & cmt. 12, R. 1.7 cmt. 13; *see also* Restatement, *supra* note 100, § 134 cmt. e.

195. ABA Comm. on Prof'l Ethics, Formal Op. 324 (1970).

196. *Id.*; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 343 (1977); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974); State Bar of Mich., Standing Comm. on Prof'l and Judicial Ethics, Op. RI-210 (1994). The Model Code explains that attorneys have a duty not to accept employment with a legal aid

client community, the resources of the program, and, in the case of law clinics, pedagogical goals, not on the identity of prospective adverse parties or anticipated adverse community reaction.¹⁹⁷

Ethics committees have repeatedly held that case selection procedures that require prior approval of clients and cases on a case-by-case basis by boards of directors or non-lawyer executive directors of legal aid organizations are improper under the rules of professional responsibility.¹⁹⁸ This does not mean that staff lawyers cannot be required to consult with and follow the case selection directives of senior staff attorneys or even the executive director (if a lawyer), just as the associates in a firm are subject to the direction and control of partners.¹⁹⁹ However, according to the ABA ethics committee, external control on a case-by-case basis of a staff attorney's case selection judgment is improper.

Regarding law school clinics, the ABA ethics panel held that requiring a clinic lawyer to seek on a case-by-case basis prior approval of the dean or a law faculty committee before accepting a case against a government officer would violate the ethical responsibilities of the dean, faculty committee members, and clinic lawyers "because the case-by-case review makes it likely that the independent judgment of the five clinic lawyers and their loyalty to their clients will be impaired."²⁰⁰ Provided they do not act on a case-by-case basis and the selection guidelines do not seek to avoid controversial cases or clients,

organization unless there will be no outside interference in the attorney-client relationship:

Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves.

Model Code, *supra* note 100, at EC 5-24.

197. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

198. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 343 (1977); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1232 (1972); ABA Comm. on Prof'l Ethics, Formal Op. 324 (1970); see also Iowa Sup. Ct., Board of Prof'l Ethics and Conduct, Op. 86-20 (May 22, 1987) (finding that it would not be improper for an attorney to serve as a board member for a legal aid society provided the board only makes policy and does not consider individual cases). *But cf.* Finman & Schneyer, *supra* note 161, at 135-37 (questioning the basis for the ABA's ruling that intake decisions on a case-by-case basis are prohibited but acknowledging that the Model Code's proscription of conduct that is prejudicial to the administration of justice might be applicable).

199. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974); see also Model Rules, *supra* note 100, at R. 5.1 (making a lawyer having supervisory authority over another lawyer responsible for the other lawyer's compliance with rules of professional conduct); Restatement, *supra* note 100, § 11.

200. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972). A requirement for case-by-case approval would be improper regardless of whether the limitations were imposed by the university board of trustees, the university administration, the law school faculty, or the law school dean. *Id.*

the governing board of a law school clinic²⁰¹ may “legitimately exercise control by establishing priorities as to the categories or kinds of cases which the office will undertake” without running afoul of rules of professional responsibility.²⁰² Similarly, a former comment to the Model Rules explained that representation provided by a legal aid agency may be subject to limitations on the types of cases the agency handles.²⁰³ By extension, a financial donor to a law clinic could condition receipt of the funds on representing certain categories of clients or cases, provided the conditions do not violate rules of professional responsibility or other laws.²⁰⁴ But within the policies and conditions set by the governing board or funding source, the clinic lawyer retains the discretion to make case and client selection decisions on a case-by-case basis.²⁰⁵

The rationale for allowing those outside of the law clinic to impose case and client selection policies is that, prior to initiation of the representation, the lawyer is not rendering legal services to the

201. As noted above, and as stated in ABA Informal Opinion 1208, the governing body of a law school clinic consists of the law school dean, law school faculty and its committees, university administration, and university board of trustees, some of whom are lawyers and some of whom are not. *Supra* text accompanying note 155.

202. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

203. Model Rules of Prof'l Conduct R. 1.2 cmt. 4 (1998). The ABA's 2002 amendments to the Model Rules struck this language from the comment, although the reporter's explanation of changes is silent on the purpose of the deletion. See ABA Commission on Evaluation of the Rules of Professional Conduct, Report with Recommendations to the House of Delegates (Aug. 2001), Proposed Final Rule 1.2, available at http://www.abanet.org/cpr/e2k-final_rules2.html (last visited Jan 23, 2003). The reporter for the Ethics 2000 Commission explained that the deletion was made to shorten the comment, not to make a political statement or substantive change. E-mail from Carl Pierce, Professor, University of Tennessee College of Law, to Robert R. Kuehn (Nov. 4, 2002) (on file with authors). For a list of the limitations on the types of cases that Congress has imposed on the Legal Services Corporation, see Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *Fordham L. Rev.* 2187, 2189-95 (1999), and Jessica A. Roth, *It is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 *Harv. C.R.-C.L. L. Rev.* 107, 107-08 (1998).

204. See generally Martha A. Hausman, Note, *The Ethics of Lawyering in the Public Interest: Using Client and Lawyer Autonomy as a Guidepost*, 4 *Geo. J. Legal Ethics* 383, 387-88 (1990) (identifying the interests of third-party organizations that fund public interest litigation). The case of Judith Nathanson, who was sanctioned by the Massachusetts Commission Against Discrimination for refusing to represent men in divorce cases, is an example of how a case or client selection policy or condition, although permissible under the rules of professional conduct, could violate other laws. See Terri R. Day & Scott L. Rogers, *When Principled Representation Tests Antidiscrimination Law*, 20 *W. New. Eng. L. Rev.* 23, 24-25 (1998) (describing facts of *Stropnick v. Nathanson*); see also *supra* notes 117-19 and accompanying text. The decisions in *Trister*, *Atkinson*, and *Hoover*, discussed in Part II.A, illustrate the legal limits of restrictions by government funders. See *supra* notes 16, 24-26 and accompanying text.

205. Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 *B.U. L. Rev.* 337, 348 (1978) (citing ABA Formal Opinions 334 and 343).

client.²⁰⁶ Hence, restricting the attorney's freedom to select clients and cases does not direct or regulate the attorney's professional judgment in rendering legal services or interfere with the attorney-client relationship.²⁰⁷ Nevertheless, even though such restrictions prior to formation of the attorney-client relationship may not illegally impinge on the clinic attorney's professional judgment, such interference still may significantly intrude on the academic freedom of the law school and law clinic professor²⁰⁸ and on other professional responsibilities.²⁰⁹

206. See ABA Comm. on Prof'l Ethics, Formal Op. 324 (1970). "We believe that the foregoing quotations from the Code of Professional Responsibility militate against any interference with the lawyer-client relationship by the directors of a legal aid society *after* a case has been assigned to a staff attorney." *Id.* (emphasis added); see also ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1252 (1972) (finding that the Model Code does not bar the governing body of a legal aid organization from broadly limiting the categories of legal services that its attorneys may undertake for a client).

207. Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. Rev. 282, 310 (1982) (arguing that the Legal Services Corporation's restrictions on who can be represented do not violate ethics rules); *Ethical Issues Panel*, 25 Fordham Urb. L.J. 357, 374 (1998) (remarks of Stephen Ellmann) (same); *id.* at 388 (remarks of Stephen Gillers) (same); Houseman, *supra* note 203, at 2198-99, 2209 (same). As Stephen Ellmann argued, "The [Model Rule] 5.4(c) problems only become acute when the restrictions deal not with who can be taken as a client, but what can be done on the client's behalf." *Ethical Issues Panel, supra* at 374.

208. For a discussion of the academic freedom issues implicated by outside interference with the operation of law school clinical programs, see Schneider, *supra* note 19, at 188-90, 198-213 (arguing why outside interference violates the academic freedom of the institution and individual clinical faculty member). The ABA stated in 1997:

Improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of the educational mission of affected law schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Responsibility. In appropriate ways, the Council [of the ABA Section of Legal Education and Admissions to the Bar] shall assist law schools in preserving the independence of law school clinical programs and courses.

Section of Legal Education and Admissions to the Bar, Am. Bar Ass'n, *Interference in Law School Clinical Activities* (June 1997), available at <http://www.abanet.org/legaled/section/geninfo2.html> (last visited Jan. 23, 2003). A similar statement was issued in Memorandum from James P. White, Consultant on Legal Education to the American Bar Association, to Deans of ABA Approved Law Schools (Feb. 21, 1983) (on file with authors).

The AALS has stated: "[I]t is clear that clinical teachers . . . have a First Amendment right to select cases as their course materials for their clinics. . . . [L]aw faculty case and client selection decisions are protected by the First Amendment." *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*, reprinted in 4 Clinical L. Rev. 539, 557-58 (1998).

Based on a January 3, 2001 statement of the Executive Committee of the AALS explicitly supporting academic freedom for all law school clinical faculty, two commentators argue:

The express statement by the AALS, affirming the academic freedom rights of clinical faculty, demonstrates that law school deans and university

Once the representation of a law clinic client begins, there can be no interference by the governing body of a clinic or advisory committee, or by any other outside entity or person, in the attorney-client relationship.²¹⁰ An ABA ethics opinion noted, “a lawyer’s obligation to remain professionally independent forbids a lawyer to drop an existing client merely because a funding source does not like that client.”²¹¹ As discussed in Part III, policies and guidelines by a governing body or other outside entity that restrict how a lawyer may represent a client *after* a clinic case has been selected raise significant ethical concerns.

2. The Propriety of Law Clinic Advisory Committees

The role of advisory committees in law school clinic case and client selection is also circumscribed.²¹² A requirement for a law clinic

administrators cannot interfere with the academic freedom of clinical faculty without violating AALS policy. If a dean, university administrator, or other faculty interfere with the academic freedom of any law faculty member—clinical or non-clinical faculty alike—the affected faculty at AALS member schools may file a complaint with the AALS, which will attempt to resolve the matter. If a violation of academic freedom is found, there are remedies available to the aggrieved faculty, and the law school may be further sanctioned by the AALS.

Peter Joy & Bridget McCormack, *AALS Issues a Strong Statement in Support of Academic Freedom for All Clinical Faculty*, AALS Section on Clinical Legal Education Newsletter, at 35 (April 2001); *see also* Statement of the Association of American Law Schools in Support of Academic Freedom for Clinical Faculty (Jan. 3, 2001) (on file with authors). Concerning the 1968 interference by law school and university administrators at the University of Mississippi in the school’s law clinic, the AALS Committee on Academic Freedom and Tenure found that the violations of the academic freedom of law clinic faculty “are so serious, that in the absence of positive and effective action by the University of Mississippi to redress the clear impairment of academic freedom . . . the appropriate sanction is expulsion of the University of Mississippi Law School from the Association.” *The University of Mississippi*, *supra* note 14, at 84-85 (containing “Recommendations of the AALS Committee on Academic Freedom and Tenure Concerning the University of Mississippi Matter”).

209. *See* discussion of professional responsibilities, *supra* Part II.C and *infra* Parts II.E, F & G.

210. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974); ABA Comm. on Prof’l Ethics, Formal Op. 324 (1970); *see also* Standing Comm. on Legal Aid and Indigent Defendants, Am. Bar Ass’n, Standards for Providers of Civil Legal Services to the Poor 7.1-2 & commentary (1986).

211. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 399 (1996). *See generally* Irey, *supra* note 72 (pressing the University of Pittsburgh to dismiss the director of the law school’s environmental law clinic and to cease representation of a controversial client).

212. In April 2000, the Political Interference Group of the AALS Section on Clinical Education distributed a brief survey on the law school clinical faculty e-mail listserv. At twenty of the twenty-three (87%) schools that responded, only clinical faculty and students participate in case selection decisions; only three (13%) use advisory boards, though the final decisions are made by clinic faculty and students. Political Interference Group, AALS Section on Clinical Legal Education, Summary of Survey About Law Clinic Intake Guidelines and Decisionmaking (on file with authors).

attorney to consult with an attorney advisory committee prior to making a case or client selection decision does not violate ethics rules, provided the advisory committee does not exercise any decision-making authority.²¹³ Where a law clinic is organized as a tax-exempt public interest law firm under section 501(c)(3) of the Internal Revenue Code, the clinic must establish a board or committee, not controlled by employees or persons who litigate on behalf of the organization, to determine the clinic's policies and programs.²¹⁴ To comply with rules of professional responsibility, a law clinic committee's role must be strictly advisory and must not directly or indirectly impinge on the attorney's independent professional judgment or discourage the handling of controversial clients or cases.²¹⁵

Although an advisory or oversight committee could at times be created as a vehicle for directing the clinic away from certain cases or clients, it could also provide outside expertise on legal issues and serve

213. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1232 (1972); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1262 (1973); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974). The ABA's ethics committee posited that it may be desirable to have a full discussion with an outside advisory committee "in order to avoid possible errors of judgment due to hasty action or action taken based on a distorted view of the facts, or the exercise of poor judgment." ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1232 (1972). Of course, advisory committee members must be carefully policed for possible conflicts of interest with law clinic cases and clients. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 345 (1979); Model Rules, *supra* note 100, at R. 6.3 & cmt. 1 (stating in the comment that while a lawyer who serves as an officer of a legal services organization does not thereby have an attorney-client relationship with persons served by the organization, there is a potential conflict between the interests of the organization's clients and the interests of the board member's clients); Restatement, *supra* note 100, § 135 cmt. e; *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1412 (1981) (identifying ways that courts and ethics opinions have addressed possible conflicts of interest by members of legal services organization boards).

214. Rev. Proc. 92-59, 1992-29 I.R.B. 11, § 3.05. For a discussion of possible conflicts between Internal Revenue Service rules and rules of professional conduct, see Nicole T. Chapin, Note, *Regulation of Public Interest Law Firms by the IRS and the Bar: Making it Hard to Serve the Public Good*, 7 Geo. J. Legal Ethics 437 (1993).

A number of courts considering whether a public interest law firm could legally operate in spite of laws in some states that prohibit the practice of law by corporations have held that the firms were lawful provided the not-for-profit corporation did not interfere with the independent professional judgment of the staff lawyers. See, e.g., *In re Education Law Center*, 429 A.2d 1051, 1058-59 (N.J. 1981). "This logic suggests that if those corporations had been constraining their lawyers' professional judgment, then they would have been in breach of prohibitions on corporate practice of law—and they would have had to go out of existence." *Ethical Issues Panel*, *supra* note 207, at 372 (remarks of Stephen Ellmann); see also Moore, *supra* note 142, at 2402-07.

215. See ABA Comm. on Prof'l Ethics, Formal Op. 324 (1970); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1232 (1972); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

as a buffer to politically-motivated attacks on the clinic.²¹⁶ However, where creation of the advisory committee is motivated by hostility to the law clinic's case and client selection activities, service on the committee by a member of the bar would be contrary to the ethical precept that legal services should be fully available to those in need and not denied because the client or cause is unpopular or controversial.²¹⁷

Ethics opinions countenancing a limited role for attorney advisory committees appear to allow a similar consulting role for a law school dean, faculty, university administration, or university board of trustees. Nevertheless, because those in the governing body of a law clinic have the ability to hire and terminate clinic staff, regulate clinic staff salaries, benefits and promotions, and otherwise significantly influence the professional judgment of clinic attorneys, in practice such a limited, non-interfering role by law school and university representatives is doubtful. Even where those in the governing body of a clinic have no intent to sway a clinic attorney's decisions, a requirement to consult on case selection decisions may inhibit the clinic attorney from handling certain controversial matters.²¹⁸ This is especially the case if the motivation for or effect of the advisory role is not pedagogical or resource related but instead the avoidance of controversial cases.

Case-by-case review or consultation by a law clinic governing body or attorney advisory committee also raises confidentiality concerns. As the ABA's committee on ethics observed, "[i]t is difficult to see how the preservation of confidences and secrets of a client can be held

216. See Comm. on Guidelines for Clinical Legal Educ., Ass'n of American Law Schools—Am. Bar Ass'n, Guidelines for Clinical Legal Education 90 (1980) (stating that "the Committee felt that it may be advisable for a school to have an advisory group which can assist when problems of professional responsibility arise. Such a group not only provides assistance; it can also help provide a buffer for the clinic."); Marsha Shuler, *Official Defends Tulane*, Advocate (Baton Rouge, La.), July 25, 1997, at 1A (reporting that Tulane Law School's dean defended the Tulane Environmental Law Clinic's involvement in the controversial Shintech case on the ground that a special review board of independent attorneys unanimously approved the case).

217. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (citing Canon 2 of the Model Code). The ABA's Standards for Providers of Civil Legal Services to the Poor states that all members of the governing body of a legal services provider, which includes law school clinics, should have a concern for the legal needs of persons with limited means and be committed to the delivery of high quality legal services that respond to the client's needs. Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 210, at 7.2-3.

218. See *Estep v. Johnson*, 383 F. Supp. 1323, 1326 (D. Conn. 1974) (warning of the influence of legal aid board members over staff salaries and promotions); N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 688 (1997) (identifying the ways that university trustees and non-clinical law school faculty may wield power or influence over a law clinic attorney's salary, tenure or working conditions); Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 210, at 7.2-5 cmt. (warning that members of the governing body of a legal aid organization can exert subtle influence through pointed inquiries to attorneys and staff).

inviolate prior to filing an action when the proposed action is described to those outside of the legal services office.”²¹⁹ Although a client impliedly consents to disclosure of confidences to other attorneys or staff in the law clinic in order to carry out the representation,²²⁰ there is no attorney-client relationship between the client and the governing body of a clinic or advisory committee and no such implied consent.²²¹ Further, any information sought by the oversight entity “must be reasonably required by the immediate governing board for a legitimate purpose and not used to restrict the office’s activities.”²²² Thus, unless the client has consented, prior consultation by law clinic attorneys with a law clinic’s governing hierarchy or outside committee must not result in disclosure of client confidences.²²³

Where client confidences are sought by the governing hierarchy or outside committee, the clinic attorney must fully disclose and discuss with the client the consequences of consenting to such disclosure,²²⁴ and the client’s consent must be completely voluntary, without a sense of pressure, guilt, or embarrassment.²²⁵ Receipt of services from the clinic cannot be conditioned on consenting to the disclosure.²²⁶

219. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974).

220. *Id.*; see Model Rules, *supra* note 100, at R. 1.6(a) & cmt. 5; Model Code, *supra* note 100, at EC 4-2; Restatement, *supra* note 100, § 60 cmts. f, g. See generally ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1428 (1979) (“It is the opinion of the Committee that absent a special agreement, the client employs the legal services office as a firm and not a particular lawyer.”).

221. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974). The ABA ethics committee held:

The members of the Advisory Committee should not be given confidences or secrets of the client, for there is no lawyer-client relationship between the client and the Advisory Committee or any member of it. The requirement of prior consultation [with the Advisory Committee] should recognize that the obligation of the [legal services] staff lawyers to preserve the confidences and secrets of clients applies to statements to and information conveyed to the advisory committee. . . .

Id. See generally *supra* text accompanying note 84 (noting that an associate dean, without permission from the client or clinic director, reviewed clinic files on a controversial case).

222. *Id.*

223. *Id.* For ABA ethics opinions discussing the limited scope of information that may be disclosed without the client’s consent, see ABA Formal Opinions 334, 358, 393 and 399 and Informal Opinions 1081, 1137, 1287, 1394 and 1443. See also Samuel J. Levine, *Legal Services Lawyers and the Influence of Third Parties on the Lawyer-Client Relationship: Some Thoughts from Scholars, Practitioners, and Courts*, 67 *Fordham L. Rev.* 2319, 2319-27 (1999).

224. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 399 (1996).

225. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1287 (1974).

226. See, e.g., State Bar of Mich., Standing Comm. on Prof’l and Judicial Ethics, Op. RI-210 (1994) (holding that a legal services office could not condition the receipt of services on the client’s granting of consent to disclose client confidences to the program’s non-lawyer director (citing N.H. Bar Ass’n, Comm. on Ethics, Formal Op. 1988-89/13 (1989)); Miss. State Bar, Ethics Comm., Op. 101 (1985) (holding that client must be assured that no sanctions will be imposed for refusal to agree to the release of

E. Interference as Contrary to Pro Bono Responsibilities

The obligation of attorneys to aid the legal profession in ensuring that legal services are fully available to the public presents an additional ethical constraint on interference in law school clinic case and client selection.

Under the Model Rules, “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay” for an attorney by providing direct pro bono services or, when direct pro bono service is not feasible, financial support to those providing free legal services.²²⁷ Because of the severe crisis in delivering legal services to those of limited means, the Model Rules were amended in 1993 to add the expectation that every lawyer make an additional financial contribution, beyond the individual attorney’s direct pro bono service obligation, “to support financially the very important work that is carried out by legal services programs throughout the country.”²²⁸ The preamble to the Model Rules further directs attorneys not just to devote professional time and resources but also to “use civic influence” to ensure equal access to justice for all those who cannot afford or secure adequate legal assistance.²²⁹

The Model Code similarly directs that every lawyer has a responsibility to provide legal services to those unable to pay and should assist the legal profession in fulfilling its duty to make legal services fully available.²³⁰ Not only should lawyers donate their legal services to those unable to pay but “[e]very lawyer should support all proper efforts to meet this need for legal services.”²³¹

In response to cutbacks in federal funding for legal services offices and to an increasing number of restrictions on the clients and cases that are eligible for federally-funded legal services, the ABA’s ethics committee declared that it is the ethical responsibility of lawyers “to do the best we can to provide appropriate and competent legal representation for indigent persons who will no longer be able to avail

confidential information to auditors from the Legal Services Corporation).

227. Model Rules, *supra* note 100, at R. 6.1 & cmt. 9.

228. ABA Standing Committee on Lawyers’ Public Service Responsibility, Committee Report Supporting 1993 Amendment to Rule 6.1, *reprinted in* Gillers & Simon, *supra* note 102, at 339-40; *see also* Model Rules, *supra* note 100, at R. 6.1 & cmt. 10 (stating that in addition to providing 50 hours of pro bono legal services or making a financial contribution of reasonably equivalent amount when pro bono service is not feasible, a lawyer should voluntarily contribute financial support for organizations that provide legal services to persons of limited means).

229. The preamble reads: “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 who because of economic or social barriers cannot afford or secure adequate legal counsel.” Model Rules, *supra* note 100, at pmb. ¶ 6.

230. Model Code, *supra* note 100, at Canon 2, EC 2-1, 2-25, 8-3.

231. *Id.* at EC 2-25; *see also id.* at EC 2-16 (stating that lawyers should support and participate in ethical activities designed to achieve the objective of providing necessary legal services to those unable to pay).

themselves of this source of legal assistance.”²³² Lawyers in every jurisdiction “should take all necessary actions to prevent the abandonment of indigent clients,”²³³ including supporting organizations providing free legal services offices where they exist and establishing them where they do not.²³⁴ According to the ethics committee, there is “no doubt” as to the ethical responsibility of an individual lawyer to assist in providing legal services to those in need.²³⁵

Thus, under rules of professional conduct, all members of the legal profession bear two pro bono service responsibilities: to render pro bono services and to support, financially and otherwise, the efforts of organizations to provide such services. Despite ethics rules and advisory ethics opinions urging the legal profession to make legal services available to all in need, lawyers have in many instances led attacks on law school clinical programs in an effort to deny access to the courts for those who are often the most in need of legal services.²³⁶ For these lawyers, their strategy focuses on denying clinic clients access to the courts, rather than letting courts decide legal disputes on the merits. Unfortunately for the clients affected, the ethics rules discussing pro bono obligations do not include mandatory language, but rather are hortatory and speak in terms of what a lawyer should

232. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996). As early as 1939, the ABA noted that free legal clinics were worthwhile and “should be encouraged.” ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 191 (1939).

233. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981). The ABA ethics committee stated:

The problem of reduced funding of legal services offices is a problem for all lawyers, not merely for those who have been employed by the legal services offices or who have volunteered their time to serve as members of the boards of directors of those offices. The legal profession has a clear responsibility to respond by helping to obtain funds for existing legal services programs and by providing free legal services to indigent clients who would be served by legal services offices were funding available. While not providing Disciplinary Rules, the Model Code leaves no doubt as to the professional responsibility of the individual lawyer

Id.

234. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996). The Board of Governors of the State Bar of California “encourages the participation of law schools and others to assist in the continued development and improvement of these programs to provide legal services to the disadvantaged. The Board of Governors encourages every lawyer to support all efforts to meet the need for legal services to the disadvantaged.” Cal. State Bar, Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1981-64 (1981) (quoting the November 20, 1981 resolution of the Board of Governors). Similarly, the ABA's House of Delegates passed a resolution calling on the legal profession to increase the delivery of free legal services to persons raising environmental justice claims and for the expansion of law school clinical programs to address environmental justice problems. ABA House of Delegates, Resolution on Environmental Justice (Aug. 11, 1993), reprinted in 118 Ann. Rep. A.B.A., No. 2, at 43 (1993).

235. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

236. See *supra* notes 92-93 and accompanying text.

do. Thus, failure to comply with these pro bono publico ethical precepts will not result in disciplinary action.²³⁷

In contrast, law schools, and their faculties, who also bear this pro bono professional responsibility, address it by providing free legal services through law clinics, school-supported voluntary pro bono programs, and pro bono requirements for graduation.²³⁸ The huge numbers of low and moderate-income persons with unmet civil legal needs led one commentator to argue that the need for law school clinic programs has rarely been greater.²³⁹ Law school clinics are the last and only lawyer in town for most of the clients they serve. Thus, restrictions imposed on clinic case or client selection do not simply drive the needy client to another lawyer outside the law school but deny legal assistance altogether.²⁴⁰

In many cases, this denial of access to all legal representation is precisely the result sought by those advancing the law clinic restrictions.²⁴¹ For a lawyer who is part of the governing body of a law school clinic to assist or accede to these efforts to deny legal assistance is contrary to the attorney's public service responsibilities under the rules of professional responsibility, which include the obligation to support efforts of others to provide pro bono services. Acquiescence to restrictions that are motivated by a desire to deny legal assistance also contravenes the "most sensitive ethical and professional standards" expected by the ABA and AALS of all law professors.²⁴²

237. See Model Rules, *supra* note 100, at R. 6.1 cmt. 12 ("The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.")

238. Section of Legal Educ. and Admissions to the Bar, *supra* note 2, at Standard 302(e) ("A law school should encourage and provide opportunities for student participation in pro bono activities."). The latest amendments to the Model Rules clarify that law firms, not just individual lawyers, should take steps to provide pro bono legal services: "Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule." Model Rules, *supra* note 100, at R. 6.1 cmt. 11.

239. Dubin, *supra* note 1, at 1475. The ABA estimated that the legal problems of 71% of low-income and 61% of moderate-income households are never addressed by the civil justice system. ABA Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans 15* (1994). Even before the most recent cuts in funding for the Legal Services Corporation, the legal services office in Fresno, California, explained that it could only serve the needs of about one-fifth of the people who need its help. Jeanie Borba, *Agency Defends the Needy*, Fresno Bee, Apr. 7, 1994, at B1.

240. Unless, of course, the client has a Sixth Amendment right to counsel and will be provided, at the expense of the government, with another criminal defense attorney.

241. See Kuehn, *supra* note 1, at 69-75 (noting efforts of attorneys in Louisiana to prevent clients of the Tulane Environmental Law Clinic from gaining access to any legal representation); A.F. Conard, *supra* note 90, at 204 (arguing that critics of the law clinic were upset that the clinic was bringing suits that would not be brought at all if the clinic did not exist).

242. Statement of Good Practices, *supra* note 177; see also *supra* notes 173-79 and accompanying text.

Lawyers not part of a law school governing body similarly breach their pro bono ethical responsibilities when their interference in law clinic case and client selection is motivated by politics, economics, or ideology and results in a denial of legal assistance to needy clinic clients. The history of attacks on law clinics reveals that attorneys attacking law school representation of certain clients or cases have not explained how the potential clients would be able to find an alternative source of representation, nor stepped forward to volunteer their time or financial resources for such representation.²⁴³ Absent such efforts to provide alternative legal representation, these attorneys have violated their “clear responsibility” to respond to funding cuts and restrictions on free legal services by providing alternative legal services or financial funding.²⁴⁴

Thus, efforts of lawyers to impose law clinic case and client selection restrictions in order to deny access to legal representation, while not illegal, are both unprofessional and contrary to long-standing ethics rules.

F. *Duty Not To Prejudice the Administration of Justice*²⁴⁵

Attacks intended to deter or deny a law clinic from providing legal representation to certain clients or causes, or to impede the independent judgment of a law clinic attorney, threaten the accomplishment of justice. For, as the Model Code states, “[t]he fair administration of justice requires the availability of competent lawyers.”²⁴⁶

Both the Model Rules and Model Code state that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”²⁴⁷ Case law generally holds that this

243. See, e.g., Kuehn, *supra* note 1, at 121-22 & nn.421-24 (reporting that lawyers leading or supporting attacks in various states on the pro bono activities of law clinics and law school professors failed to propose or provide an alternative source of legal representation for the clients aided by the law schools).

As a profession, lawyers average less than a half an hour of work per week and under half a dollar per day in support of pro bono legal services. Deborah L. Rhode, *Access to Justice*, 69 *Fordham L. Rev.* 1785, 1810 (2001). What little pro bono assistance given by members of the bar goes primarily to popular, uncontroversial clients and causes, while unpopular or controversial clients and causes go without. Norman W. Spaulding, Note, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 *Stan. L. Rev.* 1395, 1420 (1998).

244. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

245. Portions of this and the next section were previously published in Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 *Harv. Envtl. L. Rev.* 417 (2002).

246. Model Code, *supra* note 100, at EC 8-3; see also Model Rules, *supra* note 100, at pmb. ¶ 8 (noting that when an opposing party is well represented, a lawyer can be a zealous advocate for the other side and at the same time assume that justice is being done).

247. Model Rules, *supra* note 100, at R. 8.4(d); Model Code, *supra* note 100, at DR 1-102(A)(5).

phrase does not require that the attorney's conduct take place in court or in the presence of the judge, nor must it affect an ongoing proceeding or arise out of the attorney's representation of a particular client.²⁴⁸ Further, words alone can be deemed prejudicial to the administration of justice.²⁴⁹ A lawyer's role as a zealous advocate for a client does not excuse violations of the rule.²⁵⁰ "A showing of actual prejudice to the administration of justice is not required to establish a violation Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice."²⁵¹ Thus, attacks on law clinics with the effect or reasonable likelihood of preventing certain persons or causes from obtaining legal representation or of interfering with a clinic lawyer's independent professional judgment, even if done at the request of a client, may constitute actions prejudicial to the administration of justice.²⁵²

A number of problems may prevent the application of this rule to attacks on clinics. The Model Rules and some state rules of professional conduct require that for bias or discrimination to prejudice justice, it must be manifested in the course of representing a client.²⁵³ A number of court decisions also require a showing that the conduct or words adversely affected the administration of justice in a

248. Hazard & Hodes, *supra* note 100, at 65-22 n.5 (citing *Hirschfeld v. Superior Court*, 908 P.2d 22, 28, 30 (Ariz. Ct. App. 1985), *Black v. Blount*, 938 S.W.2d 394, 401 (Tenn. 1996), and *In re A.M.E.*, 533 N.W.2d 849, 851 (Minn. 1995)); *see also* ABA/BNA Lawyers' Manual on Prof'l Conduct, *supra* note 102, at 101:504 (noting that an attorney may violate the rule regardless of whether the action directly interferes with a legal proceeding and citing *In re Keller*, 502 N.W.2d 504 (N.D. 1993), and *In re Manson*, 676 N.E.2d 347 (Ind. 1997)).

249. *See, e.g.*, *Florida Bar v. Saylor*, 721 So. 2d 1152, 1155 (Fla. 1998) (holding that the rule prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice requires lawyers to refrain from making statements that knowingly disparage or humiliate other lawyers); *In re Edwall*, 557 N.W.2d 343 (Minn. 1997) (disciplining a lawyer for harassing and threatening phone calls and letters to his wife's attorney and for threatening to sue her attorney); *Comm. on Legal Ethics v. Douglas*, 370 S.E.2d 325, 329 (W. Va. 1988) (observing that most of the disciplinary cases involving attorneys speaking critically of the judiciary or judicial system are brought under the "prejudicial to the administration of justice" misconduct rule). The Model Code provides that "[h]aranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system." Model Code, *supra* note 100, at EC 7-37.

250. Annotated Model Rules, *supra* note 139, at 598-99 (citing *In re Williams*, 414 N.W.2d 394 (Minn. 1987), and *In re Vincenti*, 704 A.2d 927 (N.J. 1998)).

251. N.C. Rules of Prof'l Conduct R. 8.4 cmt. 3 (2002).

252. *See* Finman & Schneyer, *supra* note 161, at 135 (noting that the proscription on conduct that is prejudicial to justice might be invoked to prohibit board members of a legal services office from basing considerations of who can be represented on the identity of the adverse parties or the controversial nature of the subject matter); Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. New Eng. L. Rev. 49, 58 n.44 (1998) ("An argument can be made that the refusal to represent a client in a situation where no other competent attorney is available might impact on the integrity of the judicial process.").

253. *See, e.g.*, Model Rules, *supra* note 100, at R. 8.4 cmt. 3; Az. Rules of Prof'l Conduct ER 8.4 cmt. (2002); Mo. Rules of Prof'l Conduct R. 4-8.4(g) (2002).

particular legal proceeding.²⁵⁴ On the other hand, a number of states prohibit bias or prejudice in the practice of law, operation of a law practice, or professional capacity, language broad enough to cover actions of a lawyer that are not related to the representation of a particular client or to a particular proceeding.²⁵⁵

The ABA recently extended the “prejudicial to the administration of justice” prohibition in the Model Rules explicitly to prohibit bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status that is prejudicial to the administration of justice.²⁵⁶ As interpreted by the comment, this rule generally prohibits actions or speech that are also regulated by other laws, but does not specifically address bias or prejudice toward the political or social views of a client or cause.²⁵⁷ Nevertheless, in prohibiting derogatory comments about a person’s socioeconomic status, the ABA has indicated that otherwise protected speech can merit disciplinary action when a lawyer, acting in a professional capacity, knowingly uses words or conduct for the purpose of interfering with the ability of the judicial system to administer justice.²⁵⁸

Application of the “prejudicial to the administration of justice” rule to punish lawyers for what they say, as opposed to what they do, to restrict the ability of an attorney to provide legal representation raises significant First Amendment problems.²⁵⁹ Public criticism of an opposing attorney or law clinic program would generally be protected speech.²⁶⁰ On the other hand, false statements, or those made with

254. See, e.g., *United States v. Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996); *State v. Nelson*, 504 P.2d 211, 215 (Kan. 1972).

255. See, e.g., Cal. Rules of Prof’l Conduct R. 2-400(B) (2002) (prohibiting discrimination in the management or operation of a law practice); Fla. Rules of Prof’l Conduct R. 4-8.4(d) (2002) (prohibiting discriminatory conduct in connection with the practice of law); N.J. Rules of Prof’l Conduct R. 8.4(g) (2002) (prohibiting lawyers from engaging, in a professional capacity, in conduct involving discrimination); N.Y. Code of Prof’l Responsibility DR 1-102(A)(6) (2001) (prohibiting lawyers from discriminating in the practice of law); Ohio Code of Prof’l Responsibility DR 1-102(B) (2002) (prohibiting a lawyer from engaging, in a professional capacity, in conduct involving discrimination).

256. Model Rules, *supra* note 100, at R. 8.4 cmt. 3.

257. See *id.*

258. See *id.* (prohibiting words or conduct that manifests bias or prejudice based upon socioeconomic status); see also Fla. Rules of Prof’l Conduct R. 4-8.4(d) (2002) (prohibiting conduct that disparages, humiliates, or discriminates against parties or other lawyers on any basis).

259. Ronald D. Rotunda, *Can You Say That?*, *Trial*, Dec. 1994, at 19-20; see also Hazard & Hodes, *supra* note 100, at 65-23 n.6.

260. *In re Snyder*, 472 U.S. 634, 646 (1985) (“We do not consider a lawyer’s criticism of the administration of the [Criminal Justice Act] or criticism of inequities in assignments under the Act as cause for discipline or suspension.”); *In re Hinds*, 449 A.2d 483, 499 (N.J. 1982) (“Because DR 1-102(A)(5) applies to an attorney in his capacity as an ordinary citizen, the standard for invoking the [disciplinary] rule’s sanctions against [out of court statements criticizing a judge’s conduct] should be that

reckless disregard as to their truth or falsity, and statements intended to harass, threaten, or ridicule other attorneys or parties may not be protected.²⁶¹

Application of the rule to attacks on law clinics also is susceptible to arguments that it is unconstitutionally vague or overbroad. Generally, courts have held that the “prejudicial to the administration of justice” standard is not unconstitutionally vague because the standard is considered in light of the traditions of the legal profession and its established practices, and as a rule written by and for members of the bar, it need not meet the precise standards of clarity that might be required for rules of conduct for laymen.²⁶² This justification depends, in part, on the argument that lawyers “have the benefit of guidance [as to the term’s scope] provided by case law, court rules and the ‘lore of the profession.’”²⁶³

of a ‘clear and present danger’ or, to use an alternative formulation, a ‘serious and imminent threat’ to the fairness and integrity of the judicial system.”); *State ex rel Okla. Bar Ass’n v. Porter*, 766 P.2d 958, 965 (Okla. 1988) (noting that “an attorney is free to criticise [sic] the institution of the law in this country or the wisdom and efficacy of the rules of law which control the exercise of judicial power”).

261. *Fla. Bar v. Sayler*, 721 So. 2d 1152, 1154-55 (Fla. 1998) (holding that the First Amendment does not protect attorneys who make harassing or threatening remarks); *Comm. on Legal Ethics v. Douglas*, 370 S.E.2d 325, 332 (W. Va. 1988) (noting that “statements [of lawyers] that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection”).

Reviewing the case law on lawyer speech, Professor Kathleen Sullivan observed: “When speaking in clearly public capacities . . . lawyers receive relatively robust free speech protection. When speaking in capacities that might adversely implicate the administration of justice or perception of administration of justice by the government . . . the Court has regarded the government as freer to place conditions on its sponsorship.” Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *Fordham L. Rev.* 569, 587 (1998); see also *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1442 (9th Cir. 1995) (observing that the Supreme Court has held that speech otherwise entitled to full constitutional protection may be sanctioned if it prejudices the administration of justice but the prejudice must be shown to be highly likely).

262. *In re Keiler*, 380 A.2d 119, 126 (D.C. 1977); *Douglas*, 370 S.E.2d at 328-29; ABA/BNA *Lawyers’ Manual on Prof’l Conduct*, *supra* note 102, at 101:502 (stating that “in general, courts have upheld this provision against attacks of unconstitutional vagueness and overbreadth”). “The debate leading to adoption of Rule 8.4(d) by the ABA House of Delegates made clear that it was intended to address violations of well-understood norms and conventions of practice only.” Hazard & Hodes, *supra* note 100, at 65-12.

263. *Howell v. State Bar of Tx.*, 843 F.2d 205, 208 (5th Cir. 1988) (quoting *In re Snyder*, 472 U.S. 634, 645 (1985)); see also *In re Bithoney*, 486 F.2d 319, 324 (1st Cir. 1973). The ABA House of Delegates has identified the lawyer’s duties to exercise independent legal judgment for the benefit of the client and to promote access to justice as two of the six core values of the legal profession. ABA House of Delegates, Resolution 10F (July 11, 2000), reprinted in Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 *Wake Forest L. Rev.* 133 app. at 164 (2001).

Ethics rules' longstanding position that unpopular clients and causes should not be denied legal representation and clear proscription against efforts to interfere with an ongoing attorney-client relationship should provide attorneys with fair notice that attacks on law clinic representation may subject the attacking attorney to discipline. However, it could also be argued that in the absence of previous court or ethics decisions finding attacks on other attorneys to be improper, application of the "prejudicial to the administration of justice" standard is unfair.²⁶⁴

Consequently, where the words or conduct are aimed at preventing a law clinic from providing controversial clients with access to the judicial system or at interfering with an ongoing legal relationship, attacks by an attorney that are intended to deny or deter a law clinic from providing independent legal assistance could be considered prejudicial to the administration of justice and might survive a constitutional challenge. Nonetheless, a review of reported cases and state ethics opinions did not uncover any instance where an attorney's attempt to induce another attorney to reject or diminish the representation of a defenseless or controversial client was alleged to be prejudicial to the administration of justice, an absence that is not surprising given the lack of a specific ethics rule condemning such attacks and the First Amendment concerns mentioned above.

G. Prohibition on the Use of Means That Have No Substantial Purpose Other Than To Embarrass, Harass or Delay a Third Person

Where an attorney is engaging in attacks on law clinic representation in the course of representing a client a final ethical proscription also may apply.²⁶⁵ The Model Rules provide that in the course of representing a client "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."²⁶⁶ Similarly, the Model Code prohibits a lawyer from

264. See *In re Ruffalo*, 390 U.S. 544, 556 (1968) (White, J., concurring) (arguing that a court "may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct"); *In re Finkelstein*, 901 F.2d 1560, 1565 (11th Cir. 1990) (holding that while the conduct of the lawyer in writing a threatening and disruptive letter to opposing counsel may have been an act of "unlawyerlike rudeness" and offensive to the trial court, disbarment was improper because the lawyer was not on notice that such conduct would lead to his suspension).

265. Courts have shown a readiness to find that certain kinds of verbal attacks encompassed within the prohibition on conduct prejudicial to the administration of justice are also encompassed by Model Rule 4.4(a). ABA/BNA Lawyers' Manual on Prof'l Conduct, *supra* note 102, at 71:103-04 (citing numerous cases).

266. Model Rules, *supra* note 100, at R. 4.4(a); see also *id.* at R. 1.3 cmt. 1 ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *id.* at pmb. ¶ 5 ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."); Restatement,

taking action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.²⁶⁷ These prohibitions, intended to temper the zeal with which a lawyer is permitted to represent a client,²⁶⁸ are not limited to activities in litigation or the courtroom,²⁶⁹ and include conduct directed at opposing counsel and opposing parties.²⁷⁰

Extra-judicial attacks on law clinics intended to deny or delay clients access to clinic representation or to induce a clinic attorney to render less than independent professional representation would lack a substantial purpose other than to embarrass, delay, or burden the clinic attorney or her client.²⁷¹ Because such efforts are prohibited by imperative rules of professional conduct, they could constitute misconduct under the Model Rules or Model Code. For instance, lawyers prompting or participating in an audit or other investigation of a law school clinic that seeks to intimidate or interfere with the clinic's legal representation could be viewed as violating, or assisting or inducing another to violate, the ethical prohibition on use of means that have no substantial purpose other than to embarrass, delay, or burden a third person.²⁷² Similarly, filing or threatening to file an

supra note 100, § 106 (prohibiting a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person).

267. Model Code, *supra* note 100, at DR 7-102(A)(1). "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." *Id.* at EC 7-10; *see also id.* at EC 7-37 ("Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.").

268. ABA/BNA Lawyers' Manual on Prof'l Conduct, *supra* note 102, at 71:101.

269. Annotated Model Rules, *supra* note 139, at 424; Hazard & Hodes, *supra* note 100, at 40-4. The Restatement limits the duty of an advocate to avoid harassing a third person to situations where an attorney is "representing a client in a matter before a tribunal." Restatement, *supra* note 100, § 106.

270. *See, e.g.,* Castillo v. St. Paul Fire & Marine Ins. Co., 828 F. Supp. 594, 602-03 (C.D. Ill. 1992); Fla. Bar v. Adams, 641 So. 2d 399, 400 (Fla. 1994); *In re Black*, 941 P.2d 1380, 1385 (Kan. 1997); La. State Bar Ass'n v. Harrington, 585 So. 2d 514, 516-17 (La. 1990); *In re Belue*, 766 P.2d 206, 209 (Mont. 1988); Principe v. Assay Partners, 586 N.Y.S.2d 182, 187-88 (N.Y. Sup. Ct. 1992).

271. "Substantial" is defined in the Model Rules as a "material matter of clear and weighty importance." Model Rules, *supra* note 100, at R. 1.0(l). As an example of lack of a substantial purpose for conduct that results in embarrassment, delay, or burden, the Restatement explains that a delay in a trial date in order to gather additional relevant evidence is permissible, but a delay to permit a client to extract a nuisance-value settlement is improper. Restatement, *supra* note 100, § 106 cmt. e.

272. Legal services offices that have been audited by the Legal Services Corporation as a result of complaints or pressure from opposing parties or politicians allege that such audits smack of retaliation and harassment. Michael Doyle & Lesli A. Maxwell, *Legal Services Group Still Being Audited*, Modesto Bee (Modesto, Cal.), Mar. 1, 2002, at B4 (describing Legal Services Corporation audit of California Rural Legal Assistance after request by congressman upset over lawsuits); *see also* Molly Moore, *Speaking for Long-Ignored Workers*, Wash. Post, Aug. 29, 1985, at A21 (describing Legal Services Corporation audit of Maryland Legal Aid after complaints from defendants). The audits have the effect, and the local legal services providers

ethics complaint against a law school clinic attorney to gain an advantage in a pending case or to intimidate the attorney from providing legal representation would lack a substantial legitimate purpose.²⁷³ However, the attorney engaging in such tactics may argue under the Model Rules' language that the action had some other "substantial purpose" and, therefore, does not subject the attorney to discipline or, in some instances, that it is otherwise protected speech under the First Amendment.²⁷⁴

III. LIMITATIONS ON MEANS OF REPRESENTATION

Law school clinic programs may face interference not just with whom they may represent or what kinds of cases they may handle, but also limitations on how they may represent a client. These practice restrictions on what can be done for a client may be imposed as a condition of receiving public funds, imposed by the law school or university to avoid political or funding controversies, or voluntarily imposed by the law clinic as ways to avoid possible controversies, allocate scarce clinic resources, or advance educational goals. Regardless of the source or motivation, limitations on the means of representation a law clinic provides the client raise case and client selection ethical concerns.

A. *Types and Effects of Practice Restrictions*

Some law student practice rules prohibit law clinics from seeking statutory attorney's fees.²⁷⁵ At least one state student practice rule

argue the substantial purpose, of diverting lawyers from preparing cases and slowing fund raising. Doyle & Maxwell, *supra*; Philip Shenon, *Federal Audits of Legal Aide at Issue*, N.Y. Times, Nov. 18, 1985, at A19.

273. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 383 (1994) (noting that such a threat would "be improper if the professional misconduct is unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice"); see also, e.g., D.C. Rules of Prof'l Conduct R. 8.4(g) (2002) (making it professional misconduct for a lawyer to "seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter"); Me. Code of Prof'l Responsibility R. 3.6(c) (2002) (prohibiting a lawyer from presenting, or threatening to present, criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter).

274. See ABA/BNA Lawyers' Manual on Prof'l Conduct, *supra* note 102, at 71:103-04 (identifying cases where attorneys have been sanctioned under Model Rule 4.4 for harassing or intimidating opposing counsel). While the First Amendment may provide a defense in some instances, numerous courts have sanctioned lawyers for verbal attacks on opposing parties or counsel. See, e.g., *In re Warrick*, 44 P.3d 1141, 1145-46 (Idaho 2002); *In re Bechhold*, 771 P.2d 563, 563-64 (Mont. 1989); *State ex rel. Neb. State Bar Ass'n v. Michaelis*, 316 N.W.2d 46, 52-55 (Neb. 1982); *In re Vincenti*, 554 A.2d 470, 473-74 (N.J. 1989).

275. See, e.g., E., M. & W. La. U.S. Dist. Ct. Unif. R. 83.2.13 (2001) (limiting law student appearances to civil cases where fees are not provided for or sought). Many

prevents student attorneys from lobbying on behalf of clients before state or federal legislatures.²⁷⁶ Both of these court-imposed student practice rule restrictions may limit the legal representation that a clinic client would otherwise receive from an attorney.

Clinic funding sources may also impose restrictions. In the past, the Legal Services Corporation (“LSC”) provided grants for law clinic programs, which often served as the chief source of government-funded civil legal assistance in the state.²⁷⁷ Over time, local legal services offices separated from law schools.²⁷⁸ Consequently, at present, the LSC does not provide any direct grants to law clinic programs.²⁷⁹ However, some law clinic programs work closely with local legal services offices and are even subgrantees of legal services offices that receive LSC funds.²⁸⁰

Since Congress established the LSC in 1974, the governing statute has prohibited lobbying activities and class action representation by LSC-funded lawyers unless the activities were determined by the grant recipient to be necessary to ensure that a client was properly represented.²⁸¹ Prior to 1996, LSC recipients were allowed to use non-

student practice rules prohibit a law clinic student from asking for or receiving compensation or remuneration of any kind for legal services. *See, e.g.*, Ky. Sup. Ct. R. 2.540 (2002); Md. Bar Admission R. 16 (2002); S.C. App. Ct. R. 401 (2002). If a court or law clinic program applies this provision in a way that prevents or deters the clinic from asking for statutory attorney’s fees for the student’s work (rather than asking for fees for student work but not using the award to compensate the student attorney), the rule would have the effect of limiting the receipt of fees for law clinic work.

276. La. Sup. Ct. R. XX, § 11 (2002).

277. *See, e.g.*, *Trister v. Univ. of Miss.*, 420 F.2d 499, 500-01 (5th Cir. 1969); *Blaze*, *supra* note 35, at 952-53, 959 (recounting history of law clinics at the University of Tennessee); *Stevens & Maxey*, *supra* note 14, at 344-45 (explaining early history of law clinic at University of Mississippi); Louise G. Trubek, *U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective*, 5 Md. J. Contemp. Legal Issues 381, 386 (1994) (explaining the LSC’s special program to fund law clinic programs).

278. *See, e.g.*, *Trister*, 420 F.2d at 501; *Blaze*, *supra* note 35, at 960.

279. E-mail from Pat Hanrahan, Legal Services Corporation, to Dallis Nordstrom (May 25, 2001) (on file with authors).

280. *See, e.g.*, Analisa Nazareno, *Area Legal Aid Entities Merge*, San Antonio Express-News, July 6, 2002, at 1B (reporting that head of Texas Rural Legal Aid wants to expand the law clinic it already has at St. Mary’s University Law School to involve students at the University of Texas Law School); Telephone Interview with Juan Correa, Director, Community Law Office, Inter American University of Puerto Rico School of Law (May 14, 2002) (describing Legal Services Corporation funding of law school’s law clinics); Telephone Interview with David Moss, Professor, Wayne State University Law School (Apr. 23, 2002) (describing law school’s relationship with LSC grantee Free Legal Aid Clinic); Telephone Interview with Lawrence Pivnick, Professor and Director of Legal Clinic, University of Memphis Cecil C. Humphreys School of Law (Apr. 18, 2002) (explaining law clinic’s relationship with LSC grantee Memphis Area Legal Services); Telephone Interview with Larry Spain, Professor, Texas Tech University School of Law (Apr. 23, 2002) (describing funding arrangement between law clinic at University of North Dakota School of Law and state legal services office).

281. 42 U.S.C. §§ 2996e(d)(5), 2996f(a)(5) (2000). Congress also has imposed

LSC funds for whatever purpose these other funding entities provided.²⁸² Thus, for example, a class action could be filed by an LSC grant recipient if the class action litigation was funded by non-LSC moneys.

In 1996, Congress imposed significant new restrictions on the ability of attorneys working in offices receiving LSC funds to advocate for their clients. The new limitations stipulate that none of the funds appropriated to the LSC, and subsequently given to local legal services providers, may be used by grant recipients: to attempt to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of any legislative body;²⁸³ to attempt to influence the issuance, amendment, or revocation of any executive order, regulation or other statement of general applicability by any agency, or any administrative adjudicatory proceeding designed for the formulation or modification of any agency policy of general applicability;²⁸⁴ for the initiation or participation in any class action suit;²⁸⁵ to claim, collect, or retain any attorneys fees, even if fees are otherwise authorized by statute;²⁸⁶ or in the representation of any client seeking specific relief from a welfare

restrictions on the types of cases that LSC-funded lawyers may handle, including bans on cases involving abortion, criminal matters, desegregation, redistricting, and military service, and restrictions on who may be represented, including prohibitions on representing certain aliens, prisoners, and public housing residents charged with or convicted of drug crimes. *See* 42 U.S.C. § 2996f(b) (2000); *see also* 45 C.F.R. §§ 1613, 1615, 1626, 1632, 1633, 1637 (2002).

282. 42 U.S.C. § 2996i(c) (1994).

283. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(4), 110 Stat. 1321-53 (1996); *see also* 45 C.F.R. § 1612 (2002). Restrictions on lobbying could be viewed as limitations on the types or categories of cases that LSC recipients may undertake rather than as limitations on the methods of representing a client. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (viewing restrictions on legislative activity as a permissible limit on the categories of legal services that a legal aid society may undertake for a client but also noting that where certain rights of indigent clients can only be asserted through legislative means "there can be no limitation on the availability of the staff lawyer to give advice in connection with such legislative means"). Professor Paula Galowitz argues that restrictions on lobbying should be treated like those on class actions because both are remedies. Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. Pub. Int. L.J. 39, 70 n.162 (1994).

284. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(2), (3), 110 Stat. 1321-53 (1996); *see also* 45 C.F.R. § 1612 (2002).

285. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321-53 (1996); *see also* 45 C.F.R. § 1617.3 (2002). LSC-funded lawyers are even prevented from participating as *amicus curiae* or co-counsel in a class action proceeding. 45 C.F.R. § 1617.2(b)(1) (2002).

286. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(13), 110 Stat. 1321-55 (1996); *see also* 45 C.F.R. § 1642 (2002).

agency if that representation involves an effort to challenge existing law.²⁸⁷

Unlike past LSC restrictions, the 1996 limitations extend to all of the activities at an entity receiving LSC funds, even if the activity in question is funded entirely from non-LSC sources.²⁸⁸ In response to constitutional concerns, the LSC issued a “program integrity regulation” that loosened the restrictions by allowing an LSC-funded program to finance with non-LSC funds a “physically and financially separate” legal affiliate that could provide prohibited legal services to indigent clients.²⁸⁹ This separate program is allowed, provided the LSC recipient retains “objective integrity and independence” from the affiliate organization that engages in restricted activities.²⁹⁰

Interest on Lawyer Trust Account (“IOLTA”) programs, which exist in all states and the District of Columbia as a vehicle for generating moneys for civil legal services for the poor,²⁹¹ provide funding for many law school clinical programs.²⁹² A number of

287. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321-55 (1996); *see also* 45 C.F.R. § 1639 (2002).

288. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(2)(B), 110 Stat. 1321-56 (1996); *see also* 45 C.F.R. § 1610.8 (2002). A grantee that receives LSC funds is prohibited from accepting funds from any other source unless it notifies the source that the other funds may not be expended for any purpose prohibited by LSC legislation. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(1), 110 Stat. 1321-56 (1996).

Alan Houseman explained the use of non-LSC funds for prohibited activities after the 1996 amendments:

The restrictions on attorneys’ fees, class actions, and welfare reform challenges apply to all funds of [an LSC] recipient and have no substantive or procedural exceptions. The restrictions on rulemaking and lobbying are not absolute. Recipients can use non-LSC funds to comment in public rulemaking proceedings, which are virtually all rulemaking proceedings. Recipients can also use non-LSC funds to respond to a written request for information or testimony from a government agency, legislative body or committee, or a member of such agency, body or committee, if the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.

Houseman, *supra* note 203, at 2201.

289. *See* 45 C.F.R. § 1610.8(a) (2002); Burt Neuborne & David Udell, *Legal Services Corporation v. Velazquez*, Clearinghouse Rev., May-June 2001, at 83, 86-87; David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 Yale L. & Pol’y Rev. 337, 338 (1998).

290. 45 C.F.R. § 1610.8(a) (2002). “Objective integrity and independence” is determined by whether the LSC grantee and non-LSC grantee are legally separate, whether the non-LSC organization receives any LSC funds, and whether the organizations are physically and financially separate. *Id.*

291. Brennan J. Torregrossa, Note, *Washington Legal Foundation v. Texas Equal Access to Justice Foundation: Is There an Iota of Property Interest in IOLTA?*, 42 Vill. L. Rev. 189, 191 (1997); ABA Commission on Interest on Lawyers’ Trust Accounts, *What is IOLTA?*, at <http://www.abanet.org/legalservices/iolta/ioltback.html> (last visited Jan. 23, 2003).

292. *See, e.g.*, Alabama Law Foundation, *2001 IOLTA Grants*, at <http://www.alfinc.org/events.html> (last visited Jan. 24, 2003) (listing IOLTA grant to

IOLTA programs restrict the legal services that grant recipients may provide eligible clients, with some mirroring the restrictions on LSC funding. For instance, many IOLTA programs prohibit legal assistance with respect to any fee-generating case.²⁹³ Others prohibit the use of IOLTA funds for lobbying to influence an executive or administrative order, regulation or legislation, although some programs, like the pre-1996 LSC restrictions, allow such activity if the lobbying is part of needed representation on a client's particular case or claim.²⁹⁴ Some states forbid the use of IOLTA funds for class action lawsuits.²⁹⁵

the University of Alabama's Disability Litigation Clinic); IOLA Fund of the State of New York, *Approximately \$12.2 Million in IOLA Funds Awarded*, http://www.iola.org/iola/2001_Grants_List.PDF (last visited Jan. 24, 2003) (listing IOLA grants to four law school clinical programs); Lawyers Trust Fund of Illinois, *Current Grants for Civil Legal Services: FY 2003*, at <http://www.ltf.org/grants/list.htm> (last visited Jan. 24, 2003) (listing IOLTA grants to two Illinois law schools); Maryland Legal Services Corporation, *MLSC Grantee Profiles*, at <http://www.mlsc.org/mlscgrantees.htm> (last visited Jan. 24, 2003) (listing state-appropriated IOLTA grant to one Maryland law school clinical program); PA IOLTA Board, *Grant Awards 2001-2002*, at <http://www.paiolta.org/grants/legawa01.html> (last visited Jan. 24, 2003) (listing IOLTA grants of over \$1.8 million to seven Pennsylvania law schools); Texas Equal Access to Justice Foundation, *2002 TEAJF Grantees*, at <http://www.txiolta.org/grantees.html> (last visited Jan. 24, 2003) (listing IOLTA grants to four law school clinics and state-appropriated legal services funds to two clinics).

293. Some IOLTA programs prohibit recipients from using funds to provide legal assistance in a case in which a fee reasonably may be expected unless the recipient demonstrates that other adequate representation is unavailable. *See, e.g.*, PA IOLTA Board, *IOLTA Grant Provisions*, available at www.paiolta.org/grants/grprovis.htm (last visited Jan. 24, 2003); Texas Equal Access to Justice Foundation, *Rules Governing the Operation of the Texas Equal Access to Justice Foundation*, available at <http://www.txiolta.org/rules.html> (last visited Jan. 24, 2003). Other IOLTA programs, however, contain a blanket prohibition on the use of funds to provide legal assistance with respect to any fee-generating case. *See, e.g.*, Cal. Bus. & Prof. Code § 6223 (2002); Md. Code Ann., Legal Officials § 45J(b)(1) (2000); IOLA Fund of the State of New York, *IOLA Grants Programs*, available at http://www.iola.org/iola/IOLA_grants_programs.htm (last visited Jan. 24, 2003); Mississippi Bar Foundation, *Interest on Lawyers Trust Accounts Program*, available at <http://www.msbar.org/ioltagrant.html> (last visited Jan. 24, 2003). The Texas and Pennsylvania IOLTA rules specify that the anticipated fee cannot come from an award from public funds or the opposing party. PA IOLTA Board, *supra*; Texas Equal Access to Justice Foundation, *supra*. Nevada interprets its IOLTA prohibition on providing legal assistance for fee generating cases to allow court-awarded fees only if the party did not ask for the fees. E-mail from Suzan Baucum, Executive Director, Nevada Law Foundation, to Robert R. Kuehn (Apr. 23, 2002) (on file with authors).

294. *See, e.g.*, Md. Code Ann., Legal Officials § 45J(b)(4) (2000) (prohibiting activities to influence executive orders, referenda, or legislation); Iowa Lawyer Trust Account Commission, *Grant Criteria and Guidelines*, available at <http://www.judicial.state.ia.us/regs/grantcrit/asp> (last visited Jan. 24, 2003) (prohibiting lobbying or legislative advocacy); PA IOLTA Board, *IOLTA Grant Provisions*, available at <http://www.paiolta.org/Grants/grprovis.htm> (last visited Jan. 24, 2003) (prohibiting lobbying unless "in the provision of legal services to a client on a particular application, claim, or case, which directly involves that client's legal rights and responsibilities"); Texas Equal Access to Justice Foundation, *Rules Governing the Operation of the Texas Equal Access to Justice Foundation*, available at

State legislatures and federal agencies also have imposed practice restrictions on the activities of lawyers working for government-funded legal assistance programs.²⁹⁶ At least one state grant program restricts the remedies available in suits against a government entity to declaratory and injunctive relief and prohibits claims for actual or punitive damages;²⁹⁷ at least one federal agency sought to mandate that a grantee could not file suit against the agency unless the grantee's attorney first attempted to informally resolve the matter.²⁹⁸ The extent to which law school clinical programs receive state or federal funds with such additional practice restrictions is not known, although at least two law clinic programs receive funds subject to such restrictions.²⁹⁹

<http://www.txiolta.org/rules.html> (last visited Jan. 24, 2003) (prohibiting the use of funds for "lobbying for or against any candidate or issue").

295. See, e.g., Md. Code Ann., Legal Officials § 45J(b)(6) (2000); Lawyers Trust Fund of Illinois, *Grant Information—Guidelines*, available at <http://www.ltf.org/grants/guidelines.htm> (last visited Jan. 24, 2003) (requiring that assistance be given to "individual clients and families"); Nevada Law Foundation Grant Considerations (on file with authors); Texas Equal Access to Justice Foundation, *Rules Governing the Operation of the Texas Equal Access to Justice Foundation*, available at <http://www.txiolta.org/rules.html> (last visited Jan. 24, 2003).

296. Florida, Maryland, Texas, and Washington, for example, significantly limit the activities of lawyers receiving state funds for civil legal services to indigents. See Md. Code Ann., Legal Officials § 45J(b)(6) (2000); Houseman, *supra* note 203, at 2196-97 (discussing Texas and Washington state legislation); Brennan Center for Justice, *A Chart of Restrictions on State and IOLTA Funding for Civil Legal Services* (2002) (on file with authors) (identifying practice restrictions on funding for civil legal services from state budget appropriations or court fees and fines in Florida, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Tennessee, Texas, Virginia, and Washington); see also Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 *Fordham Urb. L.J.* 873, 879 n.22 (2002) (identifying states that prohibit legal services' grantees from engaging in class actions).

297. See Tex. Gov't Code Ann. § 51.943(c) (Vernon 2002); Order of the Court Approving Rules and Procedures Governing the Administration of the Crime Victims Civil Legal Services Program, Including the Distribution of and Sanctions With Respect to the Funds, Misc. Docket No. 02-9045 (Tex. Feb. 21, 2002), available at <http://www.supreme.courts.state.tx.us/miscdocket/02/02904500.pdf> (last visited Jan. 24, 2003); Texas Equal Access to Justice Foundation, *Rules Governing the Operation of the Texas Equal Access to Justice Foundation*, available at <http://www.txiolta.org/rules.html> (last visited Jan. 24, 2003).

298. Letter from C. Elizabeth Belmont, *supra* note 45 (explaining a proposed Federal Bureau of Prisons grant condition that "the head of the [Washington and Lee University School of Law clinic] program must . . . attempt an informal resolution of the matter with the appropriate Bureau of Prisons' legal staff prior to filing in court").

299. See reference to state funding of Maryland and Texas law school clinical programs, *supra* note 292. After objections by the law school, the Bureau of Prisons removed the requirement in the contract for legal services with the Washington and Lee University School of Law that the law clinic must attempt an informal resolution prior to filing suit against the agency or its employees. Letter from C. Elizabeth Belmont, *supra* note 45.

Further practice restrictions may be self-imposed by the law clinics or by law school or university administrators. For example, a number of clinics at state-funded law schools have decided to forgo requests for attorney's fees when a state entity or official is an opposing party.³⁰⁰ Other law clinics may decide that seeking or accepting fees is inconsistent with the public service or educational objectives of the clinic or might put the clinic in competition for clients with the private bar.

In limiting the way an attorney can represent a client, the client may be losing an important advantage in a case. For example, where an attorney is prevented from seeking statutory attorney's fees from the opposing party, the opposing party may be more inclined to drag out the lawsuit and less inclined to settle.³⁰¹ By increasing the costs of noncompliance with the law, the availability of attorney's fees to prevailing parties also serves to deter future law breaking and may deter meritless lawsuits against clinic clients.³⁰² By not requesting fees, the attorney may also be giving up the opportunity to structure a settlement whereby the client would receive a higher monetary payment or greater equitable relief from the defendant in exchange for the attorney waiving some part of her statutory attorney's fees.³⁰³

300. See, e.g., *supra* note 35 and accompanying text (explaining the policy of the University of Tennessee Board of Trustees that law clinics cannot bring suit against the state where attorney's fees would likely be available); E-mail from law clinic program director to Robert R. Kuehn (Apr. 11, 2001) (on file with authors) (explaining that the state-funded law school clinic decided against seeking attorney's fees in a lawsuit against a state agency because of concerns about a legislative funding backlash); E-mail from Kenneth S. Gallant, University of Arkansas at Little Rock School of Law, to Robert R. Kuehn (Nov. 26, 2001) (on file with authors) (explaining policy of not seeking attorney's fees in mental health cases against the state).

301. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1403 (1977) (observing that the availability of statutory attorney's fees is a negotiation tool for legal aid clients); Brennan Center for Justice, *Restricting Legal Services: How Congress Left the Poor with Only Half a Lawyer* 14 (2000); see also Abel & Udell, *supra* note 296, at 887-91.

Where a judgment granting statutory attorney's fees has already been entered, a decision not to collect the fees would have no effect upon the negotiation of the case. Therefore, the attorney may decline to seek the fees, apparently without notice to and the consent of the client. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1403 (1977).

302. *Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., concurring in part and dissenting in part) (observing that the availability of statutory attorney's fees to prevailing plaintiffs in civil rights cases "gives defendants strong incentives to avoid arguable civil rights violations in the first place and to make concessions in hope of an early settlement"); Brennan Center for Justice, *supra* note 301, at 14-15.

303. See generally *Evans v. Jeff D.*, 475 U.S. 717 (1986) (approving a settlement in a civil rights case that required the plaintiffs' attorney to waive his attorney's fees in exchange for plaintiffs receiving virtually all the injunctive relief they had sought in their complaint). State ethics opinions differ on whether it is unethical for a defendant to request a statutory fee waiver in exchange for relief on the merits of the plaintiff's claim. *Id.* at 728 n.15 (citing state bar opinions on the issue).

Prohibiting a lawyer from pursuing a claim as a class action makes it easier for the defendant to defeat the claim of the individual client and, because it avoids the additional class action costs to the defendant, results in less deterrence from future violations of the law.³⁰⁴ Moreover, the mere threat of a class action, rather than just an individual suit on behalf of the client, often results in swifter and more extensive relief for the individual client.³⁰⁵ The Supreme Court recognized that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”³⁰⁶ For less politically and economically powerful groups, “association for litigation may be the most effective form of political association.”³⁰⁷

Harm may also result to the client by prohibiting a lawyer from lobbying. In some circumstances, lobbying a legislature or an executive branch agency for a change in the law or regulations may be the lawyer’s most effective, or only, way to address the client’s need.³⁰⁸

The result, therefore, of limitations on the legal methods that a law clinic attorney may employ is that the client may receive less representation, and less effective representation, than the client would receive from an attorney not encumbered by such practice restrictions.

304. Brennan Center for Justice, *supra* note 301, at 12-13; *see also* Abel & Udell, *supra* note 296, at 882-87.

305. Brennan Center for Justice, *supra* note 301, at 10-11; Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St. L.J. 1, 17-18 (1984). “The potential value of collective response is one of the recurrent concerns in the ‘rebellious idea of lawyering against subordination’ being articulated by Gerald Lopez.” Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 Va. L. Rev. 1103, 1121 n.63 (1992) (citing Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 Geo. L.J. 1603, 1608 (1989)).

306. NAACP v. Ala., 357 U.S. 449, 460 (1958).

307. NAACP v. Button, 371 U.S. 415, 431 (1963).

308. *See* Brennan Center for Justice, *supra* note 301, at 16-17; Galowitz, *supra* note 283, at 71-72. *But see* Breger, *supra* note 207, at 313 (arguing that legislative advocacy is not an inseparable part of a lawyer’s workload; restrictions on lobbying “do not raise questions of professional ethics”).

Regarding a requirement that an attorney negotiate with governmental agencies prior to instituting litigation against the agency, ABA Informal Opinion 1232 held:

In our view it is not an improper restraint to suggest that before litigation against governmental agencies takes place there be some opportunity afforded the governmental agency in question to consider the legal and social aspects of its position so that it would have an opportunity to modify or explain same if it desires to do so.

ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1232 (1972).

B. *Legality of Practice Limitations*

The legality of restrictions on the manner in which a law school clinic can represent a client are in doubt after the Supreme Court's recent decision in *Legal Services Corporation v. Velazquez*.³⁰⁹ In that case, lawyers employed by LSC grantees, along with their clients and others who provide financial assistance to LSC grantees, challenged the constitutionality of the Congressional prohibition on legal representation by recipients of LSC moneys if the representation involved an effort to amend or otherwise challenge an existing welfare law.³¹⁰

The Court found that the restriction violated the First Amendment, expressing four primary reasons. First, the Court found that because the LSC program was designed to facilitate the private speech of LSC clients, and not promote a governmental message, Congress could not engage in viewpoint-based funding decisions that prevent certain speech.³¹¹ Second, restricting an attorney's ability to present certain arguments to a court and to advise fully the client distorts the legal system by altering the traditional role of attorneys.³¹² Third, by prohibiting certain advice or argumentation, the restriction had the effect of insulating welfare laws from judicial scrutiny, threatening severe impairment of the judicial function and creating a scheme inconsistent with accepted separation-of-powers principles.³¹³ Finally, because LSC clients are unlikely to find other counsel if the LSC lawyers refuse to represent the clients or withdraw from the cases once a constitutional issue arises, there is no alternative channel of expression of the advocacy Congress sought to restrict.³¹⁴

The Court noted that Congress was not required to fund attorneys for indigent clients and, when it did so, was not required to fund the whole range of legal representations.³¹⁵ However, where Congress

309. 531 U.S. 533 (2001).

310. *Id.* at 540.

311. *Id.* at 541-43. The Court distinguished *Rust v. Sullivan*, 500 U.S. 173 (1991), which upheld the constitutionality of a federal program that forbade doctors at federally-funded family planning clinics from discussing abortion with their patients, as an instance where a viewpoint-based funding decision was sustained because the government itself was the speaker. *Velazquez*, 531 U.S. at 541-43.

312. 531 U.S. at 543-45. One commentator observed: "Broadly construed, the *Velazquez* decision may stand for the proposition that a subsidy indirectly facilitating private speech, and conditioned on a viewpoint-based funding restriction that 'distorts' the usual functioning of the expressive medium, violates the First Amendment's free-speech guarantee." Andrew D. Cotlar, *A Subsidy by Any Other Name: First Amendment Implications of the Satellite Home Viewer Improvement Act of 1999*, 53 Fed. Comm. L.J. 379, 416 (2001).

313. *Velazquez*, 531 U.S. at 546.

314. *Id.* at 546-47. The Court again distinguished *Rust v. Sullivan*, arguing that a patient who did not receive abortion information from a government-funded program could nonetheless later consult an affiliate or independent organization to receive abortion counseling. *Id.* at 547.

315. *Id.* at 548.

does fund representation, it may not “define the scope of the litigation it funds to exclude certain vital theories and ideas” as a means to suppress ideas thought inimical to the government’s own interests.³¹⁶ Courts must be especially vigilant when “Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.”³¹⁷

In response to the Court’s decision, the LSC amended its regulations to provide that clients seeking relief from a welfare agency may be represented by an LSC grant recipient without regard to whether the relief involves an effort to amend or otherwise challenge existing welfare reform law.³¹⁸ Similar restrictions on welfare advocacy in IOLTA programs or state appropriations for civil legal assistance would likewise no longer be valid.³¹⁹

Due to the recency of the decision, the impact of *Velazquez* on other limitations on lawyer advocacy is unclear. Government funding for a law school clinic that is conditioned on agreeing not to pursue class actions, attorneys fees, or lobbying can be interpreted as restrictions that interfere with a clinic client’s ability to advance certain points of view, especially where the effect of the restrictions is to deter the clinic attorney from presenting all available legal arguments to the court or to insulate or deter allegedly illegal state activities from judicial review.³²⁰

316. *Id.* The *Velazquez* case was before the Court on a petition for certiorari filed by the LSC to review an injunction against enforcement of the welfare reform restrictions upheld by the United States Court of Appeals for the Second Circuit. See *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999). One week after its decision that the welfare reform restrictions violate the First Amendment, the Court denied the *Velazquez* plaintiffs’ related certiorari petition seeking review of various other restrictions applicable to LSC-funded lawyers that had been upheld by the United States District Court and United States Court of Appeals. *Velazquez v. Legal Servs. Corp.*, 532 U.S. 903 (2001). Attorneys for *Velazquez* argue that because their case reached the Supreme Court on an appeal from the district court’s denial of a preliminary injunction, they are free to return to the district court for a trial on the merits of the LSC’s other program restrictions. Neuborne & Udell, *supra* note 289, at 91.

317. *Velazquez*, 531 U.S. at 548. See generally *supra* text accompanying notes 23-31, 39-41 (noting legislation to restrict law clinic lawsuits against state agencies in Arkansas, Colorado, Idaho, Iowa, and Arizona).

318. 45 C.F.R. § 1639.4 (2002); see also 67 Fed. Reg. 19,342 (Apr. 19, 2002) (explaining the amendments to the regulations); Pub. L. No. 107-77, 115 Stat. 795 (2001) (striking the restriction on LSC representation). Reading the *Velazquez* decision narrowly, the LSC contends that restrictions on participation in lobbying or rulemaking with respect to efforts to reform a state or federal welfare system remain in effect. Legal Services Corporation, Program Letter 01-3 (June 20, 2001) (on file with authors); see also 45 C.F.R. § 1639.3(b) & (c) (2002).

319. See Brennan Center for Justice, *supra* note 296, at 2-3 (identifying Iowa, North Dakota, and Washington as having appropriation restrictions that mirror the federal LSC restrictions).

320. See Neuborne & Udell, *supra* note 289, at 91-92. But see Breger, *supra* note 207, at 312 (arguing that the justification for legislative advocacy differs from the

On remand to the United States District Court, the plaintiffs in *Velazquez* have argued that, based on the Court's decision, six additional restrictions on the activities of LSC grant recipients are unconstitutional, including the ban on participating in class actions, the ban on claiming, collecting or retaining statutory attorney's fee awards, and the ban on notifying prospective clients of their legal rights and then offering representation.³²¹

Regarding the legality of prohibitions on the award of attorney's fees to legal services providers, the Third Circuit held in *Shadis v. Beal* that a contractual provision prohibiting state-funded legal services programs from requesting or accepting attorney's fees in civil rights suits against the state violated the public policy behind the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988.³²² The court noted that it was well settled that Congress intended legal services programs to receive fees under the Fees Awards Act and held that the state could not attempt, by conditioning receipt of state funds, to vitiate the civil rights enforcement policies embodied in the Act.³²³ It

justification for litigation services because the former does not flow from a citizen's claim of access to the legal system).

In *Southern Christian Leadership Conference v. Supreme Court of Louisiana*, 252 F.3d 781 (5th Cir. 2001), the court ruled that a restriction in the Louisiana law student practice rule that prohibits law clinic students from appearing in a representative capacity if any clinic student, staff person, or supervising lawyer initiated contact with a person or organization for the purpose of representing the contacted person or organization did not violate the First Amendment. The court upheld the restriction because it only had the effect of disqualifying the clinic student from appearing in a representative capacity as a student attorney and did not impose any limitation on what a clinic supervising attorney could do in soliciting or representing a client. *Id.* at 789-90. The legality of the student practice rule's limitation on the ability of law clinic students to appear in a representative capacity before state or federal legislatures was not before the court. *See* La. Sup. Ct. R. XX, § 11 (2002).

321. Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 1, *Velazquez v. Legal Servs. Corp.*, No. 97 Civ. 00182 (E.D.N.Y. Dec. 14, 2001). Plaintiffs also challenge the congressional ban on communicating with policy-makers and legislators, except under narrow circumstances; the ban on representing certain categories of aliens; and the restrictions on the use of privately-donated funds by LSC grantees to provide legal services that are otherwise restricted by Congress. *Id.* at 1-2; *see also* Abel & Udell, *supra* note 296, at 896-903 (arguing why restrictions on legal representation for the poor violate principles of separation of powers and federalism).

At the same time the *Velazquez* plaintiffs filed their brief, their lawyers filed *Dobbins v. Legal Servs. Corp.* as a related case. Complaint, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 8371 (E.D.N.Y. Dec. 14, 2001). Plaintiffs in *Velazquez* and *Dobbins* jointly moved to consolidate the two actions and jointly sought a preliminary injunction. Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* at 1 n.1.

322. *Shadis v. Beal*, 685 F.2d 824, 828-31 (3d Cir. 1982).

323. *Id.* at 831. The court stated:

What the Commonwealth has attempted to do here is to buy immunity from [the legal services program] lawyers. In return for a steady partial subsidy, the Commonwealth has demanded that [the legal services program] not seek

should be noted that the *Shadis* case pre-dates Congress's 1996 prohibition on the receipt of attorney's fees by LSC grantees and the Supreme Court's decision in *Evans v. Jeff D.*, which held that the Fees Awards Act did not prohibit individual settlements conditioned on the waiver of attorney's fees.³²⁴ However, the Court in *Evans v. Jeff D.* suggested, but did not decide, that two fee waiver practices could violate the Fees Awards Act: when a defendant adopts a uniform policy of insisting on fee waivers as part of settlement offers and when the waiver is a vindictive effort to teach counsel that they should not bring such suits.³²⁵

C. Ethical Constraints on Practice Limitations

As a general rule, a law clinic client may agree to certain limitations, such as those outlined above, on methods of legal representation. However, as the *Velazquez* and *Shadis* cases indicate, some limitations imposed by the government on the services that a law clinic might provide a client may violate the First Amendment or Civil Rights Fees Awards Act. In addition, other practice restrictions, whether imposed by the law clinic or by those outside the clinic, may breach rules of legal ethics.

Model Rule 1.2 provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."³²⁶ Comments to the Model Rules explain that, with the client's consent, a lawyer may limit the scope of services provided to the client but any such agreement does not exempt the lawyer from the duty to provide competent representation.³²⁷ Although decisions as to means or procedure are

attorneys' fees in cases brought against the Commonwealth. *The obvious effect of this, if the agreement is enforced, is to cause [the legal services program] not to bring actions against the Commonwealth.* In end result, an important member of the plaintiffs' civil rights bar would be removed from the scene, and the vigorous enforcement of the laws would be materially quelled.

Id. (quoting *Shadis v. Beal*, 520 F. Supp. 858, 864 (E.D.N.Y. 1981) (alteration in original)); *cf.* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (noting that courts must be especially vigilant of restrictions on legal services when a legislature imposes rules and conditions that, in effect, insulate its own laws from judicial challenge).

324. 475 U.S. 717 (1986).

325. *Id.* at 740; *see also* *Johnson v. Dist. of Columbia*, 190 F. Supp. 2d 34, 42-44 (D.D.C. 2002) (relying on *Evans v. Jeff D.*, the court would be inclined to hold that settlement offers conditioned on fee waivers, when part of a consistent policy by a government agency or part of a vindictive effort to undermine the right of parents and children to attorneys, violate the Individuals with Disabilities Education Act's attorney's fee provision).

326. Model Rules, *supra* note 100, at R. 1.2(c); *see also* Restatement, *supra* note 100, § 19.

327. Model Rules, *supra* note 100, at R. 1.2 cmts. 6, 7, 8. Model Rule 1.4 imposes the additional requirement that a lawyer explain a matter to the extent reasonably

often viewed as resting with the lawyer, an attorney has no authority to waive or impair any substantial right of her client unless specifically authorized by the client.³²⁸

The Model Code similarly provides that in certain areas not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer may make decisions on her own.³²⁹ However, “the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client,” not for the lawyer.³³⁰

These rules of professional conduct indicate that a law clinic may limit the means of representation if the client is properly advised of the limitation and of its potential impact. An ABA ethics opinion on the ethical implications of the LSC’s practice restrictions suggests that all future clients be told of the limitations “even if the possibility of a statutory violation seems remote at best.”³³¹ However, commentators argue that an attorney need not advise a client of a restriction unless the attorney reasonably believes that the restriction could negatively impact the representation.³³²

Although an attorney would be in compliance with the rules of professional conduct if she chose not to advise a potential client of

necessary to permit the client to make informed decisions regarding the representation. *Id.* at R. 1.4; Restatement, *supra* note 100, § 20(3). “The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” Model Rules, *supra* note 100, at R. 1.4 cmt. 5.

328. *Linsk v. Linsk*, 449 P.2d 760, 762 (Cal. 1969); *Graves v. P.J. Taggares Co.*, 616 P.2d 1223, 1227 (Wash. 1980) (en banc). The Model Rules require the lawyer to consult reasonably with the client, usually prior to taking action, about the means to be used to accomplish the client’s objectives. Model Rules, *supra* note 100, at R. 1.4 cmt. 3.

329. Model Code, *supra* note 100, at EC 7-7.

330. *Id.* at EC 7-8. The Model Code further states that a lawyer shall not intentionally “[f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.” *Id.* at DR 7-101(A)(1). Nonetheless, a lawyer may fail to assert a right or position of his client where based on the lawyer’s independent professional judgment. *Id.* at DR 7-101(B)(1).

331. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 399 (1996). “To ensure that no future conflicts arise, the lawyer should see to it that an agreement limiting the scope of the representation is signed with *each* new client, even if the possibility of a statutory violation seems remote at best.” *Id.* (emphasis added).

332. See, e.g., *Ethical Issues Panel*, *supra* note 207, at 389-92 (1998) (remarks of Stephen Gillers); *id.* at 364 (remarks of Helaine Barnett); Houseman, *supra* note 203, at 2234; see also Model Rules, *supra* note 100, at R. 1.4 cmts. 1, 5 (explaining that the reason for requiring an attorney to keep a client reasonably informed about the status of a matter is to enable the client to participate intelligently in decisions concerning the case); Model Code, *supra* note 100, at EC 7-8 (stating that a lawyer should exert his best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations); *id.* at EC 9-2 (stating that a lawyer should fully and promptly inform his client of material developments in matters handled for the client).

restrictions that were not reasonably likely to affect the potential client's rights or interests,³³³ the most prudent course for law school clinics subject to practice restrictions is to include information on restrictions in every retainer agreement with a new law clinic client. Ethics aside, erring on the side of giving advance notice to all potential clients, while imposing some additional burdens on a clinical program, is both consistent with the widespread client-centered approach to clinic attorney-client relationships and helps avoid misunderstandings or ill will should the client later learn about the practice restrictions.³³⁴

Where consent to the practice limitations is sought, the clinic attorney should not only advise the client of precisely what methods of representation will not be provided and how those limits could negatively impact the client's interests, but also of the fact that another attorney, not operating under the same limitations, might be able to obtain a quicker or more favorable result.³³⁵ Only by being informed of both the potential impact of the limits and of the fact that other lawyers do not operate under such restrictions can it be said that the client gave informed consent to proceed even with the potentially negative restrictions on representation.³³⁶

333. The Model Rule 1.4 duties regarding communication are qualified by the requirement of reasonableness under the circumstances. Hazard & Hodes, *supra* note 100, at 7-5. The Restatement explains that reasonableness depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client's sophistication and interest, the time and money that consultation will consume, the room for choice by the client, the ability of the client to shape the decision, and the time available for a decision. Restatement, *supra* note 100, § 20 cmt. c. In a legal malpractice action, the court held:

[I]f the attorney has reason to believe, or should have reason to believe that there could be some adverse consequences from taking the course advised, he is obligated to so advise his client. But if there is no reasonable ground for him to believe that his advice is questionable, he certainly has no obligation to advise clients of every remote possibility that might exist.

Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283, 1290 (M.D. La. 1973), *aff'd*, 500 F.2d 1131 (5th Cir. 1974).

334. See, e.g., David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* 16-24 (1991) (explaining a client-centered approach for resolving a client's problems). "In counseling clients, lawyers should provide clients with a reasonable opportunity to identify and evaluate those alternatives and consequences that similarly-situated clients usually find pivotal or pertinent." *Id.* at 275. "'Pertinent' alternatives and consequences are those which a client would want to know about even though the information would not alter the client's decision." *Id.*

335. See *Nichols v. Keller*, 19 Cal. Rptr. 2d 601, 608 (Cal. Ct. App. 1993) (holding that an attorney should inform the client of the limitations on the attorney's representation and of the possible need for other counsel); Utah State Bar, *Ethics Advisory Opinion Comm.*, Op. 96-07 (1996) (observing that a lawyer may need to advise a client that the client may be better off with another lawyer who is not subject to the LSC practice restrictions). The Model Rules define "informed consent" to require the lawyer to communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rules, *supra* note 100, at R. 1.0(e).

336. "Courts have interpreted the duty to communicate as meaning that if a lawyer

Some legal commentators question whether, even with a client's informed consent, an attorney can agree to accept funding that includes limitations on the actions a lawyer might otherwise take in the exercise of the attorney's independent professional judgment. Model Rule 1.8(f) prohibits an attorney from accepting compensation from a third party unless the client consents after consultation and there is no interference with the lawyer's independent professional judgment or with the attorney-client relationship.³³⁷ Model Rule 5.4(c) provides that a lawyer shall not permit a person who employs or pays the lawyer to render legal services to another to direct or regulate the lawyer's professional judgment in rendering such services.³³⁸ The Model Code contains similar prohibitions on

advises a course of action that may result in adverse consequences to the client, the lawyer must also advise the client of the risks involved and must present any alternatives and their possible consequences." Annotated Model Rules, *supra* note 139, at 37. Failing to explain fully the consequences of limited representation may expose the lawyer to malpractice liability. Hazard & Hodes, *supra* note 100, at 5-68 n.1.

It is not clear whether, even if the client consents to the limitations, an attorney could still face malpractice liability regarding the means of representation that were waived. The Model Rules provide that a lawyer cannot make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; the Model Code prohibits any attempt by a lawyer to limit liability to the client. *See* Model Rules, *supra* note 100, at R. 1.8(h)(1); Model Code, *supra* note 100, at DR 6-102(A); *see also* Restatement, *supra* note 100, § 54(2) (making any agreement prospectively limiting a lawyer's liability to a client for malpractice unenforceable). Professor Charles Wolfram argues that Model Rule 1.2(c) "plainly implies that it is permissible for a lawyer to agree with a client that a representation will be conducted in such a way as possibly to incur defined risks." Wolfram, *supra* note 99, at 239; *see also* Restatement, *supra* note 100, § 19 cmt. c. However, in filing suit for malpractice on behalf of a client that had been told in detail by her lawyer all of the legal services the lawyer would not be performing, the attorney for the plaintiff argued that an attorney cannot make an agreement with a client that limits the attorney's malpractice liability. Matt Ackermann, *Attorney's Limited Role No Defense*, Nat'l L.J., Oct. 4, 1999, at A4 (reporting on the New Jersey case of *Lerner v. Laufer*). As one malpractice attorney argued: "If an attorney is going to get involved in a case, he can't get involved in a limited way. Either handle the full representation, or don't get involved at all." *Id.* *But see* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 253-54 (5th ed. 2000) ("A restriction or limitation on the scope of the representation, which does not otherwise seek to excuse compliance with the standard of care or to exculpate the attorney from liability, is valid and will be sustained."); Forrest S. Mosten, *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte* 32-33, 95-96 (2000) (arguing the validity of limited scope agreements); Zacharias, *supra* note 112, at 921 (concluding from a review of case law that courts are willing, with certain limits, to approve advance agreements that define how a particular lawyer will perform).

337. Model Rules, *supra* note 100, at R. 1.8(f); *see also id.* at R. 1.7 cmt. 13 (stating that if acceptance of payment from any source other than the client presents a significant risk that the lawyer's representation of the client will be materially limited, then the lawyer must comply with the requirements in Model Rule 1.7(b) for consent to representation notwithstanding a conflict of interest).

338. Model Rules, *supra* note 100, at R. 5.4(c); *see also id.* at R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and

interference by third-parties in the lawyer's independent professional judgment.³³⁹

Under these rules of professional conduct, a limitation imposed by a third party on the means by which an attorney may represent a client is not ethical unless the client consents *and* the limitation does not interfere with the attorney's independent professional judgment. Professor Stephen Ellmann explains:

When, however, the lawyer is told by the person who pays or employs her that she cannot use her independent professional judgment on a case that she is now handling, then 5.4(c) has been breached. Moreover, I would argue that the constraint on the lawyer's judgment need not be so intense as to make her work incompetent and a violation of Rule 1.1. The lawyer may be doing the best she can, and her best may be competent—but if she has been forbidden to consider possibilities that she otherwise might have chosen, in the exercise of her independent professional judgment, then Rule 5.4(c), read according to its terms, has been violated.³⁴⁰

The prohibitions on third-party influence, however, only apply towards a "client." Thus, Ellmann concludes, "[a]lthough clients cannot consent to third-party limitations on their lawyers once the representation is underway, they apparently can agree to such limitations at the onset of the matter," unless the limitations are not in accord with other rules of professional conduct.³⁴¹ Professor Stephen Gillers and Alan Houseman likewise argue that Model Rules 1.8(f) and 5.4(c) do not prevent a lawyer and client from agreeing at the onset to limit the objectives and means of the representation.³⁴² But, where limitations are imposed by third persons on the means by which a law clinic attorney may represent an existing client, thereby

render candid advice.").

339. Model Code, *supra* note 100, at DR 5-107(A)(1), 5-107(B), EC 5-23. The Restatement allows a lawyer's professional conduct to be directed by someone other than the client but only if the direction does not interfere with the lawyer's independence of professional judgment, the direction is reasonable in scope and character, and the client consents to the direction. Restatement, *supra* note 100, § 134.

340. *Ethical Issues Panel*, *supra* note 207, at 374 (remarks of Stephen Ellmann). ABA Formal Opinion 334 declared that if a staff attorney at a legal aid office has undertaken to represent a client in a particular matter and the full representation of that client requires the filing of a class action, "then any limitation on the right to do so would be unethical." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

341. *Ethical Issues Panel*, *supra* note 207, at 377.

342. *Id.* at 388 (remarks of Stephen Gillers); Houseman, *supra* note 203, at 2209. "[W]hat those Rules [1.8(f) and 5.4(c)] prohibit is interference with the lawyer's independence of professional judgment once the case is underway." *Ethical Issues Panel*, *supra* note 207, at 388 (remarks of Stephen Gillers). "[I]t is not unethical for a civil legal assistance program or its attorneys to practice law under restrictions imposed prior to the commencement of representation by a funding source." Houseman, *supra* note 203, at 2209.

interfering with the lawyer's independent professional judgment, the clinic attorney cannot agree to the limitations and must withdraw from the representation.³⁴³

ABA Formal Opinion 399 addressed the ethical obligations of lawyers when their funding is subject to the LSC's practice restrictions. Regarding existing clients, the opinion concluded that the Model Rules preclude a lawyer from even asking for the client's consent to a practice restriction "unless the lawyer reasonably believes that the representation will not be adversely affected."³⁴⁴ This conclusion reflects the requirements of Model Rule 1.7(a)(2), which prevents a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to a third person, unless the lawyer reasonably believes that she will be able to provide competent and diligent representation and the client gives informed consent.³⁴⁵ According to the ABA's ethics committee, future clients may be represented under the practice restrictions, provided an agreement identifying the legal options that will not be pursued is signed with each new client.³⁴⁶

343. See Model Rules, *supra* note 100, at R. 1.16(a)(1) (stating that a lawyer shall not represent a client, or if the representation has already commenced shall withdraw, if the representation will result in a violation of the rules of professional conduct); Model Code, *supra* note 100, at DR 2-110(B)(2) (requiring a lawyer to withdraw from employment if the lawyer knows or it is obvious that continued employment will result in violation of a disciplinary rule); see also ABA Comm. on Prof'l Ethics, Formal Op. 324 (1970) (holding that there can be no interference in the lawyer-client relationship after a case has been assigned to a legal aid staff attorney); Restatement, *supra* note 100, § 32(2)(1) (adopting the prohibition in Model Rule 1.16(a)(1)); *Ethical Issues Panel*, *supra* note 207, at 378 (remarks of Stephen Ellmann).

344. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996); see also State Bar of Mich., Standing Comm. on Prof'l and Judicial Ethics, Op. RI-293 (1997) (stating that consent of the client is not sufficient to allow an agreement to restrictions by a third party on the activities of an attorney if the agreement will in any way adversely affect the representation of the client). Earlier in Formal Op. 334, the ABA's ethics committee stated that "[i]f a staff attorney has undertaken to represent a client" and full representation requires the filing of a class action to assert the client's rights effectively, then any limitation upon the right to do so would be unethical. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974). That decision also held that, absent an explicit limitation on legislative activity expressly promulgated by the governing body of a legal aid office and made known to the client prior to the acceptance of the client for representation, there can be no limitation on the ability of legal services lawyers to give advice in connection with legislative remedies. *Id.*; see also Bellow & Kettleon, *supra* note 205, at 352.

345. Model Rules, *supra* note 100, at R. 1.7(a)(2); see also *id.* at R 1.7 cmt. 13 (stating that a lawyer may be paid by a source other than the client if the client consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client); Restatement, *supra* note 100, § 125 (tracking the requirements in Model Rule 1.7(a)(2)).

346. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996); accord State Bar of Mich., Standing Comm. on Prof'l and Judicial Ethics, Op. RI-252 (1996); Utah State Bar, Ethics Advisory Opinion Comm., Op. 96-07 (1996); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 343 (1977) ("If the client is fully informed at the outset, such limited services [such as no class actions]

In some situations, the informed consent of even a future client to a limitation on the means of representation may not avoid an ethics violation by the attorney. Any agreement to limit the means of representation must comply with the rules of professional conduct and other law.³⁴⁷ Thus, “an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation.”³⁴⁸

For example, if competent representation would require the attorney to proceed with a class action on behalf of the client, an attorney cannot seek the client’s consent to representation that prohibits the attorney from pursuing that means.³⁴⁹ As for asking a prospective client to agree to forego the ability to obtain attorney’s fees, the Rules of Professional Conduct Committee for Washington state explained:

[A legal services attorney] may condition representation of the client on waiver or relinquishment of State or Federal claims for attorneys’ fees if, and only if, in the reasonable opinion of the attorney, such a waiver or relinquishment will not effectively preclude the lawyer from providing competent representation, the attorney has consulted with the client about the limitations of representation and has obtained written consent to that representation. If the opinion of the attorney is to the contrary or consent is not obtained, [the attorney] must decline representation of the client.³⁵⁰

may be provided in keeping with policies established by the appropriate authority.”).

347. Model Rules, *supra* note 100, at R. 1.2 cmt. 8; *see also id.* at R. 1.16(a)(1) (stating that a lawyer shall not represent a client if the representation will result in a violation of the rules of professional conduct or other law).

348. Model Rules, *supra* note 100, at R. 1.2 cmt. 7. The Restatement provides that, subject to other requirements in the Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if the client is adequately informed and consents and the terms of the limitation are reasonable in the circumstances. Restatement, *supra* note 100, § 19. However, “[s]ome contracts limiting the scope or objectives of a representation may harm the client, for example if a lawyer insists on agreement that a proposed suit will not include a substantial claim that reasonably should be joined.” *Id.* at cmt. c. Factors in determining the reasonableness of the limitation include the sophistication of the client, whether the benefits supposedly obtained by the waiver could reasonably be considered to outweigh the potential risks posed by the limitation, whether it was the client or the lawyer who sought the limitation, and whether there were special circumstances warranting the limitation. *Id.*

349. “The class action mechanism is a legally available mechanism and, frequently, the best mechanism for a poor person’s lawyer to succeed. In a significant number of cases, the inability to use the class action will result in the inability to achieve the client’s objectives.” Committees on Civil Rights and Professional Responsibility, *supra* note 139, at 56. Alan Houseman downplays the importance of the class action mechanism in vindicating an individual’s legal rights: “It will be a very rare situation, however, where [an LSC] recipient must file a class action to remedy an individual’s legal rights and cannot limit its scope of representation to individual non-class actions at the time that representation is begun.” Houseman, *supra* note 203, at 2215.

350. Letter from Cathy J. Blinka, Professional Responsibility Counsel, Washington

Although it may sometimes be difficult to predict the effect of failing to utilize certain tools of legal representation, a law clinic attorney operating under practice restrictions must, nonetheless, make a reasonable judgment as to whether that failure could result in services to the client that are less than competent representation.³⁵¹

A number of ABA and state ethics opinions also address the ethical obligations of a legal services attorney to potential new clients where there is a reasonable possibility that there may be a loss of funding to continue the program. These opinions generally hold that the attorney must provide potential new clients with sufficient information about the funding dilemma and its possible future effect on any representation for the client to make an informed decision about whether or not to use the office's services.³⁵² Thus, law clinics with a well-founded concern that they may lose funding and have to shut down or restrict services likewise should inform potential new clients of this financing dilemma and how it could impact the client's case, including the possibility that the clinic may have to withdraw from the representation.³⁵³

A final ethical consideration raised by practice restrictions is whether most clients or potential clients of a law clinic could in fact freely consent to restrictions on the legal services they will receive. The Court in *Velazquez* recognized that for clients of LSC grantees, often there will be no alternate source of legal representation.³⁵⁴ As Ellmann observed: "These clients, or would-be-clients, not only have little hope of finding other counsel, but they also frequently have acute legal needs. When the only possible source of aid in dealing with those needs comes complete with burdensome restrictions, consent to those restrictions hardly seems fully voluntary."³⁵⁵

State Bar Association, to unidentified attorney (Apr. 29, 1997) (responding to Inquiry #1741) (on file with authors).

351. A comment to Model Rule 1.1 defines competent handling of a client's matter to include the "use of methods and procedures meeting the standards of competent practitioners." Model Rules, *supra* note 100, at R. 1.1 cmt. 5.

352. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981); Cal. State Bar, Standing Comm. on Prof'l Resp. and Conduct, Formal Op. 1981-64 (1981); State Bar of Mich., Standing Comm. on Prof'l and Judicial Ethics, Op. RI-252 (1996); State Bar of Mich., Standing Comm. on Prof'l and Judicial Ethics, Op. CI-637 (1981); Utah State Bar, Ethics Advisory Opinion Comm., Op. 96-07 (1996).

353. See generally Model Rules, *supra* note 100, at R. 1.16(a)(1) (stating that a lawyer shall withdraw if the representation will result in violation of the rules of professional conduct or other law) & 1.16(b)(6) (stating that the lawyer may withdraw if the representation will result in an unreasonable financial burden on the lawyer); Model Code, *supra* note 100, at DR 2-110(B) (stating that a lawyer shall withdraw if the lawyer knows or it is obvious that continued representation will result in a violation of a Disciplinary Rule); Restatement, *supra* note 100, § 32.

354. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-47 (2001).

355. *Ethical Issues Panel*, *supra* note 207, at 385 (remarks of Stephen Ellmann); accord *Bellow & Kettleison*, *supra* note 205, at 359.

Nevertheless, as ABA ethics opinions have held, although the clients may have no alternative source of legal representation, rules of professional conduct do not prohibit legal aid offices or law school clinics from establishing limits on their services, subject to the constitutional and ethical restraints described above, even if the result is to leave potential clients without legal representation.³⁵⁶

IV. CONCLUSION

Identifying the ethical concerns raised by interference in law school clinic case and client selection and discussing the consequences of such actions are essential to discouraging such interference. Although any lawyer may potentially face interference in client or case selection and representation, interference is most often an issue for lawyers representing poor or unpopular clients or causes as other lawyers, opposing parties, or individuals seek to limit access to the courts, and thereby access to justice, for poor and disadvantaged people.³⁵⁷

Vindicating the rights of individuals and groups often depends upon the availability of a lawyer. Without an attorney, most individuals and groups are denied their right to be heard or are excluded from legal proceedings.³⁵⁸ Given the importance of ensuring that all persons have

356. ABA Formal Opinion 334 held:

It has been suggested that even the limitations upon the activities of a legal services office permitted by Formal Opinion 324 are improper because, while a private law office may limit its activities in any way it pleases, as the services which it does not furnish will be available elsewhere, the indigent has nowhere else to turn and therefore any limitation upon the services available at a legal services office amounts to a deprivation of those services. The Code of Professional Responsibility does not ban such limitations.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

Similarly, in addressing the ethical implications of the 1996 LSC restrictions, ABA Formal Opinion 399 stated: "If the client refuses to consent to such a scope limitation, the lawyer may decline the representation." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996). "If a lawyer appropriately declines to represent a new client, the Model Rules do not impose any duty on the lawyer to locate alternative representation." *Id.*

357. See David Luban, *Silence! Four Ways the Law Keeps Poor People From Getting Heard in Court*, Legal Affairs, May-June 2002, at 54 (arguing that "in the last few years a rash of cases, statutes, and rules has made it easier for adversaries of the poor to silence them by muzzling their lawyers").

358. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); see also Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 Yale L.J. 1317, 1336 (1964) (stating that a lawyer's function is "effectively and properly [communicating] to a person with power to provide a remedy"); Joy, *supra* note 59, at 263 ("Without lawyers asserting and defending the rights of individuals and groups, there are usually no remedies for the unrepresented."); Luban, *supra* note 357, at 58 ("'Hear the other side' is a principle of justice because in the absence of dissenting voices, a kind of smug consensus—a lie, really—takes their place, and the adversary system becomes little more than a field of lies.").

access to legal representation to protect their rights, and the importance that law school clinics play in providing legal representation to persons and causes who would otherwise go unrepresented and in modeling ethical behavior, it is crucial for law schools to resist interference. Indeed, all members of the legal profession must be sensitive to these issues and fulfill their ethical obligations both by refusing to interfere with other lawyers' case and client representation decisions and by working to dissuade others from engaging in such actions.