1998

Am I My Client's Lawyer: Role Definition and the Clinical Supervisor

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AM I MY CLIENT'S LAWYER?: ROLE DEFINITION AND THE CLINICAL SUPERVISOR

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* Associate Professor of Law, Washington College of Law, American University. This Article had its beginning in Nancy Polikoff's examination of her mixed roles as an attorney representing groups with which she identified and on issues in which she had an emotional stake. *See* Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996). During the presentation of her piece at a Mid-Atlantic Clinical Theory and Practice Workshop, I began to wonder about the "role confusion" of a clinical supervisor and the implications of role definition.

More than any of my prior writings, this Article belongs to my clinical colleagues at American University. They have created an intellectual environment in which even the newest clinician is encouraged to challenge every assumption and to test every hypothesis. This atmosphere of intellectual stimulation and support has made it possible for me to explore topics that would otherwise have been foreclosed. The reaction to an earlier draft of this Article in our ongoing series of internal substantive workshops helped me to refine my thoughts and to expand the scope of this piece.

I am also indebted to Professor Stephen Ellmann and the participants in the New York Law School Clinical Workshops. Steve is one of the special treasures of clinical education and helps make this such a unique community of scholars, lawyers, and teachers. An early version of this Article was presented at a New York Workshop in September 1997. The response to that draft reaffirmed to me the value of this piece and helped me greatly advance my thinking. A more developed draft was presented at a New England Clinical Workshop at Boston College in February 1998. The challenges presented through the intellectual inquiries at that workshop also contributed greatly to the development of this piece.

Valuable research assistance was provided by James Mehigan, Jill Nusbaum, Stacey Feldman, Elizabeth Appison, and Margaret A. Burns. This research was generously supported by Dean Claudio Grossman of the Washington College of Law, American University.

I. CHALLENGING THE ASSUMPTION

When I first started in clinical education, I was fortunate to receive an early version of Ann Shalleck's then work-in-progress regarding supervision in clinical programs.[1] While that article was hardly designed to be a primer in clinical supervision, I (and I suspect many others) used it as a guide to the demands of day-to-day supervision and a description of the levels of performance to which we could aspire.[2]

Over the years, as I have gained experience as a clinical teacher, I have frequently revisited Ann's supervision article.[3] Like a favorite novel, I have returned to reread particular passages and have discovered richness of analysis and complexity of issues that meant nothing to me in earlier readings.[4] I have also felt emboldened to address one of the issues that Ann and others chose not to address in their examinations of clinical supervision.

This still-largely unexamined issue is the nature of the supervisor-client

1. This Article continued to grow and develop until its published configuration. See Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1993-94). One of the striking things about this process is that it represents an important change in and maturing of clinical legal education. As Ann describes in her article, "Clinicians have a strong sense of community, a rich oral tradition, a distinctive culture, and, through teaching conferences and workshops, a set of common intellectual experiences." *Id.* at 111, n.5. While that oral tradition continues to be a powerful force in the development of new clinicians and in the growth of clinical education, the increase in scholarship by clinicians and the creation of such journals as the Clinical Law Review are emblematic of a newer, rich written tradition in clinical education that has made the wisdom of clinical educators accessible to another generation of clinicians who were barely a "twinkle in the eye" of clinicians who participated in the teaching conferences and workshops that helped define clinical legal education. Some of the issues addressed in Ann's groundbreaking article were recently revisited in a new piece. *See* Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997).

2. This was true despite Ann's caution that, "[the supervision transcript] is not an 'ideal' supervision, a model toward which to strive, nor a 'typical' supervision, a realistic portrayal of an actual supervisory experience." Shalleck, *Clinical Contexts*, *supra* note 1, at 112. The supervision interaction and the pedagogical issues identified in Ann's analysis provided a guide, albeit a daunting one, to clinical supervision at its best.

3. In doing so, I have often marveled at the resilience of my students in surviving, and often transcending, my early efforts at clinical supervision.

4. I am sure that I will have similar feelings five years from now when I return to Ann's and other pieces that have helped formulate my approaches to clinical teaching.

relationship.[5] Defining this relationship[6] helps us determine the extent to which legal standards constrain our ability to give full rein to pedagogical goals.[7] One such legal standard relates to the quality of services to which

5. See id. at 111, n.3. For years, clinicians seem to have assumed that we are lawyers in the context of our clinical supervision. For example, in describing the tension between pedagogical and service goals, one group of commentators noted that, "[a]s *lawyers*, clinical teachers must be conscious of their duty to provide high quality and timely client service." James H. Stark et al., *Directiveness in Clinical Supervision*, 3 BOSTON U. PUB. INT. LAW J. 35 (1993) (emphasis added).

When this Article was first presented as a work-in-progress at the New York Law School Clinical Theory Workshop, Steve Ellmann asked why it had taken so many years to challenge this assumption. My answer then and today is that clinical legal educators have tended to come to legal education in a very different way from our non-clinical colleagues. Many of us were legal services attorneys or public defenders or other public interest lawyers. We therefore came to clinical teaching with a strong commitment to quality of representation for client communities that were not well-served by the traditional bar. Clinical teaching provided us with an opportunity to continue to demonstrate this political and professional commitment.

Over the past thirty years, however, as we have become more accepted in the academy, we have also examined more closely our roles as lawyers within an academic environment and have balanced educational and service goals differently. This Article explores the scope of our discretion in that process. Specifically, if we are not lawyers for clients in the clinical setting, then our duties as supervising attorneys to clinic clients, students, bars, and courts may be very different. As I suggest in this Article, the distinction between *lawyers* and *supervising attorneys* is far more than a semantic one. As my colleague Suzanne Jackson has emphasized, one of the most difficult aspects of clinical teaching is the transition from attorney for a client to educator of a student.

6. Through this definition of the supervisor-client relationship, the supervisor-student relationship and the student-client relationship will also be defined. As noted by Nina Tarr, "A major component of clinical education is the relationship between the clinic student, the supervisor, and the client. The implications of this triangular relationship have been lost in much of the research about clinics because scholars tend to focus on the relationship of the lawyer and the client or the supervisor and the student." Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 45 (1993). As evidenced by the reactions of clinicians to earlier drafts of this Article, it may be that we have not focused enough on the relationship of the supervisor and the student. And, in focusing on the relationship of the lawyer and the client, it may be that we have failed to ask often enough, who is the lawyer for the client?

7. George Critchlow has referred to this tension as the "role confusion and professional conflict" which will occur when the clinical teacher's "assessment of what is educationally productive for the student collides with the teacher's assessment of professional obligations owed to the client." George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415, 416 (1991). The overriding pedagogical goal against which this professional obligation is weighed has been well-described. *See, e.g.*, Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn From Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 284 (1981) ("Clinical education should reach beyond skills training to provide the students with a method for future learning from their experiences."). This goal is often described as developing "reflective practitioners." *See* DONALD SCHON, EDUCATING THE REFLECTIVE PRACTITIONER (1987); DONALD SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983). As explained by Schon,

> Usually reflection on knowing-in-action goes together with reflection on the stuff at hand. There is some puzzling, or troubling, or interesting phenomenon with which the individual is trying to deal. As he tries to make sense of it, he also reflects on the understandings which have been implicit in his action, understandings which he surfaces, criticizes, restructures, and embodies in further action. It is this entire process of reflection-in-action which is central to the "art" by which practitioners sometimes deal well with situations of uncertainty, instability, uniqueness, and value conflict.

clinic clients are entitled under the law. For example, at clinical conferences and workshops, I have heard many clinicians refer to their efforts to ensure that their students demonstrate "best practices" and provide their clients with "quality legal representation."[8] Other clinicians have described their willingness to let students discover their own way while protecting clients from "imminent error that would seriously damage a client."[9] Some have articulated a model of "effective representation" that is something less than "best practices" and something more than "non-malpractice."[10] Others have described a duty to intervene "where a

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Id. at 50.

8. In the major empirical study of clinician views regarding a clinic's obligations to clients, a large majority of clinicians endorsed an ideal of providing clinic clients with the "best possible" service. See Stark et al., *supra* note 5, at 37. As these authors have noted, "To provide clients with 'the best possible' representation, a supervisor would have to tell a student what to do or take over the case whenever the student's decisions or performance fell short of the best the supervisor could do herself." *Id.* at 45.

This formulation is also reflected in clinical scholarship. *See, e.g.,* Kreiling, *supra* note 7, at 312 (describing a model in which the supervisor "might have to intervene in rare circumstances and take over representation to ensure conformity with the highest standards of professional responsibility."). While Kreiling focuses, in this reference, on the issue of intervention in a court hearing, the legal standard against which student representation (and the duty to intervene) is to be evaluated arises at every stage in the student attorney-client relationship. Moreover, the quality of legal representation at a court hearing is almost always determined by the quality of legal representation at stages of the attorney-client relationship long preceding an actual hearing. Perhaps the earliest stage in this process is the one highlighted by the first supervisory decision in Professor Shalleck's construct, the decision not to intervene with students prior to their initial interview with a client. *See* Shalleck, *Clinical Contexts, supra* note 1, at 137.

9. Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1073 (1985).

10. *See* Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L.J. 301, 312 (1986) (describing responsibilities owed to students and clients and the varying ways in which these responsibilities can be fulfilled at different stages of the student-supervisor relationship); *see also* David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 108 (1979) ("This demands a clear, *prior* understanding of how the responsibility will be shared, and how far the student will be permitted to go before the teacher considers it necessary to interfere to protect the client's interests."). Again, such a formulation assumes that protection or advancement of a client's interests are not affected by decisions made all along the course of representation and that clinical supervisors can always "snatch victory from the jaws of defeat" by their single-handed intervention at a trial or other critical stage. From my conversations with many other clinicians, it appears that with length of teaching there often grows a greater reluctance to intervene and a greater recognition that intervention may instead "snatch defeat from the jaws of victory." However, several clinicians, in response to drafts of this Article, have confessed an increased willingness to intervene as they have gotten older.

Admittedly, there is a level of arrogance in the assumption that we, as clinical supervisors, always know when these critical stages are reached and have the omnipotence and omniscience necessary to protect a client's interests. As noted by George Critchlow, "[Non-directive supervisors] . . . question the presumption that the teacher's judgment of how to handle a case is always better or more accurate than the student's." Critchlow, *supra* note 7, at 428.

My colleague, Elliott Milstein, insightfully describes the situation with which he was confronted during the summer of 1997. An asylum case in which he had been the supervising attorney was scheduled for a summer hearing, long after the clinic students had graduated from law school. As he prepared to handle the hearing, he agonized over the ways that legal issues and client story had been presented in the students' brief and second-guessed every supervision decision he had made in the case. When he met with the judge prior to

student is in a position to irreparably damage the client."[11]

Describing the legal obligation owed by a clinical supervisor to a client neither automatically defines the nature of the supervisor-student-client relationships[12] nor determines the nature and extent of intervention.[13] However, understanding this legal obligation can provide a useful "bot-

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the hearing, the judge announced that he had been persuaded to grant the client relief on the basis of the "excellent" brief and simply wanted to put a few facts on the record. Certainly the case that Elliott was prepared to present was more nuanced and more persuasive than the case presented by the students. However, perfection is not always necessary to win and perfection does not always guarantee success. As we so often stress to our students, lawyers win cases despite their efforts and lose cases despite their efforts. Moreover, many clinicians acknowledge sometimes discovering that students make better decisions than the supervisors would have made themselves. *See* Stark et al., *supra* note 5, at 66.

11. Critchlow, *supra* note 7, at 427. *See, e.g.*, CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS – AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 27 (1980) (hereinafter GUIDELINES FOR CLINICAL LEGAL EDUCATION).

12. Others have described the role conflict of supervisors in defining the nature of the relationships. *See* Peter T. Hoffman & Kathleen A. Sullivan, *Conflict for the Clinical Teacher: Teacher or Lawyer?*, *in* ASSOCIATION OF AMERICAN LAW SCHOOLS, 1990 CONFERENCE ON CLINICAL LEGAL EDUCATION MATERIALS 33, 42 (1990) (on file with author). This conflict and the desire for non-pedagogical reasons to remain as a lawyer in the case has vitality today. As described by one clinician, "[I]f I am 'no longer lawyering in [a] public interest practice' then [I] quit. . . . [A]t least part of my role . . . is lawyering." LAWCLINIC LISTSERV ARCHIVES, at <http://lawlib.wuacc.edu/washlaw/listserv.html> (messages on file with author). (The lawclinic listserv, maintained by Washburn University, is the vehicle for daily electronic communications by and between the clinical community.).

13. I am using the term "intervention" to distinguish certain supervisor-student interactions from supervision generally. Supervision potentially includes a continuum of supervisor involvement in the student attorney-client relationship. In this context, "intervention" refers to any supervisor-student interaction that is observable to the outside world – clients, adversaries, judges. In this definition, "intervention" includes any interaction in which the supervisor displaces the student as attorney for the client. This use of the term is intended to contrast with the term "supervision." "Supervision" may include directing a student attorney towards a particular legal or factual resource or suggesting a particular course of action. In its most benign form, "supervision" may include simply turning a question back to the student attorney, indicating that the initial deliberative process may not have fully exhausted either the number of issues or the complexity of those issues.

In using the term "intervention," I am therefore referring to a transformation of supervisor from educator to lawyer. This may occur in settings in which the client is not even present or in ways of which the client is not aware. I use this expansive view of intervention because it reflects my belief that every such form of intervention has some negative impact on the learning of the student in clinic. In doing so, I acknowledge that some have utilized a far narrower definition. *See* Critchlow, *supra* note 7, at 419-420 ("I do not use intervention to mean the one-on-one supervision of the student by the clinical teacher. . . . [U]nless the criticism is palpable to the client, it is not intervention in the sense that the clinic teacher has directly assumed responsibility for performing the lawyering activity in question."); *see also* Hoffman & Sullivan, *supra* note 12, at 33 ("Intervention consists of the supervisor taking from the student some or all of the duties of representation originally assigned to the student and performing those duties for some period of time."); Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 223 n.1 (1981) ("I shall use [intervention] to mean to enter into an ongoing system of relationships, to come between or among persons, groups, or objects for the purpose of helping them." My narrower use of the term "intervention" highlights the distinction I draw between *teaching* of the student through supervision and *displacement* of the student through intervention. David Barnhizer distinguishes between activities on- and off-stage in similarly describing these visible and invisible supervisory actions. *See* Barnhizer, *supra* note 10, at 107.

tom line" for our decisionmaking about intervention.[14] Moreover, although malpractice actions and ethics proceedings have seldom arisen in clinical education,[15] the characterization of this legal obligation defines our potential liability to clinic clients[16] and to the bar[17] for the decisions we make regarding intervention and for the implementation of those decisions.[18]

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14. Legal obligations are only one of the factors that affect our supervisory decisions. Educational goals are often a far more powerful consideration in this process. Moreover, there may be political considerations that define our relationship to clinic clients far more powerfully than does the legal framework within which we teach. *See* Ann Juergens, *Teach Your Students Well: Valuing Clients in the Law School Clinic*, 2 CORNELL J. L. & PUB. POL'Y 339, 380 (1993) (discussing some of the non-educational factors that may influence relationships between supervisors and clinic clients).

15. There are two visions of the relationship between supervising attorney and client from which legal relationships flow. Obligations may flow from a perception of that relationship as one between attorney and client. Obligations are then largely defined by malpractice law and are indistinguishable from those owed by any attorney to a client although they are complicated by the intervening role of the student attorney. Obligations may also flow from a perception of that relationship as one between supervisory lawyer and client. Obligations are then largely defined by the characterization of the responsibility of the supervising attorney to supervise the student attorney consistent with the Rules of Professional Conduct in that jurisdiction. Obligations may also flow from a perception of that relationship as one largely defined by the Student Practice Rule in that jurisdiction. Obligations to the client are then largely defined by the duties owed in that supervising attorney-student attorney relationship with the client as an intended third party beneficiary.

16. The clinical supervisor might be personally liable to clinic clients for the acts and omissions attributable to the supervisor and/or to the student attorney.

17. The clinical supervisor might be professionally accountable for the acts and omissions attributable to the supervisor and/or to the student attorney.

18. There are also legal consequences for clients and for the judicial system that may flow from student representation. For example, in those states that permit students to represent the state in criminal matters, at least one court has invalidated a criminal conviction where a student prosecuted the offense in the absence of a prosecuting attorney. *See* State v. Cook, 512 P.2d 744 (Wash. Ct. App. 1973). Legal consequences may also flow from noncompliance with student practice rules when students represent defendants in criminal cases. *See* People v. Truly, 595 N.E.2d 1230 (Ill. App. Ct. 1992) (affirming conviction despite failure to obtain defendant's written consent to appearance by law student); People v. Schlaiss, 528 N.E.2d 334 (Ill. App. Ct. 1988) (reversing conviction when record failed to disclose consent by defendant to representation by law student); In re Moore, 380 N.E.2d 917 (Ill. App. Ct. 1978) (reversing commitment when record failed to disclose consent by respondent to representation by a law student); State v. Glanton, 231 N.W.2d 31 (Iowa 1975) (finding that the trial judge improperly intervened and assumed the partisan role of advocate for the defense in a case in which student lawyers represented the defense); State v. Kelly, 362 So. 2d 1071 (La. 1978) (holding that failure of student attorney to obtain signature of licensed attorney on notice of appeal was cured where appellate defense counsel prepared assignments of error); State v. Monroe, 508 So.2d 910 (La. 1987) (rejecting claim of ineffective assistance of counsel by law school legal clinic despite the defendant's failure to give written consent to his representation by law students when the defendant had orally consented to representation); State v. Edwards, 351 So. 2d 500 (La. 1977) (holding that the failure to obtain written consent from defendants authorizing representation by student practitioners might amount to reversible error if prejudicial to the substantial rights of the accused); State v. Daniels, 346 So. 2d 672 (La. 1977) (holding that the student practice rule was substantially complied with when the defendant orally consented to representation by law students); Benbow v. State, 614 So. 2d 398 (Miss. 1993) (holding that representation by a law student does not constitute the actual assistance of counsel guaranteed by the Constitution); Seattle v. Ratliff, 667 P.2d 630 (Wash. 1983) (reversing conviction when judge prevented law student from consulting with supervising attorney).

This Article begins by considering the extent to which external legal standards define the role of the clinical supervisor.[19] These legal standards include the various student practice rules and rules of professional conduct in the various states. The Article concludes that in most states there is nothing in these rules that imposes an attorney-client model on the clinic supervisor-clinic client relationship. The Article then discusses the reasons why we should take advantage of the freedom available under these rules in most states to define the relationship in a way that maximizes student autonomy and the ways to make that model work for student and client. It closes by describing some ways in which that relationship can be clarified for students and for clients in order to avoid a constellation of inconsistent expectations.

II. DEFINING THE ROLE OF THE CLINICAL SUPERVISOR

What is the nature of the duty owed by the clinical supervisor to the client? The almost automatic response to that question is that, at a minimum, the clinic supervisor owes a duty of "competent" representation to the client.[20] The source of this duty is usually identified as Rule 1.1 of the ABA Model Rules of Professional Conduct.[21]

Such an analysis, of course, begs the question. The Rules of Professional Conduct impose a duty on *the attorney* to provide competent representation *to a client.* A duty therefore only exists for the clinical supervisor if the supervisor has an attorney-client relationship to the client; the Rules do not purport to create a duty if such a relationship does not exist. We must therefore return to the basic question – Am I My Client's Lawyer? And, if I am, what is the source of that relationship?

A. RETAINER AGREEMENTS

One possible source of an attorney-client relationship would be an explicit contractual agreement between the clinical supervisor, the student attorney, and the client.[22] Regardless of any other provisions of law, an

19. In those states with student practice acts and rules permitting students to engage in representation of clients in externship settings, these comments are equally applicable to the personal liability and professional responsibility of externship supervisors.

20. *See, e.g.*, Critchlow, *supra* note 7, at 426 ("Thus, in general, the clinical teacher must ensure competent representation and take remedial action to avoid or mitigate the consequences of conduct which would violate the Rules of Professional Conduct.").

21. This rule provides as follows: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1994). This requirement is largely unchanged from the prior requirement of Canon 6 of the ABA Model Code of Professional Responsibility that, "A Lawyer Should Represent a Client Competently." MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

22. I will return to the importance of retainers later in this article. *See* discussion *infra* pp. 166-67. However, it is critical to recognize that, even in the absence of a retainer, a lawyer-client relationship can be inadvertently created. *See* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980). In this case the Minnesota Supreme Court sustained a legal malpractice verdict against a lawyer whose advice had been sought regarding

attorney-client relationship between the supervising attorney and the client could be established through a retainer agreement.[23] In fact, all of the clinical programs in which I have worked have used such retainer agreements. However, the retainer agreements were drafted based on the assumption that an attorney-client relationship existed between the client and the supervising attorney(s), not with the express intent of establishing such a relationship. Therefore, unless some other provision of law defines the supervisor-client relationship, the retainer agreement represents an opportunity for a conscious choice in defining the nature of the relationship.[24]

In the absence of a retainer agreement, consciously creating an attorney-client relationship between clinical supervisor and clinic client, from what other sources could such a relationship flow? There seem to be two major possibilities in most clinical settings – the state's Student Practice Rule and the Rules of Professional Conduct[25] in effect in that jurisdic-

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the merits of a medical malpractice action. *See id.* at 690-91. Although no retainer had been executed, the ambiguous nature of the interactions between attorney and client created an enforceable duty owed by the attorney to the client for the accuracy of the advice. *See id.* at 692-93. It is for this reason that I stress the importance of clarity and disclosure in the section on implementation of this model of the supervisor-student-client relationship. *See* discussion *infra* pp. 164-171.

23. There may be a variety of reasons, educational and other, for establishing such a relationship among clinical supervisor, student attorney, and client. Frank Bloch, for example, draws such a co-counsel relationship from the adult educational literature. *See* Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 348 (1982) ("Probably the most important element of an andragogically sound model for clinical supervision is the establishment of a co-counsel relationship between the student and the teacher.").

24. This practice suggests that a more thoughtful analysis of the content of retainer agreements may be in order. It also suggests that the retainer agreement presents an important opportunity for student attorneys and clients to work through issues of roles and expectations.

25. By referring to the Rules of Professional Conduct, I intend to refer inclusively to the ethical rules controlling attorney conduct in that jurisdiction. These standards may be based on the ABA Model Rules of Professional Conduct or the Model Code of Professional Responsibility or may reflect other choices. However, it is important to acknowledge that interpretation of the Rules of Professional Conduct only takes us so far in determining the existence of an attorney-client relationship. As emphasized in the Model Rules: "[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." ABA MODEL RULES OF PROFESSIONAL CONDUCT Scope (1994). This is in part the lesson to be learned from such decisions as *Togstad v. Vesely*, 291 N.W.2d 686 (Minn.1980). *See* discussion *supra* note 22.

tion.[26] We will examine these two sources in turn.[27]

B. Student Practice Rules

The American Bar Association adopted its Model Student Practice Rule in January 1969.[28] Most states soon followed the lead of the Model

26. There could be other sources of a standard of care owed by the supervising attorney to a client in some clinical programs. For example, in the Center for Applied Legal Studies (CALS) at Georgetown University Law Center, a learning contract was negotiated between students and supervisors. *See generally* Aiken, et al., *supra* note 9. Among the provisions contained in the learning contract were those establishing minimum standards for non-intervention. *See id.* at 1073. While the authors argued that, "Our approach is designed to provide excellent client service . . . ," the draft clause regarding non-intervention prohibited advisors from intervening in case handling "by directing decisions or actions, except in a rare instance of imminent error that would seriously damage a client." *Id.* That would present at least the theoretical possibility of a level of client service below "excellence." The authors noted that "there is an inherent tension between our duty to teach skills that students have never practiced and our belief that self-discovery is a superior educational instrument." *Id.* at 1074, n.91. An inherent tension is also present between the duty to educate students and the duty to serve clients. The balance that clinicians would strike in resolving that tension is at least as individualized as the number of clinicians and most clinicians probably resolve that tension in different ways with different clients being served by different students presenting different issues on different days. More recent conversations with Professors Aiken, Koplow, Lerman, Ogilvy, and Schrag, the authors of *The Learning Contract*, reveal by no means a uniform commitment to the standard described in that piece.

27. In his article, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, George Critchlow concluded that, "[N]either the Rules of Professional Conduct nor typical student practice rules are particularly useful in helping a teacher decide when direct intervention is required." Critchlow, *supra* note 7, at 419. He then went on to suggest a number of factors to be balanced in deciding whether and how to intervene. These factors include the student-client relationship, the client's informed consent, the teacher's familiarity with the student, the teacher's familiarity with the case, and the burdens on the client and the system. *Id.* at 430-37. While these factors are helpful in identifying "core values as criteria for intervention decisions," they only take our inquiry so far since criteria are meaningless without reference to some standard against which to apply them. For example, Critchlow points out that, "[I]f the teacher is not personally well prepared and apprised of the facts, law and legal strategy necessary for competent representation in the specific case, it is less likely intervention would accomplish its intended purpose of remedying unsatisfactory student performance." *Id.* at 434-35. If the clinical supervisor has a duty to the client to ensure a quality of representation, if that is the standard against which to apply the criterion, it is no answer to say that the supervisor is not well prepared and apprised of the facts, law, and legal strategy. If the supervisor has such a duty, then s/he had better be well prepared and apprised. It is the definition of the underlying duty that drives the application of core values; core values are not self-effectuating except in reference to an underlying duty.

Moreover, Critchlow's reluctance to base non-intervention on the factor of the client's informed consent seems even more powerful than it was in 1991. *See id.* at 431-32. Especially since the early 1980's, civil legal services have become an increasingly rationed commodity for the poor. This means that clients of clinical programs are generally faced with a choice of a student attorney or no attorney at all. That has certainly been the situation for low-income clients in the legal communities in which I have taught. As a result, consent ceases to be meaningful and the process of obtaining client consent constitutes little more than disclosure by the student attorney of the rules of student representation.

28. The Model Rule Relative to Legal Assistance by Law Students (commonly referred to as the Model Student Practice Rule) was adopted by the ABA House of Delegates in January 1969. *See* 94 Rep. of the A.B.A. 118 (1969). (I am indebted to Carol Weiss, Staff Director of the Section of Legal Education & Admissions to the Bar, American Bar Association, for making this history accessible to me.) The proposal for a model rule was presented to the House by C. Frank Reifsnyder, the delegate of the Section of

Rule, albeit with some significant variations.[29] Despite the significant changes in clinical education in the past thirty years, the Model Student Practice Rule has remained unchanged over that period.[30]

Judicial Administration. *See id.* As Mr. Reifsnyder explained, the rule was intended to ensure careful supervision of the work of the law students at every stage of their participation in trials and at the same time to give the students enough freedom of action so that they could make a genuine contribution to the proceedings. *See id.* The House of Delegates adopted the resolution without debate. *See id.* As noted by the House, this Model Rule followed the approval in principle by the House of Delegates in 1967 of "the promulgation and adoption of provisions permitting students in the final year of a regular course of study in an approved law school to appear in court, under adequate supervision by members of the bar in good standing, in behalf of indigent persons or the prosecution in both criminal and civil matters . . . ." *Id.*

It seems significant in understanding the primary focus of the Model Rule on service to indigent clients that the proposal came through the Section of Judicial Administration and not from the Section of Legal Education and Admissions to the Bar. Although the proposed rule was coordinated with the Law Student Division and the Section of Legal Education and Admission to the Bar, *see* 94 REP. OF THE A.B.A. 290 (1969), the focus on service, rather than education, is underscored in the Report of the Section of Judicial Administration. That report emphasized that the proposal for a Model Rule was designed to provide a model for the states to consider "in connection with the responsibility to provide legal services to all persons." *Id.* The Report did acknowledge a secondary, additional benefit that "the adoption of this rule will encourage law schools to provide a greater opportunity for instruction and learning in the field of trial advocacy." *Id.* at 290. This split personality has been noted by others. *See, e.g.*, Joan Wallman Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, 63 THE BAR EXAMINER 40 (1994) (attributing the expansion of student practice to the decisions of the Supreme Court in *Gideon v. Wainwright* and *Argersinger v. Hamlin* and to the growth of the clinical legal education movement).

For those of us in the third generation of clinical professors, it is easy to ignore the ambiguous legal landscape that confronted early clinicians. In the absence of a student practice rule, it was unclear what activities students could lawfully perform without engaging in the unauthorized practice of law. *See, e.g.*, Herbert M. Silverberg, *Law School Legal Aid Clinics: A Sample Plan; Their Legal Status*, 117 U. PA. L. REV. 970, 992-1000 (1969) (discussing the extent to which law students could provide legal assistance to prisoners without engaging in the unauthorized practice of law). Similarly, in the absence of a student practice rule, it was often unclear whether legal assistance provided by a law student would breach constitutional guarantees of a right to counsel. *See, e.g.*, William A. Roberts & Greg F. Janson, Note, *People v. Perez Misapplication of the Right to Counsel*, 6 PEPP. L. REV. 545 (1979) (discussing an intermediate appellate court decision in which the involvement of a law student in a criminal defense was found to vitiate the defendant's constitutional right to counsel). *See also* Donald M. Zupanec, Annotation, *Propriety and Effect of Law Students Acting as Counsel in Court Suit*, 3 A.L.R. 4TH 358 (1981) (summarizing the court cases addressing this issue).

29. *See generally* Kuruc & Brown, *supra* note 28.

30. In 1996, the Law Student Division approached the Bar Admissions Committee of the Section of Legal Education and Admissions to the Bar regarding the Committee's support of an ABA policy statement that would permit law students to continue representing clients in the months between law school graduation and bar passage. *See* Memorandum from Carol Weiss to David F. Chavkin (Oct. 22, 1997) (on file with the author). That proposal was discussed at the September 1996 meeting of the Bar Admissions Committee. At that time Committee representatives pointed out that under the Model Rule (section IV.A.) the certification of the law student remained in effect until the announcement of the results of the first bar examination following the student's graduation. No further action was taken. *See id.*

While it is true that certification under the Model Rule remains in effect after graduation, the Model Rule (unlike some state rules) only permits a student to make an appearance if the student is duly enrolled in a law school approved by the American Bar Association. *See* ABA MODEL STUDENT PRACTICE RULE, § III.A. That provision would no longer be met after graduation.

Student practice rules vary significantly from jurisdiction to jurisdiction.[31] A few states have explicitly defined the relationship of supervisor and client as one between attorney and client.[32] However, the vast majority of states have not explicitly addressed this subject.[33] Instead, we must infer visions of the supervisor-client relationship from such provisions as those defining the nature of the responsibility of the supervisor for work performed by the student attorney under his/her supervision.

While some states are silent on this issue as well,[34] most states fall into one of two camps. A number of states track the ABA Model Student Practice Rule[35] and impose "personal professional responsibility" on the supervisor "for the student's guidance and for supervising the quality of

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31. A summary of the relevant provisions of the various student practice rules appears in Appendix A. Comprehensive and fairly current citations to the student practice rules in effect in most jurisdictions can also be found in Frank G. Avellone, *The State of Student Practice: Proposals for Reforming Ohio's Legal Internship Rule*, 17 OHIO N.U. L. REV. 13 (1990) and COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS, app. (2d ed. 1973) [hereinafter CLEPR RULES]. *See also* Kuruc & Brown, *supra* note 28, at 48-55.

Although this analysis focuses on the rules governing practice in state courts, several federal courts have adopted rules governing practice by law students in the federal courts. *See, e.g.*, S.D. FLA. CT. R. 6(D)(6) ("Supervising attorney must . . . assume full personal professional responsibility for a student's guidance in any work undertaken and for the quality of a student's work, and be available for consultation with represented clients . . . ."); N.D. IND. CT. R. 83.9(b) ("Supervision by a member of this bar shall include the duty to examine and sign all pleadings filed on behalf of a client.").

32. For example, in Delaware, DEL. SUP. CT. R. 56(b)(2) provides that, "In any appearance of an Eligible Law Student, the student shall be supervised by an attorney of an agency specified in Paragraph (e) hereof, duly admitted to practice in this State, who shall appear as counsel of record." In Mississippi, the student practice rule reflects an even more restrictive vision of the student attorney (and an even more expansive vision of the role of the supervising attorney). MISS. CODE ANN. § 73-3-207(d) (1996) provides that, "[a] law student may not directly represent clients but may only assist the supervising attorney or clinical teacher in representing their clients."

33. The only ABA opinion touching on this issue did not interpret the Model Student Practice Rule at all. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1208 (1972) (discussing restrictions on legal clinic established by a state law school). In considering restrictions on the types of cases that the legal clinic could undertake, the Committee stated, "The lawyer-client relationship exists between the clients and the five clinic lawyers, not between the client and the governing body or the lawyer members of the governing body." *Id.* The Committee did not discuss the role of student attorneys or the application of the Student Practice Act. Instead the Committee had to distinguish between the governing body of the clinic, consisting of lawyers and non-lawyers, and the clinic lawyers.

34. For example, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kentucky, Michigan, New Jersey, New Mexico, Rhode Island, Tennessee, Utah, and Wyoming are silent on this issue.

35. The ABA Model Student Practice Rule provides as follows:

Proposed Model Rule Relative to Legal Assistance by Law Students

I. *Purpose*

The bench and bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing assistance to lawyers who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds, the following rule is adopted:

II. *Activities*

A. An eligible law student may appear in any court or before any administrative tribunal in this State on behalf of any indigent person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance, in the following matters:

1. Any civil matter. In such cases, the supervising lawyer is not required to be personally present in court if the person on whose behalf an appearance is being made consents to his absence.

2. Any criminal matter in which the defendant does not have the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer is not required to be personally present in court if the person on whose behalf an appearance is being made consents to his absence.

3. Any criminal matter in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

B. An eligible law student may also appear in any criminal matter on behalf of the State with the written approval of the prosecuting attorney or his authorized representative and of the supervising lawyer.

C. In each case the written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

III. *Requirements and Limitations*

In order to make an appearance pursuant to this rule, the law student must:

A. Be duly enrolled in this State in a law school approved by the American Bar Association.

B. Have completed legal studies amounting to at least four (4) semesters, or the equivalent if the school is on some basis other than a semester basis.

C. Be certified by the dean of his law school as being of good character and competent legal ability, and as being adequately trained to perform as a legal intern.

D. Be introduced to the court in which he is appearing by an attorney admitted to practice in that court.

E. Neither ask for nor receive any compensation or renumeration [sic] of any kind for his services from the person on whose behalf he renders services, but this shall not prevent a lawyer, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

F. Certify in writing that he has read and is familiar with Canons of Professional Ethics of the American Bar Association.

IV. *Certification*

The certification of a student by the law school dean:

A. Shall be filed with the Clerk of this Court and, unless it is sooner withdrawn, it shall remain in effect until the expiration of eighteen (18) months after it is filed, or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier. For any student who passes that examination or who is admitted to the bar with-

the student's work."[36] In other states, the student practice rules impose

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out taking an examination, the certification shall continue in effect until the date he is admitted to the bar.

B. May be withdrawn by the dean at any time by mailing a notice to that effect to the Clerk of this Court. It is not necessary that the notice state the cause for withdrawal.

C. May be terminated by this Court at any time without notice or hearing and without any showing of cause. Notice of the termination may be filed with the Clerk of the Court.

V. *Other Activities*

A. In addition, an eligible law student may engage in other activities, under the general supervision of a member of the bar of this Court, but outside the personal presence of that lawyer, including:

1. Preparation of pleadings and other documents to be filed in any matter in which the student is eligible to appear, but such pleadings or documents must be signed by the supervising lawyer.

2. Preparation of briefs, abstracts and other documents to be filed in appellate courts of this State, but such documents must be signed by the supervising lawyer.

3. Except when the assignment of counsel in the matter is required by any constitutional provision, statute or rule of this Court, assistance to indigent inmates of correctional institutions or other persons who request such assistance in preparing applications for and supporting documents for post-conviction relief. If there is an attorney of record in the matter, all such assistance must be supervised by the attorney of record, and all documents submitted to the Court on behalf of such a client must be signed by the attorney of record.

4. Each document or pleading must contain the name of the eligible law student who has participated in drafting it. If he participated in drafting only a portion of it, that fact may be mentioned.

B. An eligible law student may participate in oral argument in appellate courts, but only in the presence of the supervising lawyer.

VI. *Supervision*

The member of the bar under whose supervision an eligible law student does any of the things permitted by this rule shall:

A. Be a lawyer whose service as a supervising lawyer for this program is approved by the dean of the law school in which the law student is enrolled.

B. Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.

C. Assist the student in his preparation to the extent the supervising lawyer considers it necessary.

VII. *Miscellaneous*

Nothing contained in this rule shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of this rule.

ABA MODEL STUDENT PRACTICE RULE, 94 Rep. of the A.B.A. 290 (1969).

36. ABA MODEL STUDENT PRACTICE RULE, § VI(B). For example, the following states have largely adopted the language of the Model Rule. *See* ARIZ. SUP. CT. R. 38; ARK. CT. R. 15(H)(2) (but responsibility is also imposed "for the manner in which [cases] are conducted"); D.C. CT. R. 48(e)(2); FLA. BAR R. 11-1.7(c); KAN. SUP. CT. R. 709(e)(2); LA. SUP. CT. R. 20 § 9(b) (also imposes "liability" for the student's guidance and for supervising the quality of the student's work); ME. CT. R. 3(c)(1); MO. SUP. CT. R. 13.05(b); MONT. CT. R. 110-10(e)(2); NEB. R. STDT. PRAC. 4(D) (B) (but also imposes "personal

"personal professional responsibility" or "personal responsibility" on the supervisor "for the student's work."[37]

What is the significance of the different approach taken in these two classes of student practice rules? In the absence of ethics opinions or court decisions,[38] we are left to construe the relevant language with precious little guidance.

The first question that seems to arise is the question of responsibility to whom? Although generally vague in describing to whom the supervisor is responsible,[39] there are two possible entities to which duties may be owed. The reference may be to a responsibility the clinical supervisor owes to the bar – a duty that would be enforceable in a disciplinary proceeding. However, the reference might also be to a responsibility the clinical supervisor owes to the clinic client – a duty that would be enforceable in a legal malpractice proceeding.[40]

The context of the reference to "personal professional responsibility" in the Model Rule and in many state rules ("personal professional responsibility" for "guidance" and "supervision") seems to favor the former construction over the latter. These terms seem to envision a relationship between the supervisor and the client that is fundamentally different from

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professional responsibility to the client for the services performed by the law student"); N.D. R. LTD. PRAC. 6(B); OR. CT. R. 13.30; PA. CT. R. 322(c)(2); S.C. CT. R. 401(e); VA. SUP. CT. R. pt. 6, § 4 para. 15(d)(ii).

37. *See, e.g.*, ALA. R. INTERN. Para. 6(1) ("personal professional responsibility"); ARK. CT. R. 15(B)(3) ("fully responsible for the manner in which [cases] are conducted"); CONN. CT. R. § 69(b) ("personal professional responsibility for the intern's work"); IDAHO CT. R. 221(f)(3)(B) ("responsible to the Court, the Idaho State Bar, the Supreme Court, and the client for all acts of the legal intern"); MD. CT. R. 16(d) ("responsibility for the quality of the student's work"); MINN. R. STDT. PRAC. 104 ("personal professional responsibility for and supervision of the student's work"); NEB. R. STDT. PRAC. 4(B) ("personal professional responsibility to the client for the services performed by the law student"); NEV. SUP. CT. R. 49.5(5)(c) ("personally assume professional responsibility for any work undertaken by the student"); N.H. SUP. CT. R. 36(2)(b) ("assume personal professional responsibility for student's or graduate's work"); N.C. CT. R. subch. C, § .0205(a)(3) ("assume personal professional responsibility for any work undertaken"); OHIO SUP. CT. R. 2 § 7(A) ("assume professional responsibility for each case, client, or matter assigned to the legal intern"); OKLA. SUP. CT. R. LEG. INTERN. 3.7(d) ("assume personal professional responsibility for the legal work performed by the legal intern"); P.R. SUP. CT. R. 11(e)(5) ("making himself responsible for the student's good conduct and actions"); S.D. CODIFIED LAWS § 16-18-2.9(2) (Michie 1996) ("assume personal professional responsibility for the conduct of the legal intern"); TEX. R. STDT. PRAC. 5(B)(3) ("professional responsibility for the direct and immediate supervision for the professional work"); VT. SUP. CT. R. ADMIS. §13(e)(5) ("assume personal professional responsibility for the intern's work"); W. VA. CT. R. ADMIS. 10.4(b) ("assume personal professional responsibility for work undertaken by the student"); WASH. CT. R. 9(d)(1); WIS. SUP. CT. R. 50.05(3) ("assume personal professional responsibility for any work undertaken by the student").

38. A systematic survey of state bars yielded not a single ethical opinion on this issue. The smattering of judicial decisions discussed at note 19 all deal with other implications of student practice. Copies of responses received from state bars are on file with the author.

39. Exceptions include IDAHO CT. R. 221(f)(3)(B) ("to the Court, the Idaho State Bar, the Supreme Court, and the client"); NEB. R. STDT. PRAC. 4(B) ("to the client").

40. For a discussion of the developments in the law relating to malpractice liability of attorneys, see Note, *Lawyers' Responsibilities to the Client: Legal Malpractice and Tort Reform*, 107 HARV. L. REV. 1557 (1994).

an attorney-client relationship.[41] If an attorney-client relationship were imposed by the student practice rule, the supervisor would bear responsibilities to the client, bar, and judiciary far greater than those imposed by the rule, and the rule's language regarding responsibility would be unnecessary. Rather, the rule appears to impose liability on the supervisor only for what might be described as "negligent supervision." The client effectively, then, has contracted through the retainer agreement with the student attorney for appropriate guidance by the supervisor of the student and for appropriate supervision of that student – not for representation by the supervisor.[42] The client is similar to an intended third-party beneficiary of the agreement by the clinician with bar and student to provide guidance and supervision consistent with professional standards.

The term "personal professional responsibility" also carries with it some important messages regarding the role of the clinical supervisor. The clinical supervisor bears "personal *professional* responsibility," not "personal responsibility" for guidance/supervision of the student. Again, this seems to refer to the responsibility of the clinical supervisor under the applicable code of professional responsibility, not to a civil liability of the supervisor to the client. Even in those states in which the clinical supervisor bears "responsibility for the student's work," it is ordinarily "personal *professional* responsibility" not "personal responsibility" or "personal liability."

This interpretation of the admittedly vague and undefined term, "personal professional responsibility," is bolstered by other provisions of state student practice rules.[43] For example, the Massachusetts student practice rule warns that the "[f]ailure of an attorney supervising students to pro-

41. It is hard to speak any more definitively in this analysis since there is so little statutory or regulatory guidance. In at least one other context, however, a relatively similar regulatory scheme was interpreted so that the secondary professional was treated as an agent of the primary professional. In those states that authorize physician's assistants to practice, questions have sometimes arisen regarding the scope of authority of physician's assistants. In *Washington State Nurses Ass'n. v. Bd. of Med. Exam.*, 605 P.2d 1269 (Wash. 1980), the Washington Supreme Court considered a challenge by the nurses association to a regulation authorizing physician's assistants to write prescriptions that might have to be administered by nurses. The court ruled that, "[e]very order given by the [physician's] assistant is . . . considered as coming from the supervising physician . . . ." *Id.* at 1271. After reviewing the regulatory structure of physician's assistants, the Court rejected the challenge since "the [physician's] assistants must be considered as agents of the physicians rather than independent practitioners." *Id.*

42. The distinction between "guidance" and "supervision" reflected in the ABA Model Rule and in many state rules is difficult to discern. While rules of construction eschew treating words as surplusage, it appears that there is no meaningful difference between these two terms.

43. It is also consistent with the few decisions construing this term in other contexts. For example, in *Davis v. Commonwealth*, 466 S.E.2d 741 (Va. Ct. App. 1996), the Court considered a challenge by a criminal defendant to a conviction on the grounds that the defense attorney should have been permitted to withdraw when a colleague was identified as a potential witness. In rejecting the challenge, the court observed that, "[c]ounsel appeared to be concerned with her personal professional responsibility, not with the fact that her continued representation of appellant would be prejudicial to him." *Id.* at 744. The Court thereby distinguished between the attorney's accountability under the Virginia Code of Professional Responsibility and her accountability to the client. *See id.* at 743.

vide proper training or supervision may be ground for disciplinary action or revocation or restriction of the attorney's authority to supervise students."[44] The explicit message of the rule is that the way supervisor "responsibility" will be enforced is through action by the state bar.[45]

This interpretation is further supported by the extent to which many student practice rules authorize clinical supervisors to not be present in the courtroom during some or most proceedings.[46] The Model Rule took

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Similarly, in *Duncan v. Missouri Bd. of Architects*, 744 S.W.2d 524 (Mo. Ct. App. 1988), the Court of Appeals of Missouri considered the various liabilities of architects and engineers in the collapse of the Hyatt Regency Hotel in Kansas City in 1981. Missouri statutes governing engineers provided that the engineer affixing "'his signature and personal seal to . . . plans, specifications, . . . or other documents . . . shall be personally and professionally responsible therefor.'" *Id.* at 535 (quoting the relevant statute, MO. REV. STAT. § 327 (1978)). In discussing the meaning of the term "professionally responsible," the court explained, "The reference to 'professionally responsible' obviously refers to the engineer's certificate." *Id.* Here, again, the accountability flows to the state in its licensing and disciplinary capacity, not to the individuals affected who must rely on the personal responsibility of the professional.

44. MASS. SUP. CT. R. 3:03 Order Implementing Supreme Judicial Court Rule 3:03, §4.

45. The State of Washington has a similar provision. That student practice rule provides, "The failure of a supervising lawyer, or lawyer acting as a supervising lawyer, to provide adequate supervision or to comply with the duties set forth in this rule shall be grounds for disciplinary action pursuant to the Rules for Lawyer Discipline." WASH. CT. R. 9(d)(5).

46. As described in the "Purpose" section of the Model Rule, *see* ABA, *supra* note 35, the Rule was adopted with a greater focus on the provision of legal services to underserved populations than on the education of students. This theme was sounded at the beginning of the CLEPR volume in its reference to Justice William Brennan's concurrence in *Argersinger v. Hamlin*: ". . . I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision." Argersinger v. Hamlin, 407 U.S. 25, 44 (1972); *see* CLEPR RULES, *supra* note 31, at 2-4 (discussing representation of the poor). Because the goal of the Model Rule was primarily one of expanding services to underserved populations, the Rule also permits the attorney to be absent in many settings in which concerns over quality control would require the presence of the supervisor. In a model primarily designed to expand services, no (or little) expansion of services would be possible if the attorneys who would otherwise provide the services directly would also have to be present. *Compare*, MICH. CT. R. 8.120 Purpose.

> Effective legal service for each person in Michigan, regardless of that person's ability to pay, is important to the directly affected person, to our court system, and to the whole citizenry. Law students and recent law graduates, under supervision by a member of the state bar, may staff legal aid clinics organized under a city or county bar association or an accredited law school, or which are funded pursuant to the Legal Services Corporation Act. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, or city attorneys

with MISS. CODE ANN., § 73-3-203 ("Law student program in public interest—It is in the public interest to encourage the establishment and operation of effective legal internship and clinical legal education programs by law schools in this state and the utilization of services of law students in such programs as a form of legal education.").

That is not to say that clinical supervisors would necessarily take advantage of this authorization. While supervisor presence during interviews has been a topic of frequent and often passionate discourse, *see* LAWCLINIC LISTSERV ARCHIVES, *supra* note 12, there is reason to believe that few clinical supervisors would find either pedagogical or service justifications for not attending court appearances with students. This is consistent with the view in the GUIDELINES FOR CLINICAL LEGAL EDUCATION, that, "[s]tudents should be accompanied at all proceedings where a prior stipulation has not determined the outcome,

an approach to student supervision that permitted supervisors in most cases to refrain from sitting at counsel table and even to be absent from the courtroom.[47] If the clinician is authorized to not be present in the courtroom in states that have adopted this aspect of the Model Rule,[48] it is very difficult to envision the relationship contemplated in the Rule as one creating an attorney-client relationship between the supervising lawyer and the client of the student attorney.

The Model Rule and its parallels in the various states therefore represent a model at the most non-intrusive side of the clinician intervention continuum and a model that implicitly reflects a very limited view of the clinical supervisor-clinic client relationship.[49] Towards the other end of the continuum are the student practice rules that make the supervisor responsible for the work performed by the student.[50] In some of these

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including motion practice, negotiations, pretrial, trial, and appellate advocacy." GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 11, at 93.

47. The Model Rule provides that a law student may represent an indigent person in any civil matter and "[i]n such cases the supervising lawyer is not required to be personally present in court." ABA, *supra* note 35, at 290. The Model Rule also provides that in criminal matters in which the defendant does not have a right to the appointment of counsel "the supervising lawyer is not required to be personally present in court." *Id.* at 291. Only in criminal matters in which the defendant has the right to assignment of counsel does the Model Rule require that "the supervising lawyer must be personally present throughout the proceedings." *Id.* In comparing this to the treatment of physician's assistants, this would be comparable to an authorization for physician's assistants to undertake surgery in the absence of their supervising physicians. It is therefore not surprising that the Washington Supreme Court characterized this relationship as one of principal and agent. *See supra* note 41. This is why physician's assistants are sometimes referred to as "physician extenders" in the sense that they extend the ability of physicians to serve more patients. *See* Washington State Nurses Ass'n. v. Bd. of Med. Exam., 605 P.2d 1269, 1271 (Wash. 1980) ("The assistant acts on behalf of the physician, allowing the physician to care for many more patients at one time and reducing the cost of health care.").

48. This approach is paralleled in the student practice rules of several states. *See* ARIZ. SUP. CT. R. 38(c); FLA. BAR R. 11-1.2; ILL. SUP. CT. R. 711(c); KAN. SUP. CT. R. 709(a)(2); KY. SUP. CT. R. 2.540, LA. SUP. CT. R. 20 § 3; ME. R. CRIM. P. 56(a); ME. R. CIV. P. 90; MASS. SUP. CT. R. 3:03; MICH. CT. R. 8.120; MO. SUP. CT. R. 13.01(a); N.C. BAR R. subch. C, § .0206(c); N.D. R. LTD. PRAC. 2(A); PA. CT. R. 322(a); WY. SUP. CT. R. 12(b).

49. A number of states have adopted student practice rules based on the Model Rule or imposing a similar vision of the roles of the supervising attorney and student attorney. *See, e.g.*, ARIZ. SUP. CT. R. 38, FLA. BAR R. 11, MICH. CT. R. 8.120, S.D. CODIFIED LAWS § 16-18. In Connecticut, the rule in civil proceedings provides that the client must indicate in writing "his consent to the [eligible legal] intern's appearance" and the supervising attorney must also approve the intern's appearance. CONN. SUP. CT. R. CIV. P. § 68. Again, there is nothing in the rule that purports to describe the supervising lawyer as appearing on behalf of the person on whole behalf the intern is appearing. The student practice rule in Colorado goes even further in many ways. Under that rule, students may practice "as if licensed to practice" so long as they are students of an accredited Colorado law school that maintains a legal aid "dispensary," and are approved by the lawyers in charge of the clinic, and the judge of the court in which the student appears. COLO. R. CIV. P. 226. Such students appear "representing said dispensary and its clients." *Id.* There is no requirement of supervision, no defined role for the clinical supervisor, and no requirement of consent by the client for such representation. *See id.*

50. Probably the highest liability standard is that imposed by the Arkansas Student Practice Rule. *See* ARK. CT. R. 15. That rule makes the supervising lawyer "fully responsible for the manner in which [proceedings] are conducted." *Id.* at (B)(3). In another section of the rule, "personal professional responsibility" is imposed on the supervising lawyer

states, this obligation is consistent with the vision of a supervising attorney-client relationship imposed in other aspects of the rule.[51] In those states that have adopted or parallel the Model Rule, student autonomy can be maximized consistent with the Rule if justified by pedagogical considerations.

C. Rules of Professional Conduct

The second type of provision from which we might infer an attorney-client relationship are those provisions in the Codes of Professional Conduct dealing with the responsibilities of supervisory attorneys.[52] While

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"for the student's guidance in any work undertaken and for supervising the quality of the student's work . . . ." *Id.* at (H)(2). In some states, the supervising lawyer assumes responsibility "for the intern's work." *See, e.g.*, Conn. Sup. Ct. R. Civ. P. § 69(b).

51. For example, the Alabama rule provides that,

> An eligible law student may appear in any civil or criminal matter in any court or before any administrative tribunal in this State, if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the attorney of record has also indicated in writing approval of this appearance. The attorney of record shall personally supervise and oversee at all times any such student who shall appear before any court or administrative tribunal, and in any case tried before a jury, the licensed attorney of record shall be present in court at all times during the trial of the case.

ALA. R. INTERN. Par. 2(A).

This rule first sets up the supervising attorney as the attorney of record. While that term is not defined by statute or rule, the term seems to envision an attorney-client relationship between the supervisor and the client. By contrast, the nature of the legal relationship, if any, between the law student and the client is left uncertain. The rule also seems to set up an untenable conflict between the requirement of personal supervision and the apparent permission to not be present during proceedings before a court or administrative tribunal not involving a jury trial. How the attorney would personally supervise and oversee the student at all times without being physically present is not addressed in the rule. However, in light of the personal liability that the supervising attorney would bear as attorney of record to the client, a fairly low threshold for supervisor intervention should be anticipated. This is in addition to the "personal professional responsibility" that the rule imposes on the supervising attorney for the student's work.

52. Rule 5.1 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT provides as follow:

> Responsibilities of A Partner or Supervisory Lawyer
>
> A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
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> the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1994). In responding to my letter requesting ethics opinions regarding the supervisory responsibility of clinicians, the General Counsel of The Mississippi Bar referred to this rule as defining supervisory obliga-

admittedly not a perfect fit for all aspects of clinical programs, the relationship between clinical supervisor and student attorney approximates the senior attorney-junior attorney relationship.[53] We often analogize the clinical program to a law firm operating within a law school environment[54] and treat discussions of cases and clients in settings like "case rounds or grand rounds"[55] as protected by principles of confidentiality[56]

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tions. Letter from Michael B. Martz, General Counsel, The Mississippi Bar, to David F. Chavkin, p. 1 (May 8, 1997) (on file with author).

53. The Comment to the MODEL RULE provides as follows:

> Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1, cmt. (1994).

54. The Comment to Rule 1.10 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT defines "firm" to include "lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10, cmt. (1994).

55. By "grand rounds" or "case rounds," I am referring to the periodic interactions in the clinic seminar during which students share the latest developments in their cases with other members of the clinic class. *See* David F. Chavkin, *Training the Ed Sparers of Tomorrow: Integrating Health Law Theory and Practice,* 60 BROOK. L. REV. 303, 331 (1994).

56. This issue arises at its most basic level in the confidentiality of communications between client and student attorney, between client and supervising attorney, and between student attorney and supervising attorney. If an attorney-client relationship does not exist between the client and the student attorney or between the client and the supervising attorney, is it obvious that the communications are privileged anyway? In those states in which there are specific provisions, the answer *is* obvious. *See infra* note 57. However, in other jurisdictions, we must refer back to state statutes or common law providing that communications to the employees or agents of the attorney are privileged. *See* 8 J. WIGMORE, EVIDENCE § 2292, n.2 (McNaughton rev. ed. 1961). As noted by Professor Paul Rice,

> Technical and administrative difficulties involved in the practice of law and complex legal transactions often necessitate the assistance and special expertise of non-lawyers in order to render adequate legal services. Lawyers simply cannot tackle the multitude of related tasks necessary to be an effective representative. Because this assistance is frequently the ministerial services of secretaries, messengers, and file clerks, some courts suggest that the agency rule is limited to "ministerial agents of the attorney (such as clerks or stenographers) whose assistance is essential in the ordinary performance of legal services." The application of the privilege, however, is not limited to such services.

PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 79-80 (1993) (citations omitted). Rice explains:

> Although the issue has not been litigated, because the purpose of the privilege is to ensure more informed, and therefore more accurate, legal advice from the attorney by encouraging more open communications for the client, and students are authorized to render that advice, the attorney-client privilege should be as applicable to communications between the student attor-

within the firm.[57]

neys and their clients as it is between duly licensed attorneys and the same clients.

Id. at 116. While we are probably on safe ground in utilizing grand rounds, it is by no means as obvious as it might initially appear. Professor Rice has recently argued for disconnecting the attorney-client privilege from the requirement of confidentiality. *See generally* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853 (1998). Adoption of his recommendation whould go far towards eliminating any uncertainties regarding the privileged nature of these communications.

57. While this conclusion might seem obvious, some states apparently felt that the characterization was sufficiently ambiguous as to require specific language in the student practice rules. For example, the Arizona rule provides:

> The rules of law and of evidence relating to privileged communications between attorney and client shall govern communications made or received by professors or students certified under the provisions of this rule. All persons participating in a program of instruction pursuant to which a professor or student is certified under this rule are enjoined not to disclose privileged or confidential communications whether in the implementation of a course of instruction or otherwise.

ARIZ. SUP. CT. R. 38(h)(4); *see also* MASS. SUP. CT. R. 3:03 (providing that the attorney-client privilege applies to communications made or received by student); WASH. R. ADMIS. APR. 9(d)(6) (recognizing that, for purposes of the attorney-client privilege, an intern shall be considered a subordinate of the supervising lawyer.). This type of provision eliminates much, but not all, of the uncertainty that might exist. For example, what happens if a student in the clinic is not certified under the provisions of the rule? In the Civil Practice Clinic in which I now teach (and in prior clinics not limited to third-year students), I have frequently had students who were not certified under the local student practice rule. In some instances, this non-certification was predictable before the beginning of the semester since participation in the clinic was open to second-year students who could not have earned the requisite credits to qualify under the rule. In other instances, non-certification was unpredictable and arose because questions about a student's moral fitness to practice were raised in the application process. In both of these circumstances, non-certified students participated in grand rounds with other students and represented clients in settings or at stages of a case in which certification was not required.

Client communications are regularly shared during "grand rounds." Because we have equated the clinic setting to a law office, we have assumed that the cloak of confidentiality has encompassed all participants in the clinic. Admittedly, the fact that the Arizona Supreme Court promulgated a rule specifically mandating confidentiality does not force the conclusion that confidentiality was not otherwise present. It might as easily have been included to emphasize the importance of confidentiality in this context or simply to avoid any question about the issue. Moreover, as noted by Paul Rice,

> With or without a student practice rule, courts may indirectly afford communications with a law student the protection of the attorney-client privilege through the licensed attorney that the student is assisting in the rendering of legal advice. As with any other agent or subordinate of an attorney (like paralegals, investigators, secretaries, and expert consultants) who work directly under his supervision in the rendering of legal advice or assistance, the law student will come under the attorney's umbrella of protection.

RICE, *supra* note 56, at 117 (citations omitted). The discussion of cases in grand rounds serves two major purposes—to educate students regarding issues presented in cases handled by others and to improve the representation through the feedback obtained by students presenting cases to the group. At least this latter purpose is fully consistent with the policies underlying the application of the attorney-client privilege to all participants in the "firm." Again, however, the resolution of the issue is perhaps less obvious than at first blush. *See also* 8 J. WIGMORE, EVIDENCE § 2301 (McNaughton rev. ed. 1961); Dabney v. Investment Corp. of America, 82 F.R.D. 464, 465 (E.D. Pa. 1979) ("Examples of . . . subordinates [included in the privilege] would include any law student . . . acting as the agent of a duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege.").

Here, again, the effect of the rule is to impose personal responsibility on the lawyer for violations of the rules of professional conduct.[58] Extrapolating to the clinical context, the clinical supervisor bears personal professional responsibility for breaches by the law student of the rules of professional conduct. One of the ethical duties of the student attorney is the duty to provide competent representation to the client. The clinical supervisor therefore has a duty to take steps to ensure that the student attorney provides competent representation.

That ethical duty to supervise the clinical law student is not the same as a personal duty to provide competent representation to the client, however. This is one of the areas in which the analogy to a private law firm somewhat breaks down. The law school clinical program has no independent legal status comparable to that of a private law firm organized as a professional corporation or partnership. Therefore, unless in the retainer agreement the client has retained the clinical program,[59] the supervising attorney's duty is to take "reasonable" actions to ensure that the student provides competent representation.[60]

The duties of supervisory lawyers therefore only take us so far in defining the duties of clinical supervisors. The rule does not purport to establish an attorney-client relationship if one does not exist. Instead, it piggybacks on a model in which a client retains a law firm in which certain attorneys have direct responsibility for the work of the client and others have indirect responsibility for that representation. Thus, ethical rules do not impose an attorney-client model on the clinic supervisor and clinic client. Because neither the rules of professional conduct nor the student practice rules in most states impose such a model, the supervisor has the freedom to define the supervisor-client relationship in a way that maximizes student autonomy if there are good pedagogical justifications for such an approach.

III. JUSTIFICATIONS FOR DELAYING OR DEFERRING INTERVENTION[61]

A decision to delay or defer intervention must be based on a balancing of two important, but often conflicting, goals – maximizing the educa-

58. This is perhaps one of the reasons that so many clinicians reported that they approach ethical decision-making more directively than they do tactical decision-making. *See* Stark et al., *supra* note 5, at 53.

59. This is a questionable model for many reasons. In addition to the problems arising from the lack of independent legal status for most clinical programs, such an approach makes all clinical supervisors responsible for the work of the students in any one clinic. Such an approach also magnifies the conflict of interest problems that may occur.

60. The ABA's MODEL RULES OF PROFESSIONAL CONDUCT refer to "reasonable remedial action." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1994).

61. I am especially indebted to Professor Gerald Hess, Director of the Institute for Law Teaching at Gonzaga University School of Law, for his commitment to excellence in teaching and for his assistance in identifying the educational research in this area. Professor Hess is an extremely knowledgeable and accessible resource for clinical and other law school faculty researching educational theory. One of the resources he identified

tional benefits to the student versus maximizing the quality of service to the client.[62] Unless there are sound pedagogical reasons why intervention should be avoided, the counterbalancing interests of the client would demand intervention in any circumstance in which there would be reason to believe that the client's interests could be furthered by intervention.[63] We find these countervailing justifications for non-intervention in the belief that postponing or minimizing intervention will help the student learn better than s/he would if there were earlier or more intrusive intervention.[64]

As clinical educators have attempted to integrate principles of adult learning into their clinical courses,[65] there are still many questions for

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is the "ERIC" database within Westlaw. "ERIC" is an enormous database for articles, books, and papers dealing with learning theory.

62. This tension between "pedagogy" and "professional responsibility" highlights the longstanding tension regarding clinical education. If the focus were on "service," we would err on the side of intervention; if the focus were on "education," we would err on the side of non-intervention. *See* Kenneth S. Gallant, The Student and the Client: Understanding the Relationship, Address at the Third International Conference on Clinical Legal Education (1993) (unpublished manuscript, on file with author) ("My use of a model in which the supervisor adopts as much of a 'hands off' policy as possible, coupled with my claim that he or she should know as much as possible about the student-client interaction, demonstrates another aspect of the tension between teaching and client service in clinical legal education.").

For better or for worse, there are clinicians on both sides of this debate. For example, the authors of one of the classic pieces in clinical scholarship have described the "shock" with which many clinicians reacted to the non-interventionist approach then used at Georgetown University Law Center. Aiken et al., *supra* note 9, at 1074 n.90. ("In discussions with other clinicians, we have found that it shocks some of our colleagues as well. Instructors in many other clinics apparently intervene much more readily than we do when students are handling cases in ways at odds with their own preferred strategies.").

A resolution of the issue of the balance to be struck between education and service was attempted in the GUIDELINES FOR CLINICAL LEGAL EDUCATION. *See supra* note 11. "The primary purpose of clinical legal studies is to further the educational goals of the law school, rather than to provide service." GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 11, at 14. However, the resolution of that debate should not obscure the fact that clinical programs provide a significant service to the communities in which they are located while remaining true to their educational mission.

63. In fact, empirical results indicate that clinicians utilize a fairly low threshold to justify intervention. *See* Stark et al., *supra* note 5, at 57. Clinicians were asked to agree or disagree with the following statement: "When priorities are in conflict, the highest priority of a clinical program is to promote student growth and learning, not to provide the best possible legal service to the client." *Id.* An overwhelming majority of both directive (89.3%) and nondirective (60.4%) clinicians disagreed with that statement. *See id.* While they may choose to continue to disagree, it cannot be because of some perceived externally-imposed obligation.

64. Some have described these benefits in the following language: "When the [non-intervention] clause works as intended, case handling is structured to teach a variety of complex skills which could not be taught if the advisors intervened more frequently." Aiken et al., *supra* note 9, at 1073. An emphasis on self-direction and active experiential learning has been positively evaluated in other professional disciplines as well. *See* Lillian Tibbles, *Theories of Adult Education: Implications for Developing a Philosophy for Continuing Education in Nursing*, 8 J. CONT. EDUC. NURSING 25, 28 (1977) ("[T]he concept of andragogy provides a good basis for a philosophy of continuing education in nursing. Good planning and good teaching takes into account the adult need to be self-directive. Learning should be both problem-centered and experienced-centered.").

65. One of the earliest and most articulate voices for this effort was Frank Bloch. In his article applying andragogical learning theory to clinical education, Bloch emphasized

which there are no answers from empirical research.[66] Chief among these is the extent to which most students learn better from having to work their way initially through a problem without step-by-step guidance.[67]

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that "law students are experienced students, are at least in their early twenties and often much older, and are about to begin – and in many ways are already participating in – the practice of law." Bloch, *supra* note 23, at 325. At least one commentator has expressed concern that clinical teaching is not always so different from traditional law teaching. *See* Condlin, *supra* note 13, at 226. As Condlin has suggested, autonomous decisionmaking facilitates adult learning. *See id.* at 223 n.1, 245 n.55. For a more philosophical approach to the issue of learning from the clinical experience, see Morris D. Bernstein, *Learning From Experience: Montaigne, Jerome Frank and the Clinical Habit of Mind*, 25 CAP. U. L. REV. 517 (1996).

66. Of course, even empirical research may not establish answers for all clinicians. Maximizing educational benefits might still have to be balanced against other values. As Peter Hoffman has aptly noted, "If nothing else, clinical teachers cannot be accused of conformity of thought." Hoffman, *supra* note 10, at 303.

67. My colleague, Elliott Milstein, describes this as "The Problem of the Kitchen Organizer." If you want students to learn how to organize a kitchen, do you first teach them about the principles of kitchen organization and then take them into an organized kitchen to work for a while? Or, is it better for them to first be given the opportunity to organize a kitchen and then work in it a while so that they learn about the placement of drinking glasses through the experience of having to unload a dishwasher and the placement of measuring spoons through the experience of having to cook a meal?

The Milstein "kitchen organizer" problem tracks the debate in educational circles between the *discovery learning* model of teaching and the *exposition-application* model. *See* John D.W. Andrews, *Discovery and Expository Learning Compared: Their Effects on Independent and Dependent Students*, 78 J. EDUC. RES. 80 (1984) (I am grateful to this author for his even-handed analysis of the available studies and for the guidance this article provided to other studies.). In the discovery learning model, students' curiosity and constructive abilities will be engaged if they are first presented with ambiguous material and then when given the opportunity to organize according to concepts which they themselves develop. *See* J.S. Bruner, *The Act of Discovery*, 31 HARV. EDUC. REV. 21-32 (1961) (summarizing "the very attitudes and activities that characterize 'figuring out' or discovering things for oneself also seems to have the effect of making material more readily accessible in memory"). By contrast, in the exposition-application model, teachers begin by making an organized presentation of material and then ask students to learn and apply the knowledge thus given. *See* R.S. Blake, *Discovery Versus Expository Instructional Strategies: Literature Review and Implications for Instructional Design*, Address at the National Society for Performance and Instruction (1982).

James S. Coleman describes a three-step process of learning through experience that parallels the discovery learning model. *See* James S. Coleman, *Differences Between Experiential and Classroom Learning*, EXPERIENTIAL LEARNING 49, 51-52 (M. Keeton ed. 1976). In the first step, a student carries out an action in a particular context and observes the effects of that action. The observed effects provide information about a sequence of cause and effect. The second step is that of understanding these effects and the underlying principle in the particular instance. Finally, there is application of the general principle to a new situation within the range of generalization.

As might be expected, the educational literature indicates that different students learn better at different times from different models of teaching. A number of studies have documented advantages to the discovery learning model *See, e.g.*, Robert M. Gagne & Larry T. Brown, *Some Factors in the Programming of Conceptual Material*, 62 J. EXPER. PSYCHOL. 313, 319 (1961) (illustrating that a discovery method of learning leads to greater transfer of information than does a rule and example method); Bert Y. Kersh, *The Motivating Effect of Learning by Directing Discovery*, 53 J. EDUC. PSYCHOL. 65 (1962) (supporting hypothesis that self-discovery motivates a student to practice more and, thus, remember and transfer more than would be learned through other techniques). Other studies have found either no significant differences or some preference for the exposition-application model. *See, e.g.*, Robert C. Craig, *Directed versus independent discovery of established relations*, 47 J. EDUC. PSYCHOL. 223 (1956) (indicating that teachers should be liberal with information designed to assist learners in discovery of principles); Ronald H. Forgus &

Through which approach will students be better able to learn from their experiences and integrate those experiences in their future growth?[68]

While andragogical principles seem to suggest a minimally intrusive role for clinical supervisors,[69] some commentators have seemed to stop short of fully incorporating this vision in their proposed clinical models.[70] Some of this apparent inconsistency[71] appears to derive from external

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Rudolph J. Schwartz, *Efficient Retention and Transfer as Affected by Learning Method,* 43 J. OF PSYCHOL. 135 (1957) (concluding that learning by principle is generally superior to role learning).

68. As noted by Bob Condlin, "It is not experience itself that is valuable as much as it is the interpretation of experience. . . ." Condlin, *supra* note 13, at 224 n.2. My use of this standard to define the issues confronting clinical educators is not intended to diminish the usefulness of well-designed externships or of "role modeling" within in-house clinics to reach particular students or to teach particular skills and values. *See generally* Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989). However, even advocates of an increased use of "role modeling" acknowledge the importance of "role assumption" for many, if not most, students. *See id.* at 187. Moreover, ultimately all law students who decide to practice as attorneys will have to assume that role. It is far better that these students try on this role in a setting in which they can maximize educational benefits and in which client interests are protected. While I tend to use modeling approaches early in the student development process, my colleague Nancy Abramowitz takes the opposite approach. She believes that students will learn best if they are immersed in the attorney role early and then will be less threatened and better able to learn from supervisors when modeling is used later in the process.

69. Knowles, for example, emphasizes that "the more active the learner's role in the process, the more he is probably learning." MALCOLM S. KNOWLES, THE MODERN PRACTICE OF ADULT EDUCATION 41 (1970). Knowles is not without his critics, however. For example, Mark Tennant has criticized Knowles and the limitations imposed by Knowles' reliance on humanistic psychology. *See* MARK TENNANT, PSYCHOLOGY AND ADULT LEARNING 13-23 (1988); MARK TENNANT & PHILIP POGSON, LEARNING AND CHANGE IN THE ADULT YEARS 132 (1995) ("Approaches such as those of Knowles . . . have been just criticized for being too technical, and ignoring the social and political dimensions of learning."). As Tennant explains:

> In outline [Knowles] theory is simple, he offers a number of categories of motive which are related in a hierarchy of prepotency. . . . [Knowles] fails to acknowledge that [the learning contract process] contains assumptions about the nature of knowledge and knowing; and consequently these assumptions remain unexplored by him. At best, he offers a truncated version of self-direction; the student directs the *content*, the educator directs the *process*. . . . Knowles' model for the ideal teacher-learner relationship strongly reflects the counsellor-client relationship in humanistic clinical psychology. . . . The learning model which emerges leads to an unpalatable view of education as the identification and elimination of deficits or "gaps" in knowledge, performance, or self concept. . . .

TENNANT, PSYCHOLOGY AND ADULT LEARNING, *supra*, at 13-23.

70. For example, despite his discussion of the assumptions of andragogical learning, Bloch recommends "[t]he sharing of responsibility for clinic cases." Bloch, *supra* note 23, at 339. Hoffman recommends a model in which initial decisions are made by the supervisor and directions by the supervisor are concrete and specific. *See* Hoffman, *supra* note 10, at 305. This relationship progresses along a continuum until the students act "as lawyers in their own right." *Id.* at 309.

71. Bloch stresses the importance of the teacher following "the andragogical prescriptions of being sensitive to the student's role as a self-directed learner. . . . Thus, the teacher and student should share the assignment of responsibilities in a particular case." Bloch, *supra* note 23, at 349. In theory, an andragogical prescription would allow the student to establish responsibilities in a particular case. The "thus" linkage between Bloch's two clauses therefore seems quite tenuous. Bloch seems to acknowledge this when he notes that "[a]n andragogical model would specifically discourage this type of [teacher control]

forces, again reflecting the tension between service responsibilities and educational goals.[72] In fact, while giving lip service to the "co-counsel" model, implementation of these proposed clinical models would compel a very different approach to clinical lawyering.[73]

Two aspects of student learning perhaps best highlight the educational importance of maximizing student autonomy.[74] It is a far different experience for the student in making and implementing decisions with the client if the student does not believe that the clinical supervisor is always

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supervision, *except to the extent it is necessary to ensure competent representation in a particular case." Id.* (emphasis added).

72. For example, Bloch explains that:

> In an actual client setting, . . . the student and teacher are *forced* to work together at every step in the case because crucial decisions may have to be made at any time that could be critical to the client's claim or defense. As a result, a co-counsel relationship develops between the student and teacher that continues throughout the student's involvement in the case . . . .

Bloch, *supra* note 23, at 346 (emphasis added). This use of the passive voice to describe the development of the relationship between student and teacher seems to be especially revealing in suggesting that outside forces have imposed this model on student and teacher. Rather than representing a model of educational choice, this passage seems to reflect an accommodation of educational theory and professional realities. If the professional realities do not force the acceptance of such a model, different educational choices might be made.

The GUIDELINES FOR CLINICAL LEGAL EDUCATION also recommend a model in which the clinical supervisor must balance service responsibilities and educational goals:

> VIIIB. Responsibility for Student Actions and Evaluation of Student Performance
>
> The individual having direct and immediate supervisory responsibility for the student should:
>
> 1. accompany the student in all proceedings where the effects of the actions which may be taken can be irreversible, and be prepared to take over for the student if the client's interests require; and
>
> 2. review with the student all actions which the student has or might have taken affecting the client's interests.

GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 11, at 27.

73. Bloch emphasizes that:

> Although an actual client representation setting makes it possible for the student and teacher to establish a continuous co-counsel relationship, the proposition does not follow that the teacher and the student should work together on every aspect of all the student's cases. The optimal andragogical setting is one in which students are given the opportunity to learn through their own initiative by working together with – rather than being dominated by – the teacher. . . .

Bloch, *supra* note 23, at 347. If, as noted earlier, a co-counsel relationship is necessary because "crucial decisions may have to be made at any time that could be critical to the client's claim or defense," teachers would have to be involved as co-counsel at every stage of the client's case. GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 11. If potential impact on the client is not the source of the duty, it is possible to give greater weight to the important educational impact of student autonomy. Ultimately, Bloch attempts to reconcile these two views by cautioning that, "[c]lose supervision . . . does not mean a constant faculty presence." *Id.* at 350.

74. In reality, the distinction between the different camps on student autonomy is more a matter of degree than one of true difference. Both camps recognize a continuum that increases student autonomy consistent with student capabilities. Both camps must therefore confront these issues at some point in the student attorneys' development.

there to pull the student's "fat out of the fire."[75] This increased sense of responsibility results in a greater investment by the student in the lawyering process for many of the same reasons that we recognize that live-client representation is ultimately a better method for developing lawyering identity and lawyer skills and values than is a simulation model.[76] Second, there is the application of the popular conception of the Heisenberg "Uncertainty Principle" to clinical education.[77] The mere presence of the clinical supervisor as observer, much less participant, necessarily distorts the attorney-client relationship in a way that adversely affects student lawyering identity.[78]

This, of course, is not to say that clinical supervisors have no andragogically sound role to play in the student attorney-client relationship.[79] Cer-

75. Peter Hoffman and Kathleen Sullivan have presented this concern in the following language: "Will the student become 'addicted' to the availability of intervention and cease taking responsibility for his/her actions and decisions?" Hoffman & Sullivan, *supra* note 12, at 36. Ann Shalleck has also described this phenomenon with a somewhat different focus. "If, however, the teacher delays intervention until after the students have acted, then they may 'own' the experience more deeply. As a result, the experience may provide a powerful basis for later reflection and understanding." Shalleck, *Clinical Contexts*, *supra* note 1, at 154.

76. Rosalie Wahl, a former chair of the ABA's Section of Legal Education and Admissions to the Bar, described the impact of live-client representation on student attorneys. "I personally feel that the real consequences of working with a live client has a quality and an ethical responsibility to that person that you cannot experience by just listening about it." SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 122 (1993); *see also* Susan Bryant & Maria Arias, *A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering That Empowers Clients and Community*, 42 WASH U. J. URB. & CONTEMP. L. 207, 210 (1992) (warning that "lawyering skills courses that are taught through simulation teach skills without an explicit recognition of the importance of context. In the clinical setting, however, the real world makes context more apparent and forces students to apply their lawyering skills to problems with real world complications."); Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1 (1963) (Stressing the necessity of "live-client learning" for students to deal effectively with professional responsibility issues).

77. The "uncertainty principle" is popularly (mis-)understood to refer to the notion that measurement disturbs what we measure. *See* WERNER HEISENBERG, PHYSICS AND PHILOSOPHY 52 (1958) ("[T]his must mean that the term 'happens' is restricted to the observation. Now, this is a very strange result, since it seems to indicate that the observation plays a decisive role in the event and that the reality varies, depending upon whether we observe it or not."). The actual uncertainty principle refers to our inability to know precisely both speed/energy and position at the same time; there is a necessary trade-off between our ability to know one or the other. *See id.* at 49 ("The knowledge of the position of a particle is complementary to the knowledge of its velocity or momentum. If we know the one with high accuracy, we cannot know the other with high accuracy; still we must know both for determining the behavior of the system.").

78. All of us have experienced the situation in which the client insists on talking to the "real" lawyer, not to the student attorney. It is hard to imagine a situation that is more likely to be destructive to the student's self-image as an attorney or more destructive to the learning experience context of the student. As Minna Kotkin has described, "Particularly in a live client clinic, when client representation begins with the teacher rather than the student in role, the dynamic of authority established in the minds of the client, adversary, and court, may be irrevocable." Kotkin, *supra* note 68, at 201.

79. One role that clinical supervisors must play is to keep student anxiety within creative limits and prevent it from becoming debilitating. As described by Peter Hoffman, "Too little control [by supervisor over student] can leave the student anxious and floundering." Hoffman, *supra* note 10, at 311. While I would substitute the term "appropriate su-

tainly, we are not "*potted plants*."[80] However, the principle does suggest a style of intervention and a model for the student attorney-client relationship that minimizes the formal role of the clinical supervisor as attorney and as director/definer of that relationship.[81]

One context in which nearly all of us have confronted educational benefits of different adult learning models arises before the first hearing with a student team. How specific and directive should we be about arrival times for the hearing? To what extent should we utilize a discovery learning model as opposed to an exposition-application model?[82]

All of us have dealt with the anxiety that results when a student attorney does not appear at a court hearing as early as we anticipate. At a half-hour before the hearing we might walk out into the hallway to see if the student is somewhere away from the immediate environs of the courtroom. At 20 minutes before the hearing we might begin to pace the halls and walk down to the lobbies. At 15 minutes we might call the student's home and work telephone numbers. At 10 minutes before the hearing, we might begin to grapple with the question of whether to ask the judge to pass the matter or to seek the client's permission to represent her at the hearing.

After the first time we experience this level of anxiety, we decide how best to prevent this situation from ever happening again. The common approach would be to utilize something like the following discussion:

Supervisor: Now that we have discussed the approach you plan to take at the hearing tomorrow, I wanted to talk with you about your transportation plans.

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pervision" for the word "control," the basic concept is the same. We must be available to ensure through appropriate supervision that the student's anxiety is kept at an appropriate level.

80. One clinician reacted to the conclusions of this article with the following observation: "I can't imagine explaining to a client, his/her family, or an ethics board that I was there at counsel table merely as a Visitor or a Potted Plant." LAWCLINIC LISTSERV ARCHIVES, *supra* note 12. During the Iran-Contra hearings, in an exchange with Senator Daniel K. Inouye, Brendan Sullivan, the attorney for Oliver North declared, "I'm not a potted plant. I'm here as the lawyer. That's my job." *Iran-Contra Hearings; Note of Braggadocio Resounds at Hearing*, N.Y. TIMES, July 10, 1987, at 7.

In some ways, the observation that "we are not potted plants" distinguishes the clinical setting from either strict discovery learning or expository-attention learning models. The clinical model I espouse has been described as a model of "guided discovery" and has been evaluated to be the most effective discovery learning pattern. *See* Blake, *supra* note 67. This model has been contrasted with a "no help" model. *See* Robert C. Craig, *Discovery, Task Completion, and the Assignment as Factors in Motivation*, 2 AMER. EDUC. RES. J. 217 (1965). It also might be contrasted with a "no responsibility" model.

81. David Barnhizer has noted that, "[o]bviously, the 'primary' lawyering responsibility is shared with the teacher; however, . . . the student must, to the extent possible, be given the immediate, on-line responsibility for what will happen to *his* client." Barnhizer, *supra* note 10, at 72 n.13.

82. In the "discovery learning" model, students are first presented with ambiguous material and then given the opportunity to organize according to concepts which they themselves develop. In the "exposition-application" model, teachers begin my making an organized presentation of material and then ask students to learn and apply the knowledge thus given. *See* Andrews, *supra* note 67, at 80.

Student: What do you mean by that?
Supervisor: I wanted to discuss with you how you plan to get to the courthouse and when you plan to arrive.
Student: (somewhat bemused but going along) Well, I plan to drive to the hearing.
Supervisor: That sounds fine. What time will you leave your apartment?
Student: Well, it took me about 20 minutes to get to the courthouse when I went down to file the last motion.
Supervisor: If I remember right, you didn't do that during rush hour.
Student: No, it was during the middle of the day.
Supervisor: Do you think you should leave some extra time for driving and parking during morning rush hour.
Student: Yeah, probably so. I'll leave an extra half-hour.
Supervisor: That sounds like it should be enough. What time did you want to arrive at the court?
Student: Well, the hearing is at 9:30. I'll plan on being there at 9:15.
Supervisor: Do you think that there might be some benefits in being at the court earlier?
Student: What do you mean?
Supervisor: Well, the judge will be on the bench for some preliminary matters starting at 9:00. Do you think that you might gain something from seeing her on the bench that morning?
Student: Yeah, I suppose so.
Supervisor: Can you think of any other benefits of getting there early?
Student: Well, I might be able to talk to the opposing counsel who refuses to return my telephone calls. (pause) I might also be able to take my client into the courtroom and show her where to stand and where I will be when she is cross-examined. (pause) I might also be able to tell which witnesses have shown up.
Supervisor: So, it sounds like it might be helpful to get there even earlier than you had planned.
Student: I'll plan to be there by 9:00.

In this type of interaction, the student often indulges the supervisor. The student is not necessarily persuaded of the value of the supervisor's caution, but instead understands the message being conveyed by the supervisor. Because the student is not persuaded, the student follows the agreement during the period of the clinic and arrives, in his mind, "too early" simply to indulge his supervisor. What will happen when the student goes into practice?

My sense is that the student has not internalized the decision and will arrive late for court at some point in the near future. The main point of leaving sufficient time for misadventures on the road will not be brought home because the situation was not one that the student had to work through and for which the student had to bear responsibility.

Contrast that learning process with the one that results when the supervisor decides not to discuss this issue with the student in advance of the

hearing. Instead of indulging the supervisor by coming early, the student will be caught in traffic, perhaps be forced to detour because of an accident, discover that the parking lot is full, and arrive in court minutes after the hearing was scheduled to start. The stress that the student will invariably feel from having practiced the skill of arriving for court and finding the performance of that skill deficient will bring home the lesson far more powerfully than would a simple discussion of the skill. As adults, we tend to internalize those lessons far more powerfully when the bad things happen.[83]

There are therefore strong educational benefits to be achieved by defining the clinical model in a way that maximizes student autonomy.[84] However, if such an approach, while educationally sound, were inconsistent with legal constraints, educational theory would have to give way to professional realities. As discussed earlier, legal standards do not significantly constrain our educational choices. We must therefore determine the best ways to take advantage of this flexibility.[85]

IV. CLARIFYING THE CLINICAL SUPERVISOR-CLINIC CLIENT RELATIONSHIP

If the clinical supervisor-clinic client relationship is not defined by law,[86] how should we define that relationship? While many clinical educators will undoubtedly opt for a model, at least for some students representing some clients on some issues, in which there is an attorney-client relationship between the clinical supervisor and the client,[87] educational goals will be most advanced if clinical supervisors take advantage of the

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83. As described by Kreiling, "If [the plan of action] does not [yield the predicted results], then the 'theory of action' is disproved and the ineffectiveness of the action taken can be recognized more clearly." Kreiling, *supra* note 7, at 292.

84. Even in those programs consciously electing a co-counsel model, there has been little consideration of the impact of another provision of the Rules of Professional Conduct. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 addresses conflicts of interest. This rule provides that:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and the client consents after consultation. . . .

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994). The supervisory lawyer has a duty to the student that may materially limit the role of the supervisory lawyer in the representation of the client. That duty is the responsibility to maximize educational benefits for the student. Although there is good reason to believe that the representation will not be adversely affected by this duty, the client must be given enough information to provide informed consent, even if the lack of alternative legal resources makes this consent more of an acknowledgment.

85. This may also require an acknowledgment on our parts that "clinical programs can provide highly competent, even excellent service, but not the 'best possible.'" Stark et al., *supra* note 5, at 67.

86. This discussion excludes those few states in which an attorney-client relationship is imposed by the Student Practice Rule. *See infra* note 32.

87. A relationship in which the clinical supervisor and the student attorney are co-counsel would also fit into this model.

flexibility of most student practice rules to avoid establishing a co-counsel relationship except in extreme cases.[88] Such an approach will maximize the benefits of the role assumption model and will ultimately provide the greatest clarity for the clients affected.[89]

The definition of the relationship starts with the retainer agreement between the student and the client. Although I have largely worked in clinics using form retainers, I recently abandoned that approach, opting instead for individual retainers drafted by the students for acceptance by the clients. The drafting process provides a rich opportunity for students to work through some of the basics of role definition in a context that seems somewhat less daunting and less abstract than the "learning contract" model.[90] This means that students will confront many of these issues in advance of meeting the client and at a time when it is possible to work through these issues without the clients present. They will also work through language to include in the retainer to describe their role and that of the supervising attorney.

Admittedly, such an approach excludes the client from the process of bargaining over the terms of the retainer agreement. However, in my experience, clients seldom inquire, much less bargain, over these terms[91] and recognize that there are really no other available resources to meet their needs.[92] Such an approach also sets a tone very early in the relation-

88. Even in those clinics that opt for avoiding an attorney-client relationship between client and supervisor, such a relationship may be required during summer coverage. In the absence of a student who can be certified as the client's attorney during such a period, there may be no realistic option to having the clinical supervisor represent the client directly.

89. This recommendation has been interpreted by some as a rejection of the value of externship programs or of co-counsel model in-house clinics. That is certainly not intended. Properly-designed externship programs that help students learn from their externship experiences and that provide a vehicle for students to effectively process their insights can serve a critical role in the development of law students. Similarly, co-counsel models may be appropriate for some students at some times in their educational development. However, whatever the value of these programs, at some time the student will be practicing as a lawyer. It seems obvious that it is better to have students learn to assume that role in a setting in which there is an opportunity to minimize risks for clients while maximizing educational benefits for students. It is therefore not so much a matter of "either/or" in defining the supervisor-student-client relationship as a matter of "if not now, when?" This is consistent with the body of clinical scholarship stressing the importance of role assumption accompanied by effective supervision. *See, e.g.,* Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L. J. 277, 283-92 (1982) (discussing the importance of role assumption as "the defining feature of clinical education.").

90. *See* Aiken, et al., *supra* note 9.

91. An exception might be made for issues relating to the client's potential responsibility for litigation costs incurred during the course of representation.

92. This situation also parallels the acknowledgment by some clinicians that bargaining may be possible with students over some terms of a learning contract and may not be possible with regard to other terms.

> We are much more willing to conduct genuine bargaining over clauses governing our relationships with interns and more tenacious in our adherence to those clauses setting forth standards of practice. The standards of practice set forth in this portion of our draft contract are so basic that we are unwilling to bargain them away. Accordingly, this portion of the contract may be a contract of adhesion to the advisors' terms and perhaps it would be better if

ship that they will not be looking to the clinical supervisor as the student's supervisor, but rather will be dealing with the student as their attorney.[93]

Consistent with the student practice rules in most jurisdictions, the student attorney agrees to act consistent with the Rules of Professional Conduct in that jurisdiction. One of the critical aspects of this compliance is the commitment by the student attorney to provide "competent representation" to the client.[94] The clinical supervisor, consistent with responsibilities as the supervisory lawyer, has the duty to take "reasonable efforts to ensure that the [student attorney] conforms to the rules of professional conduct."[95] In effect, the clinical supervisor is committing to take reasonable steps to ensure that the student attorney will provide competent representation – s/he is not committing to provide competent representation her/himself.[96]

That commitment becomes the standard then to govern all decisions regarding intervention. Is the "guidance" and "supervision" reasonable in light of the goal of ensuring competent representation by the student attorney to the client?[97] If the guidance and supervision is reasonable, the clinical supervisor is meeting his/her "personal professional responsibility" to all the parties concerned – student attorney, client, judiciary, and bar. However, at every step along the way the supervisor must assess and reassess the impact of each decision on the educational benefits for the student and on the representational goals for the client.

In many ways, this imposes a far greater obligation on the supervisor – one that cannot be met by simply taking over the case from the student. Instead, the supervisor must design a training program within the clinic that provides the student attorneys with sufficient interpersonal and other

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such terms were in a separate part of the contract or in another document explicitly identified as non-negotiable.

Aiken, et al., *supra* note 9, at 1083-84. While the nature of the relationship with interns is necessarily affected by adherence to the standards of practice, the distinction drawn by the authors between true negotiation and disclosure parallels the process that I am recommending for this section of the retainer. At the same time, there is the possibility of real negotiation over such terms as the scope of representation.

93. Unlike some supervisors, I do not meet with clinic clients in most circumstances. I have worked in clinical settings in which supervisors sit in on initial interviews and I have worked with clinicians who even baby sit for the children of clinic clients. While I understand the motivations that lead to these approaches, I think that they do not give sufficient weight to the negative impact of these activities on the educational process.

94. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (1994).

95. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.1 (1994).

96. The *Praecipe*, the term used in the District of Columbia to describe the pleading entering the appearance of counsel, similarly reflects this vision of the supervisor-student, attorney-client relationships. The student attorney enters his/her appearance as counsel of record for the client. The language of the *Praecipe* contains the following phrase after that appearance: "supervised by David F. Chavkin under Rule 48." D.C. CT. APP. R. 48 is the student practice rule in the District of Columbia.

97. In the language of the Model Rules, "The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1, cmt. 4 (1994). This suggests a fairly passive role for the supervisor. In the clinical context, I think it would be far preferable to require the supervisor to take reasonable steps to monitor the conduct of the student attorney to determine if misconduct (i.e., incompetent representation) may occur.

skills to competently interact with clients and appropriate non-directive supervision thereafter to protect the rights of clients to "competent" representation. The burden then is one of providing sufficient guidance and supervision so that intervention does not become necessary.

In the clinic in which I currently teach,[98] this burden is met through a learning sequence built on a variety of teaching techniques.[99] Some exposition-application teaching is utilized to introduce each lawyering skill. This is facilitated through the use of presentation graphics and analysis of short sequences from popular films. However, over time, I have increasingly focused limited seminar hours on goals and structure rather than actual performance of these lawyering tasks.

This introduction of theory is then followed by simulations in which students have the opportunity in a very unstructured setting to apply discovery learning theory to specific lawyering tasks in a setting in which real-life client interests are not at stake. Interviewing, counseling, and negotiation simulations are conducted out-of-class; theory of the case and fact investigation simulations are conducted collaboratively in-class. These simulations are videotaped and, after completion of a self-evaluation by the students, are critiqued with the student one-on-one. These critiques take approximately two hours per exercise per student. The videotape is reviewed frame-by-frame and the student's reasons for each decision is analyzed. The student and supervisor analyze whether that decision was effectively implemented, whether the decision seemed to be correct, and how to improve both the decisionmaking and implementation process for the future. The one-on-one critique also gives student and supervisor the opportunity to discuss student perceptions as described in the self-evaluation and how to improve student skills at reporting and self-reflection.[100] Often student performance is supplemented by modeling of particular sequences.

After the completion of the interview critique, student teams receive their real-life cases. By this point, I have sufficient confidence that the students will treat their real-life clients with appropriate respect. They will also have adequate interviewing skills to fulfill the two most basic objectives of the initial interview – to develop enough information to allow the student attorneys to move forward and to develop sufficient rap-

98. The current clinic, the Civil Practice Clinic, is a one-semester clinic. Because of the limited time period involved, formal teaching of lawyering skills is limited to: interviewing, theory of the case, fact investigation, counseling, and negotiation. Effective collaboration and "fuzzy lawyering" are also taught and evaluated.

99. This model is similar to the model of experiential learning suggested by Kreiling. *See* Kreiling, *supra* note 7, at 294, n.33 fig. 1. In step 1 a skill or value is introduced to the student. In step 2 this skill or value is applied by the student through analysis of videotape. In step 3 the student uses the skill or value in a controlled (simulation) setting with videotape and critique. In step 4 the student applies the skill or value in an uncontrolled (real-life) situation with observation and analysis.

100. This helps lay the foundation for providing the supervisor with the information s/he will need later to provide effective supervision for the student. *See generally* Gallant, *supra* note 62.

port with and confidence in the client to allow the student attorney-client relationship to progress.

V. IMPACT ON OUR TEACHING

What impact will this reconceptualization of the supervisor-client relationship have on our teaching generally and most especially on our supervision? The answer is by no means obvious. Defining the student as the attorney and the supervisor as a supervising attorney outside the lawyer-client relationship simply means that the supervisor must constantly balance the pedagogical benefits of intervention against the professional obligations to clients.

Admittedly, different clinicians will strike this balance in different places for different clients with different legal issues served by different students at different points in their educational development. However, there is one common element. Under the approach advocated here, no clinician will suggest that these decisions are foreclosed by something inherent in the supervisor-student-client relationships.[101] If an attorney-client relationship is established, it must be because such a relationship furthers educational goals for the student that could not be achieved under a different model. Like the myriad of other choices we make and encourage students to make throughout their clinical experience, the choice must be conscious, not thoughtless.

I emphasize the importance of minimizing the opportunity for intervention in the student attorney-client relationships for two reasons. It is not so much because clinicians intervene at such a frequency or at such a scope that they overwhelm the student attorney-client relationship. It is because the relationship is necessarily distorted for the client by the visible presence of the supervising attorney in two ways.

First, to the extent that the client becomes aware that a "real" attorney as well as a student attorney are representing her, she will tend to look to the "real" attorney, the supervising attorney, for definitive information. That can be a substantial impediment for the student attorney in developing a lawyering identity and an appropriate lawyer-client relationship. As problematic as this first factor can be, it pales in significance before the second reason. So long as the student attorney knows that the supervising attorney is in the case, the student's responsibility for representation is necessarily diffused and impaired. This is not simply a product of the number and quality of interventions by the lawyer. It is a product of the

101. As described by Steve Ellmann, in responding to an earlier draft,

> [T]he assumption by clinicians that they were actually representing the clinic clients is far from self-evident. This is going to really require us to rethink the question of what our duties to these clients are. We may all decide after that rethinking to supervise just the same way as we otherwise would have, but our reasons, at least, will have to be refined.

E-mail communication from Stephen Ellmann to David Chavkin (September 18, 1997) (on file with author).

potential that the supervisor might intervene that dilutes ethical responsibilities and role definition.

To the extent that the clinician decides to not create an attorney-client relationship with the clinic client, this approach also requires a different calculus of supervision. At each opportunity for intervention along the way, the supervising attorney is required to make an evaluation not whether s/he would do it better (because if it is merely different it would not justify intervention), but whether there is a pedagogical value for intervening in a way visible to the client and/or others that outweighs the negative aspects that will result. A recent case in which I was involved as the supervising attorney helps highlight this difference in supervisory algorithms.

A student team in the Civil Practice Clinic was representing a client in a guardianship proceeding. The client was the brother of a patient at a local hospital who was disabled due to an inoperable brain tumor. The brother wanted to become his sister's guardian in order to protect her rights to medical care—to prevent her from being written off by the doctors because she was poor, black, and seemingly hopeless.

In an early supervision session in the case, we discussed the issue of service and reviewed the rules regarding service. Although it seemed ridiculous (since the client had been unconscious for the past several months), it was agreed that under the rule, the students would place the summons and petition on her body and then would place it on her nightstand. A copy would also be provided at the nurse's station for inclusion in her medical file. The other interested persons (other relatives) would be served by first class mail.

As often happens, however, the best lessons are often unplanned. When the students went down to court to file the petition, the clerk told them that it was not necessary to personally serve the sister and that they should simply address some envelopes for the court to send out. They did so without ever checking back with me regarding the change in plans.

About a month before the hearing in the case, it became clear that none of the interested persons had ever been served by the court. It became clear that the students would have to correct the service deficiency if the case were to move forward. They completed service on the various interested persons and on the attorney for the alleged disabled person well before the hearing; however, the issue of personal service on the alleged disabled person was not revisited.

On the day of the hearing, the student attorney checked in with the client and was blindsided when the clerk told her that there was no record of personal service on the alleged disabled person. The clerk told her that the case could not go forward without personal service and that she would flag it for the judge. The student attorney then came to me in a panic, wondering what to do.

In the best traditions of non-directive supervision we began by revisiting the rules and the instructions provided to litigants by the clerk's of-

fice. The students quickly reached the conclusion that the rules were hardly a model of clear and precise drafting. In fact, the rules seemed to require personal service in one section and permitted service by first-class mail (without using registered mail or certified mail) in another section.

I also suggested that the students might want to discuss this issue with the attorney for the alleged disabled person. After all, the subject of the proceeding was unconscious, and service by any means involved at best technical compliance. Moreover, the students had compensated for the inadequacies of the court system by facilitating service of all the relevant documents on the party's attorney. Although I stayed removed from that conversation, I could overhear enough to understand that the attorney did not want to come down to court again for a continued hearing, reassured them that people served parties by mail all the time, and told the students to not raise the issue to the judge.

Following that conversation, the students were feeling somewhat better, but were still unsure about how to handle the situation. We discussed possible options ranging from volunteering the issue to the court (with an explanation of why the case should go forward anyway) to ignoring the issue completely. When the students finished reviewing the options, they concluded that it would be preferable to ignore the other attorney's advice and to independently bring the issue to the court's attention.

When the case was called and the counsel and parties introduced themselves, the judge noted that the case seemed fairly routine and asked the attorney for the alleged disabled person if there were any matters of which the court should be aware. The attorney described his visit to the client's bedside and the results of his conversation with the attending nurses and physician. The judge then turned to the student attorney and asked if they had anything to add.

The turning of wheels was almost visible in the student's head as I stood behind her at the counsel's table while she pondered her options. After briefly introducing the brother to the court and explaining to the judge why the petition requested specific powers for the proposed guardian, the student concluded her statement without mentioning the service issue and awaited what was clearly a foregone conclusion. The judge did not disappoint and awarded the guardianship while praising the brother for looking out for his sister's needs. The case was concluded, the parties thanked the court, and we all exited from the courtroom.

Why did I allow the case to proceed as I did? If I had been the attorney for the petitioner, I certainly would have volunteered the service issue to the court while remaining confident that the court would proceed anyway with at least a temporary guardianship order. However, perhaps since this case arose after the initial draft of this article, a very different analysis was utilized.

What I first had to decide was whether the student was providing com-

petent representation[102]—representation at or above the level of most attorneys. That was a very easy equation to solve. The quality of practice is such that clinical students in general, and this student in particular, consistently exceed the level of representation provided by otherwise competent attorneys. I then turned to the other aspect of the ethical analysis.

Would the failure to disclose the absence of personal service on the alleged disabled person constitute a violation of any applicable ethical standard? I concluded that it would not. First, there were no misrepresentations in the court file. The submissions clearly described the procedure that had been used to serve the various principals in the case. Second, the clerk had flagged the case herself for the judge to review if she wished. Third, the rules were at best ambiguous as to the procedures that were to be used to accomplish service.

With these considerations in mind, there seemed to be no basis for me to intervene on any ground relating to my legal obligations to court, bar, or client as a supervising attorney. The student was providing competent representation and that representation was consistent with all ethical obligations. My duties as a supervisor were met.

By contrast, if I had been a lawyer in the case, and not merely a supervising attorney, I certainly would have done things differently. Although I am confident that the court would have proceeded with the hearing anyway, I would have explicitly described the procedural posture of the case in my opening statement and would have gone on to explain why the court should have proceeded with the hearing. This in large part reflects my personalized vision of lawyering, not necessarily one shared by other lawyers or one to impose on clinic students.

As a result of this supervisory decision, the students and I were left with an extremely rich private post-hearing analysis of why things happened the way they did, what this told us about the lawyering process, about the pressures felt by lawyers, and the ways we respond to those pressures. The pedagogical impact on the student was far more nuanced and deliberative than would have been possible if intervention had occurred. The lessons for future growth were also far richer than they would have been had I intervened during the hearing.

VI. EVERY INTERVENTION IS A FAILURE OF SUPERVISION

When I was learning to drive, my father announced that in any accident, all of the drivers are at fault. In an early exercise of clinical strategic planning (remember, I did need the car keys), I did not articulate to my father how ridiculous I considered his comment. For example, how could the middle driver in a chain reaction collision be at fault when struck from the rear?

102. Returning to the earlier analysis, a supervising attorney is required to ensure that the student attorney provides competent representation.

Of course, the more one drives, the more one can and should prepare for the unpredictable, and the more one realizes the wisdom of my father's comment. In stopping in traffic, for example, you can leave extra room between your car and the car ahead. You can also monitor the movement of the car behind and ease forward if it appears that the car behind will not stop in time. The variables are largely predictable and can be prepared for in large measure.

Obviously, there are limits to what a driver can realistically do to avoid accidents. In much the same way, there are realistic limits to what a supervisor can do to prepare a student for a court hearing. However, if the statements about drivers and clinical supervisors suffer from hyperbole at times, they are overwhelmingly true in the vast majority of circumstances.

Perhaps no aspect of this article has been more controversial or drawn more heated responses than has this one. For example, one clinician reacted to my observation in the following language:

> [T]here are innumerable situations, particularly in trial litigation, where the situation could not have been prepared for, the issues were unpredictable, or the skill needed to handle it is simply not possible for a new student lawyer. To suggest that intervention [equals] failure of the supervisor is to add a huge layer of guilt to what is already a challenging, sometimes stressful balancing act. Supervisors of the world, UNITE![103]

The shortcoming of such a criticism is that it exaggerates the unpredictability of clinical supervision and obscures basic questions in clinic design. We teach our students that situations can be prepared for if we work hard enough to isolate the variables and research the factors that underlie them. We teach our students that with sufficient preparation, the issues are predictable albeit not pre-ordained. Perhaps most significant, if the skills needed to handle a matter are not possible for a new student lawyer to master, this may tell us that clinic design is inadequate in allowing students to handle these kinds of cases. Such a statement seems to be an acknowledgment that goals more important than the student's educational attainment are being elevated above pedagogy.

If supervision is the activity that most distinguishes clinical faculty from other law professors,[104] it is failures of supervision that most devastate us as clinical teachers. However, the recognition that intervention compensates for a failure of supervision will encourage us to constantly strive to improve that supervision and to design clinics in a way that maximizes the opportunity for educational attainment. The goal is not to add layers of

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103. LAWCLINIC LISTSERV ARCHIVES, *supra* note 12. (Comment of Joan S.Meier, Director, Domestic Violence Advocacy Project, Feb. 11, 1998).

104. Of course, it is also the activity that is least understood by other law educators. *See* Association of American Law Schools (AALS) Section on Clinical Legal Education: Committee on the Future of the In-House Clinic, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 551 (1992) ("Case supervision is the core of clinical teaching and, if done well, is hard, emotionally exhausting work. It demands close interaction with students. It is extremely time-intensive. It is that aspect of our work that is least understood and appreciated by our nonclinical colleagues.").

guilt; the goal is to improve clinical education for our students by encouraging us to reflect on our performances as supervisors.

Another criticism that I have received of the approach that I advocate is that it is heavily gendered – a "male" model.[105] Students are much happier, I have been warned, with a "more nurturing" environment. A female clinician would nurture the students, it is said, by supporting the students step-by-step along the way. By contrast, only a male clinician would be so willing to cut a student loose.

While that criticism obviously reflects a stereotypical view of gender, it also seems to ask the wrong question.[106] The question should not be whether students will be happier during their clinical experience. The question should be whether students will be happier five or ten years out when they will need to use the skills and apply the values they have learned in clinic. If we have not prepared them for that process, have we truly done them a service? While there is more anxiety (for both student and supervisor) in the model I advocate, that anxiety will pay off in future concrete educational dividends.[107]

VII. CONCLUSION

In our clinical programs, we stress to students the importance of making conscious decisions and for having reasons for every action we take. For far too long, many of us have incorporated a model for the supervisor-student-client relationships without testing both its flexibility within legal constraints for that model and its pedagogical benefits.

This discussion suggests that a reexamination of that vision is long overdue. While one may conclude that a co-counsel or senior counsel relationship is appropriate with regard to a particular issue at a particular stage in a particular student's development, at some point students need to assume the role of lawyer, with the responsibilities attendant thereto, if

105. While I reject this criticism, I certainly recognize the important role that gender plays for both supervisor and student in the clinical setting. I have often thought of the choices described by Kathleen Sullivan in deciding how much of herself to disclose to the students and the impact of pictures of spouse and children on students visiting her office. *See* Kathleen A. Sullivan, *Self-disclosure, Separation, and Students: Intimacy in the Clinical Relationship*, 27 IND. L. REV. 115 (1993). The walls of my office, which clinic students often describe as a "shrine" to my daughter, reflect the different messages that I think students will draw from a male supervisor.

106. Such an attitude also ignores the fact that there are male and female clinicians all along the supervision-intervention continuum.

107. There is still a need to keep anxiety within creative limits. When anxiety ceases to be creative and becomes debilitating, it interferes with pedagogical goals. At that point, a more directive supervision model will usually be justified. Students in the Civil Practice Clinic are alerted at the beginning of the semester that if I seem to be oblivious to the clues, they have the permission to demand a more directive approach in our supervision sessions.

they are to maximize the educational benefits of clinic.[108] Both the student practice rules and the ethical standards provide us with the room to permit us to embrace this model.

108. To return to an earlier analogy, this is much like the process of teaching a child to drive. There is certainly a place for role modeling. Children will learn much by observing their parents drive and how these parents deal with speed limits, stop signs, traffic lights, and road rage. There is also certainly a place for videotapes, driver education lectures, and texts. Many children will learn efficiently through these approaches and some information can best be communicated in this way. There is also a place for driver education vehicles with dual controls to keep children from making serious mistakes as they learn to turn and park. However, at some point children need to take the wheel for themselves without their parents hands poised over the steering wheel and their feet poised over and usually nonexistent peddle. In this stage of the process children are observed and they can be debriefed and critiqued, but they also begin to truly understand the risks and responsibilities involved in driving. It is in part because this process is so ineffectively conducted that so many children experience an accident during the first year of driving. One of our goals in clinical education is to keep our students from experiencing an accident during those early years of practice and to learn effectively from their experiences as they drive.

APPENDIX A

STATE	CITATION	PERSONAL SUPERVISION REQUIRED	NATURE OF RESPONSIBILITY	MISCELLANEOUS
ABA Model Rule	MODEL RULE RELATIVE TO LEGAL ASSISTANCE BY LAW STUDENTS (Proposed Official Draft 1969)	With consent of client, not required in civil and in criminal with no right to counsel. Required in criminal with right to counsel, and appellate arguments.	Personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.	Personal supervision and signature also required for pleadings, briefs, abstracts, and all other documents that are to be filed.
Alabama	ALA. R. JUDICIAL ADMIN. App. A	Required for attorney of record to appear in jury trials and must otherwise personally supervise and oversee.	Personal professional responsibility for the student's work and assistance on student's preparation.	
Alaska	ALASKA BAR R. 44	Required *except* in district court small claims matters, arraignments, pleas, bail hearings, sentencing and recorded in-chamber conferences if specific conditions met.	No reference.	"A legal intern may appear and participate". . .while the "[Supervising] attorney represent[s] the client."
Arizona	ARIZ. SUP. CT. R. V. 38	Not required in civil and misdemeanors with consent. Required presence in misdemeanors at trial, any felonies, and on behalf of State *unless* in lower courts.	Personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.	All communications privileged, made or received by professors and student. Both are enjoined not to disclose in implementation of a course of instruction or otherwise.
Arkansas	ARK. CT. R., 15	Required in both civil or criminal.	Fully responsible for the manner in which they are conducted; Personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work and assist in preparation.	The taking of deposition shall be considered a court appearance and require supervising attorney to be present throughout proceeding.
California	CAL. CT. R. 983.2	Not required in prosecution of minor criminal offenses. Required in any public hearing, arbitration, proceeding, or deposition.	No reference.	
Colorado	COLO. R. CIV. P. 226	No reference	No reference.	Students represent "said dispensary and its clients."

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Connecticut	CONN. SUPER. CT. R. CIV. P. 68-72	Required presence in court.	Personal professional responsibility for the intern's work and assist in preparation.	
Delaware	DEL. SUP. CT. R. 56.	Required in proceedings before the Family Court unless waived by the court.	Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.	Supervising attorney shall appear as counsel of record.
District of Columbia	D.C. CT. APP. R. 48	Required that supervising attorney must appear under special rules of the divisions of the Superior Court, *except* for certain non-adversary matters.	Assume full responsibility for guiding the student's work and for supervising the quality of that student's work and for assisting student in preparation of a case.	Supervising lawyer must "insure that the student's participation is effective on behalf of the indigent person represented."
Florida	FLA. BAR R. 11-1	Required at critical stages of proceedings in cases in which the indigent person has a right to appointed counsel. Also required in appearance for the State in criminal proceeding and on behalf of governmental officers when required by court.	Assume professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.	
Georgia	GA. SUP. CT. R. 92-97	Required during conduct of any grand jury investigation, administrative proceeding, hearing, trial or other proceeding.	No reference.	Participation defined by the judge of the court. Students may not make oral argument in court. GA. SUP. CT. R. 4. Supervisor shall ensure that al all times student is covered by an adequate amount of malpractice insurance.
Hawaii	HAW. SUP. CT. R. 7	Required during court or tribunal appearances unless court or tribunal consents to absence.	No reference.	

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Idaho	IDAHO BAR COMM'N R. 221	Not required in ex parte proceedings or stipulated proceedings in courts of general jurisdiction, or with certificate of attorney in misdemeanor non-jury cases, juvenile proceedings or ex parte proceedings in courts of limited jurisdiction. Required generally for civil and criminal proceedings.	Supervising attorney is fully responsible for the acts and conduct of the legal intern, must maintain direction and supervision over all work, and must review and sign all pleadings. Supervising attorney as well as the legal intern is responsible to the Court, the Idaho State Bar, the Supreme Court, and the client for all acts of the legal intern.	
Illinois	ILL. SUP. CT. R. 711	Not required in civil or criminal cases *other than* criminal cases in which the penalty may be imprisonment, proceedings challenging sentences of imprisonment, and civil or criminal contempt proceedings.	Supervising attorney must sign pleadings.	Briefs, excerpts from records, abstracts, and other documents filed in courts of review in the State must be filed in the name of the supervising attorney.
Indiana	IND. R. FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS 2.1	Required in any proceeding in open court.	No reference.	
Iowa	IOWA CT. R. 114	Required for criminal misdemeanor defense, court of appeals and supreme court cases. Not required for other matters.	No reference.	
Kansas	KAN. SUP. CT. R. 709	Not required in civil matters (other than domestic matters) wherein the amount in controversy is less than $1,000, and in criminal defense in which there is no right to assignment of counsel. Required in all other civil matters and in criminal matters in which there is right to assignment of counsel.	Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.	

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Kentucky	KY. SUP. CT. R. 2.540	Required in all administrative proceedings, civil and criminal matters. In criminal cases with punishment by imprisonment for more than 12 months or a fine of more than $500, required personal supervision of all activities of the student before a judge.	Personally supervises all activities of the student, including all advise, negotiations and appearances, with the exception that the student may consult with a client or potential client alone.	
Louisiana	LA. SUP. CT. R. XX	Not required in criminal matters in which there is no right to the assignment of counsel, on behalf of the State, or in any civil matter in which no fee is charged to the client.	Assume personal professional responsibility and liability for the student's guidance in any work undertaken and for supervising the quality of the student's work. In criminal matters where there is a right to counsel, supervising lawyer shall be fully responsible for the manner in which they are conducted.	
Maine	ME. R. CRIM. P., Rule 56, ; ME. R. CIV. P., Rule 90	Required in criminal proceedings in which the defendant has the right to the assignment of counsel, in post-conviction review proceedings, and in civil proceedings in the Law Court.	Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.	
Maryland	MD. R. GOVERNING ADMISSION TO THE BAR 16	Required in court or before an administrative agency.	"Assumes responsibility for the quality of the student's work."	
Massachusetts	MASS. SUP. CT. R. 3:03	Not required in any court proceeding. "General supervision" shall not be construed to require the attendance in court of the supervising member of the bar.	"Failure of an attorney supervising students to provide proper training or supervision may be ground for disciplinary action or revocation or restriction of the attorney's authority to supervise students." Order implementing Rule 3:03.	Attorney-client privilege applies to communications made or received by student.
Michigan	MICH. CT. R. 8.120	Required in a criminal or juvenile case exposing the client to a penalty of more than 6 months.	Supervisor has duty to examine and sign all pleadings.	

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Minnesota	MINN. STUDENT PRACTICE R. 1-2	Required unless attorney deems appearance unnecessary.	Assume personal professional responsibility for and supervision of the student's work and sign all pleadings.	
Mississippi	MISS. CODE ANN. § 73-3-201 et seq. (1996)	"Law students may appear and participate in trials and hearings in courts if the supervising attorney or clinical teacher is present and supervising the student."		"A law student may not directly represent clients but may only assist the supervising attorney or clinical teacher in representing their clients." MISS. CODE ANN. § 73-3-207(d) (1996).
Missouri	MO. SUP. CT. R. 13.	Required in matters in which the indigent person has the right to the assignment of counsel. and for oral argument in appellate courts.	Assume professional responsibility for the student's guidance and the quality of the student's work.	
Montana	Order in the Matter of Establishment of a Mont. Student Practice R. (1975)	Required for criminal matters in which the defendant has the right to assignment of counsel.	Assume personal professional responsibility for the student's guidance and the quality of the student's work.	
Nebraska	R. OF LEGAL PRACTICE BY APPROVED SENIOR LAW STUDENT	Required in all appearances including Workers' Compensation Court, County Court and District Courts *except* County Court may waive their requirement after an initial supervised appearance and with approval by the court.	"Assume personal professional responsibility to the client for the services performed by the law student." Assume personal professional responsibility for the student's guidance and for the quality of the student's work.	
Nevada	NEV. SUP. CT. R. 49.5	Required in any public trial, hearing, or proceeding, when counseling client and during deposition.	"Personally assume professional responsibility for any work undertaken by the student while under his supervision."	
New Hampshire	N.H. SUP. CT. R. 36	Required "in all contested civil cases and in all criminal cases and in district and municipal courts at probably cause hearings."	Assume personal professional responsibility for the student's work and consider purchasing professional liability insurance coverage to include such law student.	
New Jersey	N.J.R. CT., R. 1:21-3,	No reference.	No reference.	
New Mexico	N.M. Ct. R. 1-094 - 1-094.1	Required during court appearance.	No reference.	

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New York	N.Y. COMP. CODES R. & REGS. tit. 22, § 805.5 (1996)	Not required, (only general supervision) in civil actions before any court or administrative agency; in criminal matters in superior courts for non trial proceedings; and in criminal matters for non-jury trials in cases involving misdemeanors and lesser offenses. Required immediate supervision in Appellate Division, Third Department for a supervising attorney to argue appeals and motions in the Appellate Division; in family court for contested matters; and in criminal jury trials in cases involving misdemeanors.	Appellate Division, Third Department rule requires supervising attorney to assume personal professional responsibility for any work undertaken by student and the preparation of the student's work.	Supervising attorney shall be the head of the department, agency or of a legal aid organization with at least two years actual practice in this State. Supervising attorney is the attorney of record. Law students may not act in bankruptcy proceedings, libel and slander cases, decedent estate matters or contingent fee matters, *except* where three private attorneys have rejected the case.
North Carolina	N.C. BAR R. .0200 et seq.	Not required in administrative hearings, in civil cases that could be assigned to a magistrate, in criminal cases in which there is no right to assignment of counsel, and when prosecuting misdemeanors. Required in all juvenile proceedings, in civil or criminal matters with presentation of a brief and oral argument, all misdemeanor cases, preliminary hearings in all criminal cases, all post conviction proceedings, and all civil discovery.	Assume personal professional responsibility for any work undertaken by the student while under his or her supervision, all to the extent required for the protection of the client.	
North Dakota	N.D. R. ON LIMITED PRACTICE OF LAW BY LAW STUDENTS	Required in criminal matters in which the defendant has the right to the assignment of counsel and in oral argument in appellate courts.	Assume personal professional responsibility for the student's guidance and for supervising the quality of the student's work.	
Ohio	OHIO SUP. CT. R. FOR THE GOVERNANCE OF THE BAR II	Not required if supervising attorney and client consent and court approves.	"[A]ssume professional responsibility for each case, client, or matter assigned to the legal intern."	"The supervising attorney shall . . . train and supervise the legal intern on matters assigned to the intern to the extent necessary to properly protect the interests of the client . . . ."

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Oklahoma	OKLA. SUP. CT. R. ON LEGAL INTERNSHIP	Required if employed by a prosecutor in felony cases and misdemeanor jury trial cases and at non-jury trial of a felony case. Required if employed by defense attorney in criminal cases, at all stages of a felony case, at all jury trials, and at all stages of a misdemeanor case when a second conviction for the same crime constitutes a felony; Required in civil cases when the matter in controversy is in excess of $5,000 except in specified circumstances	Assume personal professional responsibility for the legal work performed by the legal intern. Rule 3.7(d)	
Oregon	OR. CT. R. 13.10 et seq.	Not required if client approves and in civil and criminal matters on behalf of the State with consent of State. Required where involve defense of a felony, in a juvenile matter that would be considered a felony if committed by an adult, in any commitment proceeding, and in appellate argument.	Shall assume personal professional responsibility for the student's guidance and for supervising the quality of the student's work. Rule 13.30	Supervising attorney shall be responsible for explaining to the client the nature and extent of the law student's participation and for obtaining the client's consent to such participation.
Pennsylvania	PA. BAR ADMISSION R. 321	Required on behalf of a defendant in a criminal proceeding in which the defendant has the right to counsel.	"Assume personal professional responsibility for the guidance of the legal intern in any work undertaken and for supervising the quality of the work of the legal intern."	
Puerto Rico	P.R. SUP. CT. R. 11(e)	Required direct and immediate supervision.	Shall "mak[e] himself responsible for the student's good conduct and actions."	
Rhode Island	R.I. SUP. CT. R. 9	Required for trial on the merits on behalf of an indigent defendant in the District or Family Court.	No reference.	
South Carolina	S.C. APP. CT. R. 401	Required throughout the proceeding.	Shall assume personal professional responsibility for the student's guidance and for supervising the quality of the student's work.	

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South Dakota	S.D. CODIFIED LAWS §16-18-2 et seq.	Not required in any civil matter, criminal matter or quasi-criminal matter where no right to assignment of counsel. Required in any criminal or quasi-criminal proceeding at critical stages.	"Shall assume personal professional responsibility for the conduct of the legal intern."	
Tennessee	TENN. SUP. CT. R. 7, sec. 10.03	Required immediate and personal supervision.	No reference.	
Texas	RULES AND REGULATIONS GOVERNING THE PARTICIPATION OF QUALIFIED LAW STUDENTS, TEX. CT. R. IV-V	Required for trial, motions, depositions, administrative hearing.	Assume personal professional responsibility for the direct and immediate supervision for the professional work of the qualified law student.	"Maintain professional malpractice and errors and omissions insurance covering the supervised qualified law student. "
Utah	UTAH CT. R. 11-301	Required other than at default uncontested divorce proceeding where the appearing party is represented by a non-profit legal agency.	No reference.	Student's participation is limited to civil and misdemeanor cases.
Vermont	VT. SUP. CT. R. OF ADMISSION TO THE BAR § 13	Required at all court appearances involving a contested matter and all other court appearances *unless* waiver by court and client's consent.	"Assume personal professional responsibility for the intern's work."	Supervising attorney shall introduce the intern to the court at his or her first appearance before the court.
Virginia	VA. SUP. CT. R. pt. 6, § 4, para. 15	Required in any court or before administrative tribunal or in criminal matter on behalf of the Commonwealth.	Assume personal professional responsibility for the student's guidance and for supervising the quality of the student's work.	
Washington	WASH. LOCAL R. OF CT. AND WASH. CT. R., Rule 9	Not required in juvenile court to represent State in misdemeanor and gross misdemeanor cases after a reasonable period of in-court supervision, in courts of limited jurisdiction after participation in at least one prior case, and in ex parte and agreed order procedures. Required in superior court and Court of Appeals proceedings (including depositions) and in all preliminary criminal hearings.	Shall direct, supervise and review all work of the legal intern. "The failure of a supervising lawyer, or lawyer acting as a supervising lawyer, to provide adequate supervision or to comply with the duties set forth in this rule shall be grounds for disciplinary action pursuant to the Rules for Lawyer Discipline."	"For purposes of the attorney-client privilege, an intern shall be considered a subordinate of the lawyer providing supervision for the intern."

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West Virginia	W.VA. ADMISSION TO THE PRACTICE OF LAW R. 10 et seq.	Required in all court appearances.	Assume personal professional responsibility for work undertaken by the student.	
Wisconsin	WIS. SUP. CT. R. 50 et seq.	Required except for "very routine actions".	Assume personal professional responsibility for any work undertaken by the student while under his or her supervision.	
Wyoming	WYO. SUP. CT. R. 12	Not required when there is no right to the assignment of counsel with consent of client and approval of court. Required before any court, tribunal, commission, board or other government agency *unless* waived by the court or agency.	No reference.	