

SUBMISSION OF
THE CLINICAL LEGAL EDUCATION ASSOCIATION (CLEA)
TO THE NORTH DAKOTA ATTORNEY GENERAL
CONCERNING
THE UNIVERSITY OF NORTH DAKOTA'S LAW SCHOOL CLINIC

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* The views stated herein represent those of CLEA and do not necessarily represent the position of the preparers' institutions.

INTRODUCTION

The Clinical Legal Education Association (CLEA) is a non-profit educational organization formed in 1992 to improve the quality of legal education both in the United States and abroad. CLEA currently has over 700 dues-paying members representing more than 150 law schools from six continents, including members in the State of North Dakota. CLEA supports the integration of lawyering skills and professional values in law school curricula through clinical courses in which law students learn by doing. CLEA and its members are committed to training law students to be competent, ethical practitioners.

CLEA offers its views to the Attorney General of North Dakota as he considers the propriety of the University of North Dakota School of Law's clinical program representing citizens of the State of North Dakota in a First Amendment lawsuit against a political subdivision of the state. CLEA is deeply concerned that clinical legal education is an important component of the overall education of our nation's future lawyers, and an important means to providing legal representation to clients who, because of lack of financial resources or the controversial nature of their cases, would otherwise not be represented. CLEA firmly believes that the outcome of the pending Attorney General's opinion will affect the ability of the University of North Dakota School of Law to provide a first-rate legal education and contribute important pro bono services to citizens of North Dakota, and may affect legal education in other parts of the United States as well.

I. LAW SCHOOL CLINIC WORK IS AN INTEGRAL PART OF A QUALITY LEGAL EDUCATION

Over the past thirty years, law school clinic education has become an established part of American legal education. In law school clinics, students learn by doing. The students' hands-on

work for real clients in real cases is essential to the learning process. In law school clinics, students take on primary responsibility for cases and appear before courts and administrative agencies, under close faculty supervision. This work is integral to modern law schools' educational mission. Law schools fund clinics because training students with real cases is an effective method to teach the theory and the practice of law, as well as the values of the profession and legal ethics.

A. Law Schools Are Required To Provide Legal Skills Instruction, Including Training In A Clinical Or Other Practice Setting

In the first half of this century, several law schools began experimenting with teaching students with real cases.¹ Over time, there came a broad recognition that law schools should do more to prepare students for the practice of law rather than solely focus on the skill of legal analysis exemplified by the casebook method. In the 1960s, the Ford Foundation provided seed money for clinical legal education programs across the country, and clinics began to flourish.² Law schools also developed clinical courses in response to calls from leaders of the bench and bar, such as former Chief Justice Warren Burger, who urged “[the] modern law school [to] fulfill[] its basic duty to provide society with people oriented and problem oriented counselors and advocates to meet the broad social needs of our changing world.”³

¹ See, e.g., John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S.C. L. REV. 252 (1929) (describing a general practice clinic); John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1934) (discussing clinical legal education and the clinical program at Duke University); see also Jerome Frank, *Why Not A Clinical-Lawyer School*, 81 U. PA. L. REV. 907 (1933); Karl N. Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

² See George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 172-80 (1974).

³ Warren Burger, *The Future of Legal Education*, STUDENT L.J., Jan. 1970, at 19 (italics omitted).

Recognizing the importance of clinical legal education in the law school curriculum, the American Bar Association (ABA) promulgated a Model Student Practice Rule to facilitate the growth of clinical courses in American law schools.⁴ Today, all fifty states, the District of Columbia, and most federal courts have adopted similar student practice rules.⁵ As a result of student practice rules, clinic students “are granted a limited license to practice law and can actually provide legal advice and represent clients in role as a lawyer – something that nonlawyers such as paralegals, law clerks, legal assistants, or law students in clinical programs who are not certified under a student practice rule may not do.”⁶ In fact, the student practice rule for the State of North Dakota is titled “Rule on Limited Practice of Law by Law Students.”⁷

“Real-client” clinics for academic credit are well established at nearly all of our nation’s law schools.⁸ The most recent data collected by CLEA and the Association of American Law Schools (AALS) Section on Clinical Education indicates that there are real-client clinics at 183 law schools

⁴ See ABA MODEL RULE ON STUDENT PRACTICE (1969), reprinted in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 993-95 (Fannie J. Klein ed., 1978).

⁵ See Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 497 (2002). In North Dakota, there are student practice rules in both state and federal courts. See N.D. R. LTD. PRACTICE OF LAW BY LAW STUDENTS (2003); D. N.D. U.S.D.C., Rule 83.6 (2003).

⁶ Joy & Kuehn, *supra* note 5, at 497.

⁷ ND R. LTD. PRACTICE OF LAW BY LAW STUDENTS.

⁸ See LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT -- AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) 239 (1992) (“MACCRATE REPORT”). “The terms ‘live-client’ or ‘real-client’ refer to clinics where students provide representation to real clients with legal problems. These clinics are to be distinguished from clinics that are simulation based and use hypothetical clients.” Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 403 n.9 (1994).

in the United States.⁹

The ABA formally recognizes that experiential learning is an essential part of a legal education and that clinics are effective settings in which to teach the skills and values central to the practice of law. ABA accreditation standards now provide that each law school “*shall* offer . . . instruction in professional skills.”¹⁰ Further, the ABA accreditation standard for the core curriculum states that each law school “*shall* offer . . . live-client or other real-life practice experiences.”¹¹ These actions by the ABA acknowledge that “the most significant development in legal education in the post-World War II era has been the growth of the skills training curriculum” and the development of clinical education in American law schools.¹²

B. Law School Clinics Serve A Unique and Necessary Educational Role

Law school clinics are unique vehicles for law schools to teach law students essential professional skills.¹³ Clinical programs strongly reinforce the entire law school curriculum in developing students’ legal analysis and research skills.¹⁴ Clinical programs also afford students

⁹ A more complete listing of law school clinics in the United States is available at: https://cgi2.www.law.umich.edu/_GCLE/index.asp.

¹⁰ SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(c)(1) (2003) [hereinafter ABA STANDARDS] (emphasis added).

¹¹ *Id.* at Standard 302(c) (2) (emphasis added).

¹² MACCRATE REPORT, *supra* note 8, at 6; *see also Determination of Executive Commission of Ethical Standards Re: Appearance of Rutgers Attorneys*, 561 A.2d 542, 543 (N.J. 1989) (“Clinical training is one of the most significant developments in legal education.”).

¹³ MACCRATE REPORT, *supra* note 8, at 234.

¹⁴ *Id.*

paramount opportunities to engage in problem solving, factual investigation, counseling, and negotiation, which are otherwise difficult to provide in a law school curriculum.¹⁵ Prior to the development of clinical programs, these skills had been “considered as incapable of being taught other than through the direct practice experience” of a newly-licensed lawyer.¹⁶

Good lawyering skills instruction must “1) develop[] students’ understanding of lawyering tasks, 2) provid[e] opportunities to . . . engage in actual skills performance in role, and 3) develop[] [students’] capacity to reflect upon professional conduct through the use of critique.”¹⁷ Professional educators focus upon these aspects of skills instruction in structuring law school clinics. That is why the ABA’s MacCrate Report recommends that “[l]aw schools should assign primary responsibility for instruction in professional skills to permanent full-time faculty who can devote the time and expertise to teaching and developing new methods of teaching skills to law students.”¹⁸

Clinics are essential to the education of the next generation of lawyers. While lawyers can learn skills in law school clinics or in their law practice, only “real-client” clinical instruction in law school emphasizes the “conceptual underpinnings of these skills.”¹⁹ Clinics teach students how to reflect on the practice of law, how to integrate the doctrines learned in traditional classes into

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 243.

¹⁸ *Id.* at 333-34 (Recommendation C.24); *see also* Eric S. Janus, *Clinics and “Contextual Integration”: Helping Law Students Put the Pieces Back Together Again*, 16 WM. MITCHELL L. REV. 463, 486-87 (1990) (professional educators must direct law school clinics because of the critical analysis required to integrate knowledge and practice).

¹⁹ MACCRATE REPORT, *supra* note 8, at 234.

practice, how to formulate hypotheses and test them in the real world, how to approach each decision creatively and analytically, and how to identify and resolve issues of professional responsibility.²⁰ Students who experience these methods in law school learn how to continue to learn from their experiences in practice throughout the rest of their legal careers.

Furthermore, the intensive supervision in clinical courses “distinguishes clinical training from the unstructured practice experience students encounter after graduation.”²¹ Law school clinical faculty are best equipped to assess law students and supply appropriate feedback because law faculty provide more intensive guidance than is generally available in any other setting. In 1980, a joint committee of the AALS and the ABA issued guidelines for law school clinics and recommended that student-faculty ratios and student caseloads be strictly limited. Under these guidelines, clinical law faculty supply close supervision; they must assist students with case preparation, review their work, accompany them to court and observe and evaluate the students’ performances.²² This close and direct faculty supervision, and the resulting “co-counsel” relationship, is essential to creating an effective adult-learning environment.²³ It also distinguishes “real-client” clinical training from the practice experience encountered by students in “externships,” where students are supervised by practicing lawyers, and “simulation” courses, where there is neither a real client nor a shared co-

²⁰ See Anthony Amsterdam, *Clinical Legal Education -- A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

²¹ Peter T. Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ ST. L.J. 277, 280 (footnote omitted).

²² CLINICAL LEGAL EDUCATION: REPORT OF THE AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) (Guideline VII).

²³ Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 347 (1982).

counsel relationship with a law faculty supervisor.²⁴

Law school clinics provide unique educational opportunities for students to integrate professional skills and values into an actual practice setting.²⁵ Among the fundamental values of the profession is “acting in conformance with considerations of justice, fairness, and morality” on behalf of a client, and helping ensure that adequate legal services are provided to those who cannot otherwise obtain them.²⁶ By helping students fulfill the profession’s responsibility towards those who cannot obtain counsel, and by working to further the cause of justice, “real-client” clinics teach students the best values of the profession. Law school clinical programs are also one way law schools comply with the ABA Standard that law schools “should encourage and provide opportunities for student participation in pro bono activities.”²⁷

C. The Important Role of Law School Clinics

In clinical courses, the “classroom” is: 1) the clinic office, where students meet with clients and learn the tasks of lawyering; 2) the courtroom, where students appear on behalf of clients under faculty supervision; and 3) the seminar room, where case theories and lawyering skills are studied and discussed. In all of these settings, faculty are teaching and students are learning. More to the point, in all of these places, faculty and students are engaging in work that is integral to the educational mission of the law school.

²⁴ *Id.* at 346-49.

²⁵ *Id.* at 347-48.

²⁶ MACCRATE REPORT, *supra* note 8, at 213.

²⁷ ABA STANDARDS, *supra* note 10, at Standard 302(e); see *infra* Part II B for a fuller discussion of why the representation of unpopular clients or causes by the University of North Dakota clinical program is consistent with a lawyer’s pro bono obligations.

The relationship between faculty and students in a law school clinic fundamentally differs from the employment relationship between an attorney and a law clerk or paralegal. Clinical faculty do not “employ” law students to do the faculty’s work; rather, faculty teach students in a setting that the ABA and others recognize is a core component of a law school’s educational mission. Because clinics exist in law schools so that students can learn with real cases, faculty cannot represent clients unless the students are able to participate in the cases.

Some of the most educationally challenging and rewarding work students do in clinical courses involve them representing individuals and groups in cases that may be controversial. Attempts to prevent law faculty at the University of North Dakota from teaching with cases involving controversial matters interferes with the ability of the University of North Dakota to deliver the same quality education as law schools elsewhere. Law clinics across the country work on behalf of clients involved in matters against the federal government, state governments, or their political subdivisions, and clinical work on behalf of these private clients in disputes against public entities is an established part of legal education. Law students have represented individuals or groups in cases against government entities with regard to funding legal services for the poor,²⁸ defending political canvassing,²⁹ access to courts *in forma pauperis*,³⁰ challenging radio broadcast

²⁸ *Petition of New Hampshire Bar Assoc. & New Hampshire Bar Found.*, 453 A.2d 1258 (N.H. 1982), Family & Housing Law Clinic, Franklin Pierce Law Center.

²⁹ *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3rd Cir. 1986), Constitutional Litigation Clinic, Rutgers Law School.

³⁰ *California Men’s Colony, Unit II Men’s Advisory Council v. Rowland*, 939 F.2d 854 (9th Cir. 1991), *rev’d*, 506 U.S. 194 (1993), Post-Conviction Justice Project, University of Southern California.

licensing determinations,³¹ fighting sex discrimination in employment,³² enforcing zoning regulations,³³ litigating the complex interplay between Indian tribal and federal law,³⁴ pursuing legal representation for Cuban refugees,³⁵ supporting municipal nuisance ordinances,³⁶ asserting the civil rights of the homeless,³⁷ and representing prisoners in a civil rights cases against municipalities and police for intentionally violating suspects *Miranda* rights.³⁸ Had any of these clinics been banned from representing individuals and groups in cases against governmental entities, their law students would not have benefitted from exposure to such a variety of legal subject areas because their clients could not have qualified for legal assistance. This is a particularly chilling situation when a law school clinic is the only lawyer available for individuals or groups seeking redress against governmental entities.

³¹ *National Black Media Coalition v. F.C.C.*, 822 F.2d 277 (2d Cir. 1987), Media Law Clinic, New York University School of Law.

³² *Congregation Kol Ami v. Chicago Comm'n on Human Relations*, 649 N.E.2d 470 (Ill. App. Ct. 1995), Edwin F. Mandel Legal Aid Clinic, University of Chicago.

³³ *Lloyd A. Fry Roofing Co. v. Pollution Control Bd.*, 314 N.E.2d 350 (Ill. App. Ct. 1974), De Paul Law Clinic.

³⁴ *In re Catholic Charities & Cmty. Servs. of Denver*, 942 P.2d 1380 (Colo. 1997), Indian Law Clinic, University of Colorado School of Law.

³⁵ *Cuban Am. Bar Assoc., Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995), Allard K. Lowenstein International Human Rights Law Clinic, Yale Law School.

³⁶ *Inter Urban Bar Assoc. of New Orleans v. City of New Orleans*, 652 So. 2d 1038 (La. App. Ct. 1995), Tulane Environmental Law Clinic, Tulane Law School.

³⁷ *Streetwatch v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1055 (S.D.N.Y. 1995), Jerome N. Frank Legal Services Organization, Yale Law School.

³⁸ *California Attys. for Crim. Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), Center for Clinical Education, Boalt Hall School of Law, University of California, Berkeley.

Indeed, we know of no state that prohibits publicly-funded law school clinics from representing individual citizens and citizen groups in cases against governmental entities. In a matter similar to the one the Attorney General of North Dakota faces today, the Attorney General of the State of Oregon was requested by a state representative twenty years ago to issue an opinion on whether it would be an improper use of state funds for the University of Oregon Law School's Pacific Northwest Resources Clinic to be involved in litigation on behalf of private parties against governmental entities.³⁹ After surveying the facts and various provisions of Oregon law, the Oregon Attorney General concluded that the representation of clients by the University of Oregon's law school clinic was not "merely funding a private litigant's lawsuit" and the "University is acting for an educational purpose it is authorized to undertake even though there are benefits enuring to private parties." The opinion ended by stating that "we have little difficulty concluding" that the University of Oregon may, under its enabling statutes, create a clinic that uses state funds on behalf of private plaintiffs.

After considering all of the facts in the matter before him, and considering the relevant laws in the State of North Dakota, CLEA submits that the Attorney General for North Dakota should find that the University of North Dakota School of law clinic is operating within the educational purpose it is authorized to take and is consistent with practices of law school clinics across the United States.

II. THE LAW CLINIC'S REPRESENTATION IS SUPPORTED BY THE LEGAL ETHICS REQUIREMENTS IN THE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT AND THE CENTURY CODE

Legal ethics requirements in the North Dakota Rules of Professional Conduct (N.D.R. Prof. Conduct) and the North Dakota Century Code's "Duties of Attorneys" and "Attorney's Oath" mandate

³⁹ Oregon Attorney General OP-5498 (July 11, 1983) (attached as Ex. 1).

that the University of North Dakota School of Law's clinical law program not refuse representation to private plaintiffs in matters such as the Ten Commandments case.

A. A Lawyer Should Not Deny Representation to Unpopular Clients

A comment to Rule 1.2 of the N.D.R. Prof. Conduct states that "legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval." Indeed, a lawyer has a professional responsibility under the N.D.R. Prof. Conduct to accept a fair share of unpopular matters or indigent or unpopular clients.⁴⁰

This obligation flows from the legal profession's responsibility to provide legal services to all in need and from the principle of professional detachment or nonaccountability – that representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities."⁴¹ Likewise, the participation of law school clinical faculty in a lawsuit does not make the university a party to the proceeding nor constitute the university's position on the underlying subject matter.⁴²

⁴⁰ N.D.R. PROF. CONDUCT, R. 6.2 cmt. (2003); *id.* at Preamble (stating that all lawyers should devote professional time and resources to ensure equal access to the justice system for those who, because of economic or social barriers, cannot secure legal representation).

⁴¹ *Id.* at R. 1.2(b); *see also* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978) (explaining the "Principle of Nonaccountability for the Advocate"); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 569 (1986) (explaining the "principal of professional detachment or nonaccountability"). As one author observed: "The professional obligation of the lawyer is to advocate the rights of the client, not the acts of the client. This necessary distinction separates actor and principal and, thereby, enables the representation that makes our system work." Andre A. Borgeas, Note, *Necessary Adherence to Model Rule 1.2(b): Attorneys Do Not Endorse the Acts or Views of Their Clients By Virtue of Representation*, 13 GEO. J. LEGAL ETHICS 761, 762 (2000).

⁴² N.D.R. PROF. CONDUCT, R. 1.2 cmt (stating that "representing a client does not constitute approval of the client's views or activities").

Further, under Rule 6.2, where an attorney is appointed to provide representation, the lawyer shall not decline to represent an unpopular client or refuse to accept representation of an unpopular matter because of the identity of the person or cause involved or anticipated adverse community reaction. A lawyer should only seek to be excused from such representation where the attorney finds the client or cause so repugnant as likely to impair the lawyer-client relationship or the lawyer's ability to represent the client. As a joint ABA and AALS report on professional responsibility found, one of the highest services a lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the public.⁴³ The ABA and AALS observed that the legal profession as a whole "has a clear moral obligation with respect to this problem."⁴⁴

ABA ethics opinions reinforce this responsibility not to deny legal services to unpopular clients or causes. The ABA ethics committee ruled in Formal Opinion 324 (Attached as Ex. 2) that:

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

The opinion noted that attorneys associated with organizations providing free legal assistance are bound by the rules of professional conduct "from exercising their authority so as to discourage the representation of controversial clients and causes or matters that would align the legal aid society against public officials, government agencies or influential members of the community."

A later ABA ethics opinion addressed the propriety of law school clinic case selection

⁴³ Joint Conference on Professional Responsibility, ABA & AALS, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958).

⁴⁴ *Id.* at 1216-17.

guidelines at a state-funded law school that sought to avoid lawsuits against government agencies or officials. Informal Opinion 1208 (attached as Ex. 3) equated a law school clinic with a legal aid office and defined the governing body of a clinic as a hierarchy consisting of the law school faculty and its committees, the law school dean, the university administration, and the university board of trustees. The opinion admonishes the lawyer-members of the governing body of a law school clinic to avoid establishing guidelines that prohibit acceptance of controversial clients or cases or that prohibit aligning the clinic against public officials, governmental agencies, or influential members of the community. Instead, the lawyer-members "should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases, and this is particularly true if laymen may be unable otherwise to obtain legal services." Thus, subject matter priorities adopted by lawyers for a law clinic "must be based on a consideration of the needs of the client community and the resources available to the program. They may not be based on considerations such as the identity of the prospective adverse parties."

According to the ABA, all lawyers, not just those considered part of the governing body of a law clinic, should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services and should seek to remove such restraints where they exist. Therefore, as a matter of professional responsibility, the University of North Dakota School of Law should not adopt restrictions prohibiting the school's law clinic from aligning itself against state entities or officials.

The North Dakota Century Code imposes additional professional obligations on law clinic attorneys to represent unpopular clients and causes such as the plaintiffs in the Ten Commandments case. Section 27-13-01 of the Century Code, "Duties of Attorneys," requires that every attorney and

counselor at law *shall* "never reject, from any consideration personal to the attorney, the cause of the defenseless or the oppressed, or delay anyone's cause for profit or malice." Under N.D.R. Lawyer Discipl. 1.2(A)(10), violating a duty specified in Sec. 27-13-01 is considered misconduct and grounds for discipline.

Similarly, Sec. 27-11-20 mandates that every attorney, upon admission to the bar, shall take the oath required by the North Dakota Supreme Court. The court's "The Attorney's Oath" requires every lawyer to pledge: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for profit or malice." Thus, for a law clinic attorney to reject the cause of the unpopular, and otherwise unrepresented, plaintiffs in matters such as the Ten Commandments case out of a concern about offending politicians or the public, or for some other personal reason, would be to violate these duties.

As a final matter, the ethical standards of the law school teaching profession endorse the actions of the law school's clinic. The ABA has noted that "Deans and faculty should keep in mind that the law school experience provides a student's first exposure to the profession, and that professors inevitably serve as important role models for students. Therefore, the highest standards of ethics and professionalism should be adhered to within law schools."⁴⁵ "Professionalism ideals can either be enhanced or undermined by the behavior of faculty in and out of the classroom."⁴⁶

⁴⁵ COMM'N ON PROFESSIONALISM, AMERICAN BAR ASS'N, "... IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 19 (1986).

⁴⁶ SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE 13 (1996). The report explains:

Law school is where most law students first come into contact with issues relating to legal professionalism. Their law school experience has a profound influence on their professional values and their understanding of the practice of law

The ABA's MacCrate Report on legal education and professional development identified "Striving to Promote Justice, Fairness, and Morality," which includes ensuring that adequate legal services are provided to those who cannot otherwise obtain assistance, as one of the four fundamental values of the legal profession.⁴⁷ "Law school deans, professors, administrators and staff should be concerned to convey to students that the professional value of the need to 'promote justice, fairness and morality' is an essential ingredient of the legal profession"⁴⁸

The AALS's Statement of Good Practices for Law Professors in the Discharge of Their Ethical and Professional Responsibilities similarly states: "Because of their inevitable function as role models, professors should be guided by the most sensitive ethical and professional standards."⁴⁹ These heightened responsibilities include "an enhanced obligation to pursue individual and social justice."⁵⁰ Considering the importance of role modeling as a clinical teaching technique and of law

and the role of lawyers in our society.

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

⁴⁷ MACRATE REPORT, *supra* note 8, at 140.

⁴⁸ *Id.* at 333. The MacCrate Report also recommended that law schools "stress in their teaching that examination of the 'fundamental values of the profession' is as important in preparing for professional practice as acquisition of substantive knowledge." *Id.* at 332.

⁴⁹ Association of American Law Schools, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, at I (1989), *available at* <http://www.aals.org/ethic.html> [hereinafter AALS Statement of Good Practices].

⁵⁰ The AALS Statement of Good Practices argues:

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

The fact that a law professor's income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to

professors adhering to the very highest standards of professional responsibility, lawyers involved in law clinic case and client selection decisions have a heightened duty to ensure that they do not discourage the acceptance of unpopular or controversial clients or causes:

Law teachers teach as much about professional responsibility by what they do as what they say. If our conduct and actions are inconsistent with the principles and rules that we teach, we undermine our credibility as teachers and the legitimacy of the ethical principles and rules themselves. If we appear to be insincere about our pro bono responsibilities, we also encourage law students to be skeptical, indeed cynical, about the many moral principles that distinguish our profession from a trade.⁵¹

B. The Representation by the Law Clinic is Consistent With a Lawyer's Pro Bono Responsibilities

Under N.D.R. Prof. Conduct Rule 6.1, every lawyer in North Dakota has a professional responsibility to render public interest legal services in matters relating to, among others, civil rights law. Because of the severe crisis in delivering legal services to those of limited means, every lawyer is expected to support all proper efforts to meet this need for legal services, such as through law school clinics.⁵² The preamble to the N.D.R. Prof. Conduct further directs attorneys not just to devote professional time and resources but also "use civic influence" to ensure equal access to justice

which practicing lawyers may be more inhibited. With that freedom from economic pressure goes an enhanced obligation to pursue individual and social justice.
Id.

⁵¹ COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES, AALS, LEARNING TO SERVE 17-18 (1999).

⁵² N.D.R. PROF. CONDUCT, R. 6.1 cmt.; *id.* at Preamble ("A lawyer also should aid the legal profession in pursuing those objectives [of ensuring equal access to our system of justice for all who, because of economic or social barriers, cannot afford or secure adequate legal counsel].").

for all those who cannot afford or secure adequate legal assistance.⁵³

In 2000, the ABA's House of Delegates identified the lawyer's duty to promote access to justice as one of the six core values of the profession.⁵⁴ Similarly, the ABA ethics committee, in response to cutbacks in federal funding for legal services offices and to an increasing number of restrictions on the clients and cases that are eligible for federally-funded legal services, declared that it is the ethical responsibility of lawyers "to do the best we can to provide appropriate and competent legal representation for indigent persons who will no longer be able to avail themselves of this source of legal assistance."⁵⁵ Lawyers are called on to "take all necessary actions to prevent the abandonment of indigent clients,"⁵⁶ including supporting organizations providing free legal services offices where they exist and establishing them where they do not.⁵⁷ According to the ethics committee, there is "no doubt" as to the ethical responsibility of an individual lawyer to assist in

⁵³ The Preamble reads: "Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." *Id.*

⁵⁴ ABA House of Delegates, Resolution 10F (July 11, 2000), *reprinted in* Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 WAKE FOREST L. REV. 133 app. at 164 (2001).

⁵⁵ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996).

⁵⁶ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981). The ABA ethics committee stated:

The problem of reduced funding of legal services offices is a problem for all lawyers, not merely for those who have been employed by the legal services offices or who have volunteered their time to serve as members of the boards of directors of those offices. The legal profession has a clear responsibility to respond by helping to obtain funds for existing legal services programs and by providing legal services to indigent clients who would be served by legal services offices were funding available.

⁵⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996).

providing legal services to those in need.⁵⁸

Thus, under the N.D.R. Prof. Conduct, members of the legal profession bear two pro bono service responsibilities: to render pro bono services and to support, financially and otherwise, the efforts of organizations to provide such services. Despite ethics rules and advisory ethics opinions urging the legal profession to make legal services available to all in need, lawyers often have failed to step in where requested to ensure that needy clients or causes do not go unrepresented.⁵⁹

In contrast, law schools have stepped in by providing free legal services through law clinics.⁶⁰ The huge numbers of persons across the country with unmet civil legal needs led one commentator to argue that the need for law school clinic programs has rarely been greater.⁶¹ As in the case here, law school clinics are the last and only lawyer in town for most of the clients they serve.⁶² Thus,

⁵⁸ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

⁵⁹ As a profession, lawyers average less than half an hour of work per week and under half a dollar per day in support of pro bono legal services. Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1810 (2001). What little pro bono assistance is given by members of the bar goes primarily to popular, uncontroversial clients and causes, while unpopular or controversial clients and causes go without. Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 *STAN. L. REV.* 1395, 1420 (1998).

⁶⁰ ABA STANDARDS, *supra* note 10, at Standard 302(e) ("A law school should encourage and provide opportunities for student participation in pro bono activities."); *id.* at Standard 302(c)(2) ("A law school shall offer in its J.D. program . . . live-client or other real-life practice experiences.").

⁶¹ John C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 *SMU L. REV.* 1461, 1475 (1998). The ABA estimates that the legal problems of 71% of low-income and 61% of moderate-income households are never addressed by the civil justice system. ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, *LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS* 15 (1994).

⁶² It is not sufficient to suggest that some public interest law organization would otherwise provide representation to clients who are refused representation because of limitations imposed on a law clinic. Less than .001% of lawyers in the legal profession are public interest

restrictions imposed on clinic case or client selection do not simply drive the needy client to another lawyer outside the law school but deny legal assistance altogether.⁶³

In many cases, such as here, this denial of access to all legal representation is precisely the result sought by those advancing restrictions on law clinic clients.⁶⁴ For the law school or law clinic lawyers to accede to these efforts to deny legal assistance is contrary to public service responsibilities under the rules of professional conduct. Acquiescence by the law school to restrictions that are motivated by a desire to deny legal assistance also would contravene the "most sensitive ethical and professional standards" expected by the ABA and AALS of all law professors.⁶⁵

Lawyers not part of a law school governing body similarly breach their pro bono ethical responsibilities when their interference in law clinic case and client selection is motivated by politics or ideology and results in a denial of legal assistance to needy clinic clients. The history of attacks on law clinics across the country, as in the case here, reveals that those attacking law school representation of certain clients or cases have not explained how the potential clients would be able to find an alternative source of representation, nor have other attorneys stepped forward to volunteer

lawyers. Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 300 (1993-94).

⁶³ Unless the client has a Sixth Amendment right to counsel and will be provided, at the expense of the government, with another criminal defense attorney.

⁶⁴ See Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1975-89 (2002) (reporting on attacks on law clinics in various states); A.F. Conard, *"Letter From the Law Clinic"*, 26 J. LEGAL EDUC. 194, 204 (arguing that critics of law clinics are upset that the clinics are bringing suits that would not be brought at all if the clinics did not exist).

⁶⁵ AALS Statement of Good Practices, *supra* note 49.

their time or financial resources for such representation.⁶⁶ Absent such efforts to provide alternative legal representation, attorneys who participate in efforts to deny legal representation to law clinic clients violate their "clear responsibility" to respond to limits on the availability of free legal services by providing alternative legal services or financial funding.⁶⁷

Therefore, the actions of the law school's clinic in accepting the controversial Ten Commandments case are supported by the N.D.R. Prof. Conduct, the Century Code, and the ethics standards of the law teaching profession. A refusal of the law clinic to represent these plaintiffs either because of the controversial nature of their cause or because of the identity of the opposing party would be contrary to professional responsibilities.

CONCLUSION

The representation by the law clinic at the University of North Dakota School of Law of citizens of the state in a First Amendment lawsuit against a political subdivision of the state is consistent with the law school's obligation to provide legal skills instruction to its students. Moreover, any prohibition on the participation of the law clinic in the lawsuit would be contrary to ethics requirements in the N.D.R. Prof. Conduct and the Century Code. For these reasons, CLEA urges the Attorney General to find that it is legal under North Dakota law for the University of North Dakota School of Law and its law clinic to provide legal representation to citizens challenging the

⁶⁶ Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 121-22 & nn.421-24 (2000) (noting that those leading or supporting attacks on the pro bono activities of law clinics and law school professors failed to propose or provide an alternative source of legal representation for the clients aided by the law schools).

⁶⁷ See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

constitutionality of actions of a political subdivision of the state.

Respectfully submitted,

Peter A. Joy
Robert R. Kuehn
Bridget McCormack

By_____

On the Submission:
Elizabeth Clements

Date: September 15, 2003



DEPARTMENT OF JUSTICE

GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
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July 11, 1983

William E. Davis, Chancellor
Oregon State System of Higher Education
Office of the Chancellor
P.O. Box 3175
Eugene, Oregon 97403

The Honorable Max Simpson
State Representative
H481 State Capitol
Salem, Oregon 97310

Re: Opinion Request OP-5498

Dear Chancellor Davis and Representative Simpson:

Chancellor Davis and Representative Simpson have asked whether there has been improper use of state funds because of involvement in certain litigation by faculty members and students in the University of Oregon Law School's Pacific Northwest Resources Clinic.

The litigation in question involves a suit filed in U. S. District Court in Idaho on behalf of private plaintiffs by two attorneys who are faculty members of the University of Oregon Law School. These faculty members instruct the school's Environmental Law Clinic course, also known as the Pacific Northwest Resources Clinic. The suit seeks to forestall the U. S. Forest Service from the construction of a particular road in Idaho on the basis of alleged breaches of environmental statutes and regulations.

After discussing the facts surrounding this opinion request (I), the University of Oregon's authority to do what it has done (II), and relevant limitations on that authorization (III), we conclude that there is no improper use of state funds involved in the litigation.

EXHIBIT 1

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I. U of O Environmental Law Clinic and Idaho Litigation

From the written materials we have reviewed and from conversations with faculty, we understand that the Pacific Northwest Resources Clinic is the designation given to one of four clinical programs offered for course credit in the University of Oregon Law School curriculum. The others are the Criminal Defense Clinic, the Civil Practice Clinic and the Criminal Prosecution Clinic. These programs are described in the University of Oregon Law School catalog, and are designed to offer practical experience under supervision of faculty members and practicing attorneys. We are advised that law student fees pay premiums for malpractice insurance carried with the National Legal Aid and Defenders Association for all of the Law School's clinics.¹

Students in the Environmental Law Clinic are involved, under attorney supervision, in environmental litigation and appeals. Some students are placed with departments and agencies at local, state and federal levels in order to follow those agencies' work on environmental issues and to conduct legal research and prepare written memoranda. Other clinic participants may be involved with "litigation on behalf of clients."² The Idaho case which precipitated this opinion request is one such clinic litigation project.

The attorney of record in selected litigation may be a public or private attorney or a faculty member licensed to practice law. The filing of the litigation in the Idaho case, as in others, affords a vehicle for attorney-supervised experience in pursuance of the particular clinic program's objectives. This direct "hands-on" instruction benefits law students and clients. In the Idaho case, clients receive free attorney services and free supervised law clerk services. Clients similarly benefit from secretarial and incidental office services which are supplied to the faculty and students as support services for the clinics. The responsibility for filing fees, and in some cases as in this one, other costs of litigation such as copying and deposition costs, are the client's.

Although Higher Education policy recognizes the appropriateness of faculty engaging in limited "outside employment" because of beneficial educational effects to the faculty and the University community,³ in the Idaho case at issue, faculty members state they have become attorneys of record for designated plaintiffs because they believe the litigation will be of educational value to students in the clinic in which the faculty members instruct. These faculty members stress that their

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involvement as attorneys at law in this litigation should be considered as directly in pursuit of University educational "business."

II. University of Oregon

The propriety of the University's expenditure of public funds can only be addressed after a review of the authority and any pertinent limitations applicable to the University.

The University has a broad educational mandate under ORS 352.010. That statute provides that:

"The president and professors constitute the faculty of the University of Oregon and as such have the immediate government and discipline of it and the students therein The faculty may, subject to the supervision of the State Board of Higher Education, prescribe the course of study to be pursued in the university and the textbooks to be used."

See also ORS 351.070(2), concerning the State Board of Higher Education's powers in the state's educational function.

In addition to the University of Oregon Law School faculty's curriculum selection of the Environmental Law Clinic as a course of law study, Law School faculty policy provides:

"In all law school clinics students should be assigned cases or projects selected on the basis of their educational benefits to the students in that clinic." Clinic Guidelines, U of O Law School Faculty Minutes, December 17, 1980.

Since environmental law issues transcend political boundaries and since the University of Oregon Law School prepares students for law practice throughout the United States, there is no distinction made between educationally meritorious cases or projects within or without Oregon.

Clearly, the University Law School faculty's creation of the Environmental Law Clinic as a course of study encompasses off-campus litigation activity. Just as clearly, this medium has educational benefits through which to teach aspects of lawyering to law students outside the traditional classroom. As is attested to by over 300 Law Review articles,⁴ clinical legal education today is a fact and such clinics encompass far more areas

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of law than the four at the University of Oregon. The virtues of clinical legal education are now universally accepted, both in its service and pedagogical settings, and has not only been endorsed by the President of the American Bar Association,⁵ but also by the Chief Justice of the United States Supreme Court.⁶

III. Limitations on University Authority

What, if any, limitations exist on the pursuit of the University's educational functions through the Environmental Law Clinic?

Public agencies are limited to the powers and duties specified in statutes creating them. It is unlawful for any public official to expend public funds in excess of the amounts or for any other or different purpose than is provided by law. See ORS 291.990; 294.100(1) and 24 Op Atty Gen 372 (1950); ORS 297.120. In large part, absent contrary statutory provisions, the determination of what is an appropriate public purpose for which public funds may be spent is left to the agency charged with fulfilling a governmental function. Nicoll v. City of Eugene, 52 Or App 379, 628 P2d 1213, reconsideration allowed, former opinion adhered to as modified, 53 Or App 528 (1981); Miles v. City of Eugene, 252 Or 528, 451 P2d 59 (1969); Carruthers v. Port of Astoria, 249 Or 329, 438 P2d 725 (1968).

Under these cases, it is well established that a substantial public benefit is not defeated just because a private purpose also is served. Given the University's course selection prerogatives and the educational benefits which a clinic course can provide, we see no legal reason why the University cannot define the Environmental Law Clinic as a course of study and use lawfully appropriated public funds for that purpose.⁷

It may be contended that involvement of students and faculty in the Idaho litigation runs afoul of the requirements of ORS chapter 180. That chapter requires the Attorney General's assignment of counsel to state agencies for the performance of legal services and his department's control and supervision of civil actions and legal proceedings in which the State of Oregon is a party or is interested. ORS 180.060(7), 180.220(1)(a). ORS 180.230 precludes compensation to any person for services as "an attorney or counselor to any department of the state government . . . except in cases specially authorized by law."

Is any compensation paid to a faculty member supervising and teaching the clinic being paid for attorney services rendered to

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a department of state government? There is no factual basis to conclude that faculty members have ever purported to represent anyone other than private parties. The plaintiff's counsel as University faculty supervising the Law School's clinic does not make the University a party to the proceeding in the legal sense of the term (a real party in interest). We are further of the opinion that ORS chapter 180, in requiring Department of Justice supervision of actions and proceedings in which the state may be interested, refers to those proceedings in which state or state agencies' rights or duties are asserted. Here, the faculty members represent private interests. Similarly, the requirements of assignment of legal counsel by the Attorney General for the conduct of agency legal services refers to services rendered to agencies in pursuit of state business. The representation provided to clients of the law school clinics by the faculty and the students is in pursuit of those clients' rights, and not in pursuit of any right or duty claimed by the state. See SAIF v. Frohnmayer, 294 Or 570, _____ P2d _____ (1983). The legal service is provided to those clients and not the State of Oregon.

In Oregon only attorneys can "practice law." ORS 9.310 et seq. Whether hiring people who in turn practice law constitutes practicing law has not been decided in Oregon. The legislature has not attempted to define "practice of law"; the best definition the Oregon court has formulated is "any exercise of an intelligent choice . . . in advising another of his legal rights and duties." Oregon State Bar v. Security Escrows, Inc., 233 Or 80, 89, 377 P2d 334 (1962). This definition, however, is not exhaustive. In State Bar v. Miller & Co., 235 Or 341, 385 P2d 181 (1963), the court enjoined a corporation from offering clients estate-planning advice, but it is not clear whether that advice was offered by attorneys or laymen. Thus, definitive answers must be sought elsewhere.

It is generally said that corporations may not employ attorneys to carry on the business of practicing law. The Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 S2d 797 (Fla 1980); People by Lefkowitz v. Lawrence Peska Associates, 393 NYS2d 650, 90 Misc2d 59 (1977); 19 CJS Corporations § 956b. Several reasons underlie this rule. First, an attorney employed by a corporation may be subject to conflicting loyalties: the legal interests of the client may differ from financial interests of the employing corporation. Second, the employing corporation may have access to trust moneys or confidential files. Third, the corporation is not subject to the same summary disciplinary procedures that apply to an attorney. The Florida Bar v. Consolidated Business and Legal Forms, Inc., supra; In Re

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Education Law Center, Inc., 86 NJ 124, 429 A2d 1051 (1981). These potential abuses apparently prompted the concern articulated in Ethical Considerations 5-23 and -24, and Disciplinary Rule 5-107(B) of the American Bar Association's Code of Professional Responsibility:

"A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. . . . Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom." EC 5-23.

"A lawyer shall not permit a person who . . . pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B).

In regard to the Law School, the potential for abuse seems small but real. For example, a case might arise where the educationally beneficial course of action is not in the best interests of the client, or vice versa.

The very existence of these canons, however, indicates that where no statute prevents it, and proper safeguards are observed, an attorney may be employed by a "person or organization" for the purpose of "representing others." This is especially true if the organization is a nonprofit one. In In Re Education Law Center, Inc., supra, for example, the New Jersey court acknowledged the potential for abuse in a nonprofit public-interest law corporation, governed by nonlawyers and staffed by salaried attorneys, but nonetheless held that the public benefits from such an arrangement outweighed the dangers, if the following policies were rigorously followed: first, the corporation served at most as a conduit only, bringing attorneys and clients together but not thereafter interfering in the traditional attorney-client relationship; and second, the participation by nonlawyers was

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limited to matters of broad policy. In Re Education Law Center, Inc., supra; accord, EC 5-24, Model Code of Professional Responsibility. Reiterating this policy in a case similar to the present one, the ABA opined in Informal Opinion No. 1208, February 9, 1972, that a state law school clinic with faculty lawyers would avoid violation of the Code of Professional Responsibility so long as the governing body did not try to influence the operation by intervening on a case-by-case basis.

At the University of Oregon there is considerable academic freedom. See OAR 580-22-005. This should mean that there has not been and will not be any improper or unethical influence in particular cases handled by attorney faculty members and students. In fact, we are assured that the school does not exercise any control over the litigation in which the faculty member and students are involved. The litigation is entirely under the control of the attorney and the client. Neither is there any indication that were plaintiff's attorney fees to be awarded, the school would derive any proceeds from such recovery beyond its own expenses. See Jordan v. U.S. Department of Justice, 691 F2d 514 (Dist Col Cir 1982), note 14 and cited cases.

IV. Conclusion

Although there is an abundance of material involving law school clinics generally⁸ and a fair amount of case law concerning the award of attorney fees to student lawyering efforts,⁹ we have not found any dispositive discussion under Oregon law of the issues with which this opinion is concerned. Nevertheless, we have little difficulty concluding that the University of Oregon may, under its enabling statutes, create a clinic to offer opportunities for law students to gain practical legal experience (be it litigation or otherwise) under the supervision of faculty and practicing attorneys.

The University is not "practicing law" in a way that is prohibited,¹⁰ nor is it merely funding a private litigant's lawsuit. The University is acting for an educational purpose it is authorized to undertake even though there are benefits enuring to private parties.¹¹

Very truly yours,



Donald C. Arnold
Chief Counsel
General Counsel Division

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¹The University, subject to the limitations of the Oregon Tort Claims Act, "is liable for its torts and those of its . . . employees . . . acting within the scope of their employment. . . . ORS 30.265.

²The University catalog more fully describes the Environmental Law Clinic as follows:

"Participation in agency proceedings, submission of petitions requesting government action, techniques of legal access to government files, interviewing of experts and clients, interpretation and presentation of environmental data in legal proceedings, and litigation on behalf of clients. Substantial careful written work under close supervision. Potential topics include water use and conservation, wildlife, pesticides, power generation and transmission, pollution control, coastal developments, state and federal agency procedures, and hazardous materials regulation. Administrative Law is a prerequisite (although it may be taken concurrently). Preference given to students with one or more courses in environmental pollution, coastal public land, or water law."

³See OAR 580-21-025; letter of February 8, 1979 from University of Oregon President Paul Olum to University of Oregon faculty concerning rules governing acceptance of outside employment (the so-called "one day in the seven day week" policy).

We note and call to the University's attention Article XV, section 7 of the Oregon Constitution which prohibits state "officers" from "directly or indirectly receiv[ing] a fee, or . . . engag[ing] as counsel, agent or Attorney in the prosecution of any claim against this State." Cf. "office" under Or Const Art II, sec 10.

⁴See, e.g., the bibliography to P.C.A. Snyman, A Proposal for a National Link-Up of the New Legal Services Corporation Law Offices and Law School Clinical Training Programs, 30 Journal of Legal Education 43, 56 (1979).

⁵12 CLEPR Newsletter (October 1974).

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⁶Burger, The Future of Legal Education, in Council on Legal Education for Professional Responsibility and International Legal Center, Selected Readings in Clinical Legal Education 49 (1973). See also Justice Brennan's concurring opinion in Argersinger v. Hamlin, 407 US 25 (1972).

⁷In a meeting at which the Higher Education budget was passed, the Joint Ways and Means Committee heard testimony that there have been changes in the way the Environmental Law Clinic now operates: it is no longer associated with the Environmental Defense Fund, it is based entirely on campus, and it is entirely an academic pursuit controlled by professors on campus. It is also directed towards academic excellence and academic opportunity and away from ideological issues. Testimony of Representative Wayne Fawbush (HB 5007), Joint Ways and Means Committee, June 17, 1983, tape 25, side A, at 175.

⁸See fn 4 infra.

⁹See, e.g., Darmetko v. Boston Housing Authority, Mass, 393 NE2d 395 (1979); Jordan v. U. S. Dept. of Justice, 691 F2d 514 (Dist Col Cir 1982); Note, Court Awarded Attorneys' Fees in Recognition of Student Lawyering, 130 U Penn L Rev 161 (1981).

¹⁰It has also been suggested that use of University address and letterhead in papers involving the Idaho case contravenes the Department of Higher Education rule OAR 580-22-010(2), which prohibits action which might be construed as committing the institution or Board to a position on public issues. The Clinic does not purport to state the Board's or University's position. Clinic stationery has such a disclaimer. Use of an address and telephone number is necessary under court rules which require counsel in litigation to provide them so that he/she can be contacted.

¹¹It has been contended that suits and other matters which have been selected for students in the law clinic to become involved in are more likely than not to be made available to a party with a "pro-environmental" posture. The development and teaching of skills for future legal practitioners should not depend on the policy objective sought by a party litigant. As the faculty legislation referred to on page three of this opinion indicates, selection of cases or projects is to be "on the basis of their educational benefits to the students." Cases in which a party may assert positions that could be characterized as "pro-business" and "anti-environment" could afford equal educational benefits and, under the faculty policy, can be selected. Whether the faculty should choose to be more specific in its policy on what cases or projects or what balance or mix of cases or projects should in fact be brought for student involvement is a policy choice left to the faculty.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL
RESPONSIBILITY
Formal Opinion 324

August 9, 1970

The governing board or body of a legal aid society has the right and obligation to establish and enforce broad policy regarding the operation of the agency, but beyond this function the board must scrupulously guard against unreasonable interference with the handling of specific cases or the representation of specific clients by staff attorneys.

CANONS OF ETHICS: 6, 8, 15, 35, 37.

CODE OF PROFESSIONAL RESPONSIBILITY: CANONS 2, 4, 5.

DR 2-103(D)(1), 4-101(B)(1), 5-107(B).

EC 2-25, 2-27, 2-28, 4-2, 5-1, 5-21, 5-23, 5-24.

Recent years have fortunately witnessed a burgeoning of legal aid programs for the poor and others unable to afford reasonable fees for legal services. Subject to local variations, legal aid programs have as their goals one or more of the following: (1) providing legal assistance for persons unable to afford the cost of legal services; (2) educating the community as to the existence of legal problems; (3) achieving law reforms through suggested legislation or test cases; and (4) conducting research into the substantive and procedural law affecting the poor and others whom legal aid programs serve. Depending upon each legal aid society's articles of incorporation, charter or constitution, as the case may be, the programs are often administered by a board of directors or similar body whose membership may consist solely of attorneys, solely of lay persons, or of both attorneys and lay persons. The nature and extent of the control exercised by the board over the lawyers employed by the society does, of course, vary considerably.

The activities of a legal aid society were the subject of criticism by various public officials and certain of the news media. As a result of this criticism, the legal aid society's activities were examined by a special committee of the local metropolitan bar association, which concluded its report by using the following language with respect to the primary complaint directed against the society's representation of "militant" groups and causes:

"Unquestionably, the Society has, by its representations in certain cases... given support, direct or indirect, to causes or activities which may be considered militant. However, up to the present time, representations of this kind have been relatively few in relation to the some 5,000 representations afforded by the Society during the period January 1 to November 30, 1969. It is probable that publicly expressed concern as to the Society's support of 'militant' causes would appear to relate more to what it may do rather than to what it has already done.

"The President and Director of the Society made it quite clear to your Committee, as they have in the press, that the Society intends to undertake the representations of groups of poor persons where it feels they have a just cause, regardless of whether such groups are generally regarded as militant. Such representation may be expected to take a variety of forms, from the representation of rent strikers and a class action to reform the disciplinary procedures of the [Forest Park] Junior College, as had already been undertaken, to suits against governmental agencies to reform their procedures and practices. Further than that, it is the intention of the Society to undertake legal reform, either by direct suit or by advocating legislative change, in any case where such action would appear desirable in the interest of the poor. As stated by the Director, the only condition is that the action taken be within the law. In short, it is clear that the Society's future activity will be expanded far beyond the traditional concept of simply rendering legal service to individual poor persons. To what extent, if any, this broadened activity may militate against the Society's capacity to serve the individual poor is unknown. The Director of the Society feels that it will not.

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"In any event, your Committee believes that the Bar Association should be aware of the broader and more active role that the Legal Aid Society intends to play in support of causes which it deems to be for the good of the poor. Unquestionably, this increased activity will be abrasive and controversial, and the Bar Association, which necessarily assumes a large direct responsibility for the Legal Aid Society will have to keep abreast of its activities to support them or to work for their correction, as the case may require."

The executive committee of the metropolitan bar association thereafter submitted certain proposals to the legal aid society urging, *inter alia*, prior approval by the society's board of directors before any legal matter may be undertaken for an organization whose representation has not been authorized by the Board, and before class actions can be instituted by staff attorneys. The statement of the executive committee said in part:

"We feel that the Board of Directors of the Legal Aid Society... should assume the dominant and controlling position in directing the policy of the Society. In our opinion, the policy of the Society should be established by its Board of Directors. The members of the Board have a duty to be responsive to the attitudes of the entire community in establishing that policy. They also have a duty to insist that the operating Director abide by the letter and full spirit of the Board's policy, or he should be dismissed."

The questions presented for decisions are:

(1) To what extent should a board of directors or the governing body of a legal aid society be able to control the activities of lawyers employed by the society to provide legal services for indigents and others?

(2) To what extent can a lawyer employed by a legal aid society submit to such control under the Code of Professional Responsibility and the Canons of Ethics?

Canon 5 of the Code of Professional Responsibility states the broad rule that "[a] lawyer should exercise independent professional judgment on behalf of a client."

EC 5-1 provides:

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

Similarly, EC 5-21 provides:

"The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence...."

Insofar as is relevant to the specific questions with which we are presented, EC 5-23 provides:

"A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution already undertaken for clients is postponed to their detriment."

EC 5-24 stresses that the functions of the board of directors of a legal aid society should be limited to setting broad policy guidelines for the operation of the society:

"... Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer."

Moreover, DR 2-103(D)(1) clearly provides that a lawyer's professional judgment cannot be interfered with by any legal service agency by whom he is employed:

"A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, providing that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person: (1) a legal aid office..."

Finally, DR 5-107(B) provides:

"A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

We believe that the foregoing quotations from the Code of Professional Responsibility militate against any interference with the lawyer-client relationship by the directors of a legal aid society after a case has been assigned to a staff attorney.

The questions presented for decision can be more easily resolved by using a two-step analysis of the problem. We must first determine the scope of the authority a legal aid society board of directors has to prohibit its staff attorneys from accepting certain types of cases or representing certain types of clients. Only after this determination is made can we consider the control the directors should exercise over the handling of specific cases assigned to staff attorneys.

We believe that under EC 5-24 of the Code of Professional Responsibility, the governing board of a legal aid society has a moral and ethical obligation to the community to determine such broad policy matters as the financial and similar criteria of persons eligible to participate in the legal aid program, selection of the various services which the society will make available to such persons, setting priorities in the allocation of available resources and manpower, and determining the types or kinds of cases staff attorneys may undertake to handle and the type of clients they may represent. In this regard, the board functions much like the managing or senior partners in a law firm except that the board's role is expressly circumscribed by the Code to making broad, rather than narrow, policy decisions.

The composition of the board of directors may be important in determining the propriety of board-imposed limitations or restrictions upon the types of cases a legal aid society permits its staff attorneys to undertake or the type of clients it permits them to represent. Where, for example, a board consists partially or solely of lawyers, these members in determining board policy should strenuously attempt to fulfill their broad obligations under Canon 2 of the Code of Professional Responsibility by setting policies designed to make legal services as fully available to all who need them as resources permit. *See* EC 2-25. Furthermore, just as an individual attorney should not decline representation of an unpopular client or cause, an attorney member of a legal aid society's board of directors is under a similar obligation not to reject certain types of clients or particular kinds of cases merely because of their controversial nature, anticipated adverse community reaction, or because of a desire to avoid alignment against public officials, governmental agencies, or influential members of the community. *See* EC 2-27 and EC 2-28.

We believe that it is more desirable for a board of directors of a legal aid society, in determining which clients its attorneys may undertake to represent and the cases its attorneys may prosecute, to set broad guidelines respecting the categories or kinds of clients and cases rather than to act on a case-by-case, client-by-client basis. There is in a case-by-case consideration the very real danger that the more controversial causes - those which often provide opportunities for law reforms aiding the poor - will be subject to board veto solely because of a fear of criticism from certain influential segments of the community. A broader policy approach, we believe, is not only mandated by the Code of Professional Responsibility, specifically EC 5-24 and DR 5-107(B), but is also a reasonable accommodation of the sometimes conflicting responsibilities that a legal aid board and its staff attorneys feel towards the community.

In addition to establishing broad policy, the board has the concomitant obligation to insure that its policies are being faithfully carried out by the society's executive director (who, of course, has no more latitude than the Board he represents) and staff attorneys. To this end, the board may employ reasonable procedures to periodically review the actions of society personnel to determine whether the board's policy directives have been adhered to. Although a staff attorney may be asked to divulge certain information pertaining to his clients for the purpose of determining whether the board's criteria have been satisfied, we do not consider this an unreasonable encroachment upon a lawyer's independence nor do we believe that a lawyer breaches Canon 4 and sections EC 4-2 or DR 4-101(B)(1) of the Code of Professional Responsibility, or Canon 37 of the prior Canons of Ethics by divulging such information.

After the attorney has accepted a client or case of the nature and type sanctioned by board policy, the board must take special precautions not to interfere with its attorney's independent professional judgment in the handling of the matter. The staff attorney must similarly prevent his actions in handling particular cases from being directly or indirectly influenced by the board or by individual board members, thus impairing his primary obligation of loyalty to his client. It goes without saying he must also act in accordance with the Code of Professional Responsibility or the Canons of Ethics, whichever is applicable.

Difficulties may arise, however, where a case assigned to or otherwise in the hands of a staff attorney is suitable for expansion into a class action, thereby offering greater possibilities for broader relief or substantial law reforms. Whether or not an attorney should be able to expand his case into a class action without prior board approval will depend on the guidelines established by the board determining priorities among the goals of the particular legal aid society. If, for example, the board establishes law reform as the primary goal of its program, it would be reasonable to allow the attorney in charge of a particular case to expand the action into a class suit without the prior approval of the board. On the other hand, if law reform is not one of the primary goals of the particular legal aid society, prior approval of the board may well be required before an ordinary suit is enlarged into a class action.

As we have noted earlier, it has been proposed that prior approval of the legal aid society board of directors be required before any legal matter may be undertaken for an organization whose representation has not been authorized by the board, and before class actions can be instituted by staff attorneys. These restrictions, if adopted by the board of directors of the society, would, we believe, extend the board's authority beyond the limits prescribed by the Code of Professional Responsibility and the Canons of Ethics in that such restraints would grant to the board the power to make narrow rather than broad policy decisions and would, in addition, constitute an unreasonable interference with the lawyer-client relationship. Although the board may establish policy relating to financial criteria and other general matters governing the representation of organizations and individuals, it should not make this determination on a case-by-case basis. By its inherent nature, a case-by-case or client-by-client determination makes representation more vulnerable to board veto where the particular organization, individual, or cause is controversial or unpopular in the community and/or among the directors. So long as the board's general criteria are satisfied the society should undertake to represent the client if sufficient resources are available so that other more pressing work is not neglected. Further, if the goals of the society, as its president and director have stated, encompass broad-scale legal reforms in addition to the rendering of legal services to individual clients, the requirement of board approval of each contemplated class action would be an unwarranted interference with the lawyer's handling of the case.

We believe, therefore, that the following principles should govern the relationship between the board of directors of a legal aid society and the society's staff attorneys:

(1) The board's functions are limited to formulating broad goals and policies pertaining to the operation of the society.

(2) To this end, the board may establish guidelines respecting the categories or kinds of clients staff attorneys may represent and the types of cases they may handle.

(3) The board may require staff attorneys to disclose to the board such information about their clients and cases as is reasonably necessary to determine whether the board's policies are being carried out.

(4) Staff attorneys should endeavor at all times to fulfill the broad policies formulated by the board and should insure that their conduct in representing clients or causes is in conformity with the Code of Professional Responsibility or the Canons of Ethics, whichever is applicable.

(5) Attorney members of the board of directors are proscribed by the Code of Professional Responsibility from exercising their authority so as to discourage the representation of controversial clients and causes or matters which would align the legal aid society against public officials, governmental agencies or influential members of the community.

(6) Once the attorney has accepted a client or case of the nature and type sanctioned by board policy, the board must take special precautions not to interfere with its attorney's independent professional judgment in the handling of the matter.

We believe that the foregoing opinion would be equally appropriate under the former Canons of Ethics.

Informal Opinion 1208

Limitations on the Operation of a Legal Clinic By a College of Law

February 9, 1972

You have presented to us the following situation:

"A legal clinic was established by a state law school primarily as a 'skills' educational program for students but also as a legal aid project. It has a total of five licensed lawyers. It has both a criminal component and a civil component. Student work ranges from investigations of facts through the conduct of trials pursuant to a court rule regulating student practice. Classroom seminars use actual clinic cases for discussions of tactical, ethical, and substantive law problems. Two of the five lawyers are faculty members who accept or reject cases on the basis of the anticipated educational value of each case. The clinic represents only indigents, and no fees are charged; but in addition to individual clients, the clinic has represented certain state and municipal officers and agencies.

"Some of the clinic's suits have been against state and local officers, and some of its suits have been controversial on social or political grounds. The clinic does not select cases, however, on the basis of social or political considerations. Because of the controversial nature of some suits, the clinic's appropriation was questioned or jeopardized.

"A state ethics committee has held that it was not improper for the Clinic lawyers to handle suits against the state or suits in which the constitutionality of state statutes was challenged. The law school promulgated a set of general guidelines for the conduct of the clinic, and included are general standards for accepting cases. For example, no case against the University or any of its senior officials may be accepted. The guidelines also provide for acceptance or rejection of cases by the clinic's two faculty lawyer-directors to be appealed (in certain instances including acceptance of cases against governmental officials) to a faculty committee.

"Three proposals are being considered as alternatives to the guidelines. The *first* would prohibit the lawyer-directors from accepting any case involving an affirmative lawsuit against a federal, state or municipal officer or agency. The second would prohibit acceptance of a case 'for the purpose of initiating an affirmative civil rights suit' against a federal, state or municipal officer, 'provided that this would not prohibit suing the State in order to judicially review or otherwise defend against prior action which had been directed against the prospective client.' The third would require the lawyer-directors to seek, 'on a case-by-case basis,' the prior approval of the dean or a faculty committee before accepting a case involving an affirmative lawsuit against a federal, state or municipal officer. *Habeas corpus* cases are exempted from each proposal."

Collectively you ask five questions, which we will discuss separately.

At the outset, we observe that the law school clinic is a legal aid office even though occasionally nonindigents are represented. The purposes of the law school clinic indicate that a prime goal is to assist indigents, and one main purpose is to provide skill opportunities and other educational benefits to students. The governing body of the law school clinic is a hierarchy consisting of the law school faculty and its committees and its dean, the university administration, and the university board of trustees. Some of the individuals in this hierarchy are lawyers and some are not.

"*Question One.* Would any of the proposed limitations violate the professional ethics and responsibilities of (a) the dean, who is a lawyer, or (b) the lawyer-directors of the clinic?"

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. Thus, the question involves the dean's situation as a member of the governing body and involves the lawyer-directors of the clinic as lawyers operating the clinic and as lawyers representing clients.

Canon 2, CPR, stresses that every lawyer should aid in making legal services fully available. EC 2-26 tells us that each lawyer should accept his share of the burden of rendering legal services in those matters which are unattractive to the bar generally. EC 2-28 adds,

"The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment."

And according to EC 2-29, a lawyer is not justified in declining to handle legal matters which are repugnant because of "the subject matter of the proceeding (or) the identity or position of a person involved in the case..."

It follows that lawyer-members of a governing body of a legal aid clinic should seek to avoid establishing guidelines (even though they state only broad policies; *see* Formal Opinion 324) that prohibit acceptance of controversial clients and cases or that prohibit acceptance of cases aligning the legal aid clinic against public officials, governmental agencies or influential members of the community; *see* Formal Opinion 324. Acceptance of such controversial clients and cases by legal aid clinics is in line with the highest aspirations of the bar to make legal services available to all. Lawyer-members of a governing body of legal aid clinic should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases, and this is particularly true if laymen may be unable otherwise to obtain legal services.

Failure of a lawyer-member of a governing body to obtain establishment of guidelines as described is, however, not a matter involving the possibility of disciplinary action. The Code of Professional Responsibility, taking the realistic view that the lawyer-member of a governing body may be unable to cause the body to adopt guidelines conforming to the higher aspirations of the profession, does not contain a Disciplinary Rule subjecting a lawyer to discipline who participates, as a member of a governing body, in setting broad policies which restrict the legal aid clinic in the representation of controversial clients and causes.

It is our opinion, therefore, that establishment of the limitations contained in the first and second proposal would not constitute the violation of any Disciplinary Rule on the part of a lawyer-member of the governing body, even though the two proposals run counter to the ethical precepts urged upon lawyers in the Code of Professional Responsibility.

The third proposal is a different matter, for it contemplates that the lawyer-directors will see "on a case-by-case basis" the prior approval of certain members of the governing body, namely, the dean and a faculty committee. We assume that these members are lawyers.

As pointed out in Formal Opinion 324 (copy enclosed), EC 5-24 stresses that the functions of the governing body of a legal aid office should be limited to the setting of broad policy guidelines for the operation of a clinic. The underlying policy is to avoid the possibility that the judgment of a lawyer will be in any way influenced by the governing body, for the loyalty of the lawyer runs to his client and not to the governing body. It is not important whether the members of the governing body which furnishes or pays for legal services for another are lawyers; for the loyalty of the lawyer is to his client and not to the entity paying him. EC 5-21 says,

"The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment."

Based on these and similar considerations, Formal Opinion 324 said that the proper functions of a governing body is only to formulate broad goals and policies and establish guidelines respecting the categories or kind of clients that may be represented, and that the governing board must be particularly careful not to interfere with the handling of a particular matter once it is accepted. More specifically, the Opinion stated that the governing board should not

"... act on a case-by-case, client-by-client basis... A broader policy approach, we believe, is not only mandated by the Code of Professional Responsibility, specifically EC 5-24 and DR 5-107(B), but is also a reasonable accommodation of the sometimes conflicting responsibilities that a legal aid board and its staff attorneys feel towards the community."

DR 5-107(B) is highly relevant to the position of the lawyer-directors of the law school clinic. That rule states:

"A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

EC 5-24 points out that a lawyer should avoid violation of DR 5-107(B) by refusing to accept employment from an organization

"... unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves."

Likewise, lawyer-members of the governing body should not attempt to place the lawyer-members of the clinic in the position of violating DR 5-107(B); see DR 1-102(A)(2) and DR 1-103(A).

In our opinion, the establishment of the limitations contained in the third proposal are unacceptable because the case-by-case review makes it likely that the independent judgment of the five clinic lawyers and their loyalty to their clients will be impaired. Thus the proposed limitations in the third proposal violate the professional ethics and responsibilities of the dean and of the lawyer-directors of the clinic. The fact that the dean is a lawyer is not relevant for the reason that the Ethical Considerations and Disciplinary Rules of Canon 5 do not contemplate an exception permitting outside influence by one who happens to be a lawyer.

"Question Two. Would answer number one be the same if the limitations were imposed by (a) the university board of trustees, (b) the university administration, (c) the law school faculty, or (d) the law school dean?"

Yes. See the discussion under Question One.

"Question Three. Are the reasons for imposing the limitations an important determinant of whether or not they are ethical?"

No. Cf. EC 5-23.

"Question Four. Would the above answers be different if the clinic did not provide legal assistance to indigent clients?"

Some organizations, such as those operating legal aid offices, provide legal services to indigents. Other organizations, often referred to under the catch-all heading of "group legal services," furnish or pay for legal services to laymen on the basis of criteria other than indigency. An organization providing aid to indigents should more than other organizations using other criteria, feel obligated to avoid guidelines that fail to comply with the Ethical Considerations of Canon 5. Use of guidelines that avoid controversial cases and controversial clients is particularly unfortunate if the organization happens to be the only local organization providing aid to indigents. To this extent it is relevant that the law school clinic provides legal assistance to indigent clients.

"Question Five. Would the answers be the same under the Canon of Ethics and the Code of Professional Responsibility?"

The answer is yes; see Formal Opinion 324, and Canons 4, 29, 32, and 35, former ABA Canons of Professional Ethics.