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ETHICS, INTERNAL LAW SCHOOL CLINICS, AND TRAINING THE NEXT GENERATION OF POVERTY LAWYERS

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I. INTRODUCTION

Law school clinics provide a significant portion of law students with their most formative experience representing low-income individuals or organizations. Consequently, it is incumbent upon

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clinics to model the highest level of professionalism, to impress upon students the importance of ethics when representing clients who have the least power in our society and the least access to lawyers or the legal system—especially when representing those clients against powerful forces. One of the lifelong lessons I remember from my early days as a legal aid lawyer was the necessity of being meticulous in my ethics so that my clients were never vulnerable because of my failings. Ethics and poverty law are inextricably tied together in modern clinical legal education because many law school clinics owe their existence to the Council on Legal Education for Professional Responsibility (“CLEPR”) program that had the dual mission of teaching law students ethics through experience and providing social justice to those who did not have access to lawyers. Nevertheless, the peculiar nature of law school clinics creates many challenges to meeting such a high standard of excellence. This article will examine some of those challenges of ensuring high ethical standards in clinics that serve low-income clients.

Internal law school clinics, in which law students and faculty employed by the law school represent real clients with real problems, share ethics issues with law firms, government entities, public defenders, and legal aid offices. Nevertheless, law school clinics differ significantly from these other legal settings. Obvious distinctions include the differences in goals and priorities, the presence of law students and the transient nature of their participation, and the mere fact the clinic is a component of a


2. There are many variations on the structures of clinic programs within law schools, such as externships, hybrids, in-house clinics, etc. As indicated by this definition, this article is aimed toward the clinic that is within the law school, in which the law school employs: the lawyers supervising the cases and doing the legal work, the law students doing the work of lawyers, and the clinic addressing real problems and cases. Commentators suggest that an in-house clinic course must provide a model of law office management. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 189–98 (Clinical Legal Educ. Ass’n, 2007) (outlining some of the best practices for in-house clinical courses and emphasizing that an in-house clinic course must provide a model of law office management).
larger institution. It is therefore important to examine how the law of lawyering impacts the law school clinic. This article provides an inventory of some of the ethical issues that might be considered in the management of an internal law school clinic (hereinafter “clinic”), and an exposition of the competing concerns and strategies for addressing those concerns. Only if those managing law school clinics are attentive to these ethical issues can they model best ethics for students representing poor people.

Each clinic is distinctive in its history, context, personnel, culture, applicable laws, goals, and priorities. Therefore, thoughtful people may make very different but correct choices about how to resolve ethical management issues. Most clinic supervisors and faculty are highly conscientious that ethics and professionalism are a major component of their programs and that law students absorb standards of behavior that will stay with them throughout their lives. Nevertheless, because clinics must achieve so much for so many—students, clients, communities, the bar, universities, the legal academy, and funding sources, to name a few—and because clinics may have developed organically rather than through proactive planning, ethics issues constantly arise.

The topics raised in this article are important to those involved in clinics as managers, lawyers, and teachers. There is little doubt that faculty who teach in clinics serve an important role as professional models for their students, and how we identify and react to ethics issues may be one of our most important functions. Consequently, transparent discussions with students regarding how and why a clinic resolved some of the professionalism issues elucidated in this article may be extremely helpful in training a new generation of reflective practitioners who represent all sorts of clients—rich, middle class, and poor; individual and organizational.

The article begins by exploring the thorny problem of defining the parameters of the clinic as a law firm. The section that follows discusses confidentiality generally and then delves into

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3. References are primarily to the American Bar Association Model Rules of Professional Conduct, which are referred to as the “Model Rules” throughout this article. There are, however, variations in the state rules.

4. The titles and status of the people employed by the law school to supervise the law students vary from one institution to the next. For simplicity, this article refers to them as “faculty” or “clinic faculty.”

5. See infra Part II.
the benefits and hazards posed by the use of technology.\textsuperscript{6} The next sections address ethics issues of particular importance to low-income clients: the selection of clients, cases, and projects; professional and personal conflicts peculiar to law school clinics; pro bono work; political interference; and unauthorized practice and student practice rules.\textsuperscript{7} The following section examines the implications of methods for identifying and resolving existing and past ethical issues that are peculiar to a clinic operating within an academic setting.\textsuperscript{8} The article then discusses the professionalism issues associated with informing others that the lawyer is a student.\textsuperscript{9} Low-income clients, who may feel that they receive second-class legal services, might be particularly sensitive to the issue of whether the opposing party knows that the lawyer is a student. Regardless, the student lawyer may have a duty to disclose in some circumstances. Attorney–client retainers and fee agreements are the next issues covered in the article.\textsuperscript{10} Finally, the article concludes with a discussion of IOLTA accounts, client property, and client files.\textsuperscript{11}

\section{What is the “Law Firm” and Why Does It Matter?}

A preliminary, knotty question that entangles many of the other issues in this article is who or what constitutes the “law firm?” For example, confidential information may usually be shared within the firm\textsuperscript{12} and conflicts of interest may be imputed to other members of a firm.\textsuperscript{13} In some programs, the clinic is one unified law office in which, regardless of the focus of the legal work, everyone shares faculty, students, cases, physical space, staff, computer systems, libraries, classroom components, and file storage space.\textsuperscript{14} At the opposite end of the spectrum are

\begin{enumerate}
\item See infra Parts III–IV.
\item See infra Parts V–X.
\item See infra Part XI.
\item See infra Part XII.
\item See infra Part XIII.
\item See infra Part XIV.
\item \textsc{Model Rules of Prof’l Conduct} R. 1.6 cmt. 5 (2008) (“Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.”).
\item \textsc{Model Rules of Prof’l Conduct} R. 1.10 (2008).
\end{enumerate}
institutions in which each clinic project is a world in and of itself so there is no overlap. A survey of law schools would probably show some variations on these structures at any given moment, but these relationships may shift over time as resources and personnel change.

The faculty who teach in the clinic may remain the same each semester, but at some institutions, the faculty move in and out of the clinic. This raises the question of whether a faculty member who primarily teaches in the clinic, but is absent for a semester due to other teaching, research, or administrative responsibilities, should be treated as a member of the firm during that time away. Conversely, should the law firm include a member of the law school community (permanent faculty, visiting faculty, adjunct, faculty from another clinic, or administrator) whose primary responsibilities are not in a particular clinic project, but who teaches in that clinic for a semester or year, assists as primary counsel on one or two cases, or consults with the clinic either routinely or only once? Multidisciplinary practice that involves other professionals from the community or elsewhere on campus may create conflicts when professional ethics, standards of practice, or policies clash. Finally, there is the ultimate question of whether the dean or members of the senior administration are members of the firm for any purpose.

15. See generally, Nancy M. Maurer, Handling Big Cases in Law School Clinics, or Lessons from My Clinic Sabbatical, 9 CLINICAL L. REV. 879 (2003) (describing a clinical professor’s one-year sabbatical from the clinic and her inability to remain uninvolved when issues on major cases continued to arise).

16. For instance, temporary lawyers hired by law firms through temporary employment agencies could be considered members of the firm. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 356 (1988) (“Ultimately, whether a temporary lawyer is treated as being ‘associated with a firm’ while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm.”). Thus, in law schools where non-clinical faculty is often consulted about client cases, the clinic as a “law firm” could be defined expansively and encompass more than the students and supervising attorneys.

17. At least one commentator notes that the not-for-profit setting allows multidisciplinary practices, and law schools are a form of multidisciplinary practice. See Bruce A. Green, Reflections on the Ethics of Legal Academics: Law Schools as MDPs; Or, Should Law Professors Practice What They Teach?, 42 S. TEX. L. REV. 301, 305 (2001).

18. For example, as discussed later in the article, should deans or
For some purposes, such as sharing confidential information, it is advantageous to use an expansive definition of the firm because a larger firm population means more people can be consulted without violating the clients’ rights. But for other purposes, such as conflicts of interest, fewer problems arise if the firm is as small as possible. According to the ABA Model Rules of Professional Conduct, multiple programs sharing physical space or independent lawyers intermittently consulting one another need not create a firm. Thus, to avoid complex problems with conflicts and confidentiality, a school could decide to make each clinic project a standalone entity even in shared space. This structure could be costly and would require special care to be taken to impress upon students, staff, clients, and the public that each project is independent and the consequences of that independence. For example, clients’ information would need to be kept separate and neither the students nor the faculty could freely consult about cases.

The public perception of a clinic may inadvertently form a law firm. For example, names on letterhead and the identification of a law firm on pleadings tell the public what constitutes the firm. The public perception of what constitutes the firm can also be created by information that the law school produces for different audiences, such as potential students, enrolled students, alumni, members of the community, clients, and accrediting bodies. This information can include websites, pamphlets, reports, press administrators have access to confidential information for any reason, including: assessment of the clinic faculty; participation in decisions about whom to represent; inclusion in conflict-checking systems; or permission to interfere in clinic work. See infra Part III.

19. See infra Part III (discussing confidentiality).
20. See infra Part VI (discussing conflicts).
21. Most clinic structures, however, would be considered single law firms for ethics purposes because they consist of associated lawyers who are authorized to practice law. See MODEL RULES OF PROF’L CONDUCT R. 1.0(c) (2008). Consideration of the specific facts can help determine whether two or more lawyers constitute a firm. See MODEL RULES OF PROF’L CONDUCT R. 1.0 cmt. 2.
24. See Michael H. Hoeflich & J. Nick Badgerow, Symposium, Law School Faculty, LLP: Law Professors as a Law Firm, 53 U. KAN. L. REV. 853, 870 (2005) (arguing that law school faculty who also represent clients should not use law school letterhead for private practice, as it could encourage the notion that there is some connection between the law school and the client’s representation).
25. See Joy & Kuehn, supra note 14, at 531–32.
releases, or fundraising documents, and those responsible for creating and disseminating the information may not be cognizant of the consequences of presenting the clinic as a particular construct. The clinics and the rest of the law school must coordinate on this issue to avoid presenting conflicting information to the public.

If clients are invited to either call or come to the clinic for representation, they are entitled to know the structure of the program that is representing them. For example, at one point the clinic at the University of Illinois was composed of projects that did transactional work, general civil litigation, and domestic violence. Clients experienced the clinic as one law firm with multiple departments. The domestic violence project did not handle divorce matters, but the civil litigation project was willing to take some of their clients’ divorces. Similar to private law firms with multiple departments, client matters would be referred to another law clinic project. As a matter of respect, the client who wanted a divorce was always consulted before a case was transferred to another project, but all files and information could be moved efficiently. The structure limited the program’s ability to take cases because of conflicts. For example, a conflict existed if the transactional clinic had represented an individual, and that individual’s spouse sought assistance from the clinic for a divorce. As discussed below, there are limited resources for lawyers for low-income clients. The definition of the law firm can restrict availability, which may mean someone ultimately goes unrepresented.

III. CONFIDENTIALITY

Confidentiality is one of the cornerstones of the law of lawyering in the United States and is based on the assumption that clients will provide lawyers the information they need only if the client is confident the lawyer will not reveal the information unless necessary to do so to achieve the client’s goals. It is the foundation of trust between the lawyer and the client. For poor clients who often have experienced the service professions or governmental agencies as adversaries rather than advocates, it is particularly

26. In 1995, the author joined the faculty at the University of Illinois College of Law to create its first in-house clinic.

important for them to feel confident that the information they are
providing will be protected. For example, clinic clients may have
had experiences in which they were required to provide
government agencies with personal financial information or
rationales for life choices that people with money would never be
asked. Alternatively, clients may have been encouraged to confide
in social workers only to discover afterwards that their statements
were being used against them. Since many of the professional
contlicts that lawyers face surface when competing demands might
require the divulgence of client confidences, confidentiality will
frequently reappear as an area of discussion throughout this article.

Law clinics face special challenges in managing confidentiality
because of the setting and educational mission. At a very basic
level, the frequent turnover of students in the clinic means that
every semester or year a new group must be educated about what
confidentiality means and how it must be maintained. The issues
that may arise involve where, how, and with whom a client’s
information may be discussed, and the benefits and hazards of
technology.

Confidential information can be released because students are
not sufficiently alert to the subtlety of the Model Rules—this is what
they learn in the clinic. Students may experience the excitement,
fear, and bravado of having their first real clients and there is
temptation to want to process those emotions with supportive
people who should not be privy to client confidences. If they talk
to family and friends, they risk violating their client’s right to
confidentiality. Moreover, clinics rarely have sufficient physical
space so that each student has a personal office. This means that
clinics must have policies regarding whether case files and other
sensitive information can be left out in the clinic or leave the clinic
office altogether.28 Some clinics use duplicate filing systems that
allow students to reproduce all or part of a client file, which risks
the loss or misplacement of information.

Cell phones and other personal electronic devices result in
students working away from the clinic such as in homes and public
spaces that create a risk of exposure of confidential client
information.29 Students are not sitting in an office all day, so they

28.  See also infra Part IV (further discussing file maintenance).
29.  See Peter R. Jarvis & Bradley F. Tellam, Competence and Confidentiality in the
Context of Cellular Telephone, Cordless Telephone, and E-Mail Communications, 33
WILLAMETTE L. REV. 467, 470–82 (1997). Courts hold that all privileges and
are not available for easy communication. Programs must decide if students may give out their cell phone numbers or e-mail addresses so that they can be available to clients even when they are not “in the clinic.” This practice can put the students at risk of a client misunderstanding professional boundaries because the client has too much personal information about the student and too much access to constant communication. When telephone work is performed outside the clinic space, there is the risk that other people may have access to information or overhear conversations that should take place in an office. Students may be sloppy about discussing cases with other clinic students in public places such as the law school library, cafeteria, or student lounge. On the other hand, when students are representing poor clients who may not have the time or means to come to the office, it may be particularly advantageous to use cell phones or e-mail, although these methods of communication are fraught with risks.  

As discussed in Part II regarding “what is the law firm,” the clinic programs should be clear about who is in the firm in order to determine whether client confidences can be exchanged amongst the clinic students who are enrolled in different programs. Students may want to consult about cases with non-clinic faculty or adjuncts who are not necessarily a part of the law firm. Consequently, students must learn either how to protect client confidences in the process or obtain their client’s consent. There is also a risk that in a class where an issue similar to a client’s case is

prohibitions with respect to landline telephones also apply to cell phones. Id. at 476. However, three general rules should be followed when using electronic communication devices, including cell phones: (1) lawyers should use the most secure means of communication for the most sensitive information, (2) lawyers should discuss the risks of using different forms of communication unless they have reason to believe that clients are already aware of those risks, and (3) lawyers must be prepared to change and upgrade their practices as technology advances. Id. at 482.

30. See infra Part IV (discussing client’s use of public e-mail).

31. See Laura L. Rovner, The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics, 75 U. Cin. L. Rev. 1113, 1150–56, 1176–79 (2007). Even teaching students to consult non-clinical faculty using hypotheticals is not without risk. Id. at 1153–54. Thus, clinics should obtain informed consent from clients before consulting outside faculty. Id. at 1176–79. “Getting informed consent should involve explaining to the client the reasons why the clinic seeks to collaborate with the classroom teacher, the confidential information to be disclosed to the classroom teacher, the reasons for disclosing that information, and most importantly, the potential consequences of disclosing that information.” Id. at 1178.
being discussed, an enthusiastic clinic student will volunteer
information about a clinic case to make a point or ask a question.\textsuperscript{32}

Clinic faculty may face challenges regarding client confidentiality because of the nature of their employment. Clinic
faculty’s teaching and supervision may be monitored by other faculty members who do not participate in the clinic or by law school administrators as part of a clinic program review or faculty retention and promotion. Under some systems, administration and non-clinic faculty have asked to look at case files that contain confidential information.\textsuperscript{33} Depending on how the law firm has been defined, these reviews can reveal both confidential and privileged client information. If the goal of the observation is to assess the clinic professor’s teaching skills, there is artificiality if during class or a case supervision all the information regarding the client is eliminated. There is no benefit to the client to waive confidentiality to accommodate a law school’s desire to assess a professor’s performance. The school must therefore respect the need for confidentiality. If the client does waive confidentiality, particular caution must be exercised if the case may end up in litigation and privilege has been waived as a result of the client’s consent to have his or her case used in a class. Finally, law school administration may not necessarily be allowed access to confidential client files without client permission.\textsuperscript{34} The administration may think it is entitled to client files if complaints are lodged against the clinic or as part of a program review, but that may not always be appropriate under the law of confidentiality.\textsuperscript{35}

\textsuperscript{32} Id. at 1154–55 (noting that students might come to believe that “confidentiality may be a duty that is important in the abstract but not in practice”).

\textsuperscript{33} In the case of non-lawyer law school administrators, no client information should be revealed unless such disclosure will help carry out the client’s representation, or if the client expressly consented to such disclosure after consultation. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 393 (1995).

\textsuperscript{34} See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 393 (1995) (holding that a lawyer is only permitted to reveal client information to a non-lawyer supervisor if such disclosure would help carry out the client’s representation); Ethics Comm., Miss. St. B. Ass’n, Op. 101 (1985) (holding that a legal-services lawyer cannot give access to client files to a private corporation funding the nonprofit legal-services organization).

\textsuperscript{35} See infra Part IX (discussing political interference).
To the extent the clinic is a laboratory, client’s information can find its way into faculty scholarship, non-clinic classes, and public forums where faculty speak. This can run afoul of the rules of ethics, human subject research rules, and privacy rights of clients. The human subject research rules were a reaction to the scandalous exploitation of poor people for medical research, and clinic faculty at law schools risk replicating that exploitation if they are not cautious.

If the clinic is part of a multidisciplinary project, there are issues regarding what information can be disclosed to non-law faculty and non-law students who are participating in the program with their own professional culture, policies, or rules about disclosure. Many professionals are mandatory reporters of child or elder abuse, but in most states, lawyers are not allowed to reveal confidences of past incidences or threats of future harm unless the lawyer knows of a risk of imminent, serious bodily harm or death. Even then, the lawyer may reveal confidential information only to the extent necessary to prevent the imminent harm or death, so the lawyer may tell a private individual who can prevent the injury rather than a governmental agency. On the other hand, social workers may be required to report to a state agency, which would cause a conflict. Several clinic programs have found a means of bridging this legal chasm.


37. Id.

38. See MODEL RULES OF PROF’L CONDUCT R. 5.3, 5.4, 5.6 (2008).

39. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2008).

40. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2008).

When clients come to a law school clinic for assistance, they may not necessarily be aware of the consequences of the confidentiality of their information as a client in an educational setting. Poor clients may have no other choice than the law school clinic. Clinics should make a decision regarding how much information clients might need or want in order to understand how their information might be used. The Model Rules mandate that a lawyer communicate in a manner that is appropriate to keep the client informed.\(^{42}\) For example, in most cases, the student will share the client’s information with his or her supervising attorney. Such exchanges are similar to private practice and are anticipated in the Model Rules, which allow for disclosure when implied for the purposes of representation\(^{43}\) and for establishing the relationship between supervising and subordinate lawyers.\(^{44}\) Many clients may not realize, however, that the students may be discussing their case in a class that is very dissimilar to private practice. Best practice would suggest that clients be informed that their information will be discussed in this manner.\(^{45}\) For some clients, a verbal explanation will be sufficient, but for others, written information would be better. If the client’s information will be discussed in a clinic class or used in research, some kind of written consent may be necessary. The difficulty is how to gain voluntary permission when the law school clinic may be the only legal services available to the client.\(^{46}\) Clinic clients in particular are most vulnerable because law school clinics are generally free and offer services to the indigent, who often have no other source of legal assistance.

### IV. Confidentiality and Technology: Benefits and Risks

Law clinics have special confidentiality and technology issues because they are a small part of a larger institution that has different needs and requirements. Technology services may be provided by the law school or a larger university service, which means the people working in those technology offices may have access to client data and information. The lawyers in the clinic are

\(^{43}\) Model Rules of Prof’l Conduct R. 1.6(a) (2008). \textit{See also} Model Rules of Prof’l Conduct R. 1.6(a) cmt. 4 (2008) (covering hypotheticals).
\(^{44}\) Model Rules of Prof’l Conduct R. 5.1, 5.2 (2008).
\(^{45}\) \textit{See infra} Part XIII (discussing retainers).
\(^{46}\) Tart, supra note 36, at 274.
responsible for ensuring that data is kept confidential, which is a challenge when the clinic faculty may not have control over how technology services are provided or the training of the technology staff. The technology staff can be considered part of the support staff of the law firm, but that does not absolve the lawyers in the clinic from the responsibility of ensuring that the staff is trained and understands the distinctive nature of the work of the clinic or client confidentiality. This training can be particularly difficult if the technology staff is from the university and not within the law school.

Centralized servers for computers that store data or centralized phone systems that store voicemail can also implicate the confidentiality of client information because the people working on those systems do not know the peculiar requirements of law practice. University-wide servers can be a plus for clinics because law firms are expected to find a means for backing up all electronic client information, or they risk malpractice when the information disappears and they lose track of their responsibilities, such as case deadlines. Some laws require notification when there has been a security breach, so for example, a firm that has lost all of its data would need to notify all of its clients. Law school clinics that are part of the law school server that is regularly backed up are protected from that hazard.

Hardware and software decisions impact the clinic’s ability to keep client information confidential and protect it from

47. See Model Rules of Prof’l Conduct R. 5.3 (2008).
48. See, e.g., State Bar of Nev. Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 33 (2006) (noting that it is ethically permissible to store client information on servers outside of a law firm and not directly subject to the firm’s control, so long as the lawyer acts competently and reasonably to ensure the confidentiality of the information).
49. This is not to say that centralized servers cannot be utilized. Cf. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 398 (1995) (considering the propriety of a law firm granting a computer maintenance company remote access to the law firm server). Firms and clinics are obligated, however, to ensure that non-lawyers retained for services conduct themselves within the bounds of the Model Rules. Id.; Model Rules of Prof’l Conduct R. 5.3 (2008).
50. See, e.g., Paul M. Schwartz, Edward J. Janger, Notification of Data Security Breaches, 105 Mich. L. Rev. 913, 972–84 (2007) (providing a table that shows various state data security breach laws). For example, Security Breach Law, California Civil Code 1789.29 does not require notice if the “personally identifiable information” is encrypted. See id. See also Elizabeth D. De Armond, A Dearth of Remedies, 113 Penn St. L. Rev. 1 (2008) (providing an overview of Federal Privacy Laws, which the author criticizes as being unenforced). De Armond particularly advocates for state laws to protect privacy. Id. at 47–53.
inadvertent disclosures. For example, choices must be made regarding who has access to shared drives, calendaring systems with ticklers and private data, word-processing programs that effectively scrub information, and perhaps most importantly, data-backup systems. If students and faculty use law school e-mail systems to communicate with one another or clients regarding confidential information, there is a risk of a breach. Generally, lawyers are not prohibited from communicating with clients via unencrypted e-mail or even sending documents as attachments so long as common sense is used to balance the efficiency of electronic communications and the need for sensitivity to highly confidential documents.

Within law firms, lawyers routinely use internal electronic communications. The big fear is the potential for the inadvertent disclosure of privileged, sensitive, confidential, or other non-discoverable information because of metadata embedded in a document, errors in the sending of a document to the wrong e-mail address, or access to private e-mail by parties who should not have access. So, if students use the draft of a memo from an old case as

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51. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 413 (1999). All types of e-mail “afford[ ] a reasonable expectation of privacy” and are thus analogous to the ethically permissible use of telephones, mail, and fax machines to convey information. *Id.* If dealing with highly sensitive matters, additional security precautions might be warranted and the attorney might therefore refrain from using e-mail or risk violating Model Rule 1.1 (competence) and Model Rule 1.4(b) (communication with client to allow client to make informed consent). *Id.* Encryption continues to be a controversial solution to privacy. The ABA formal opinion does not require encryption, but suggests that lawyers consider it as highly sensitive material. *Id.* For current information on the topic, see the American Bar Association Legal Technology Resource Center at http://www.abanet.org/tech/ltrc. See also Mark J. Fucile, *Brave New World: Risk Management in the Electronic Era*, OR. STATE BAR BULL., Oct. 2007, at 34 (noting that depending on the sensitivity of client information and care taken to physically protect storage devices, it might be necessary to password-protect or encrypt client computer files).


53. Model Rule 4.4(b) indicates that a lawyer must advise the opposing party when there has been an inadvertent disclosure. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008). “Metadata” can be defined as data hidden in electronic documents that is generated during the course of creating and editing documents. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 442 (2006). According to the ABA, upon inadvertent receipt, the receiving lawyer may use the metadata. *Id.* Essentially, it is the responsibility of the sending lawyer to ensure that documents do not contain inadvertent material. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 437 (2005). “A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should
a format for a new memo, revise the document, and send it back and forth to the professor for editing, the document can include metadata that no one intended others to see.

One nightmare situation is when a student electronically forwards a draft to a client, and the client subsequently forwards the draft that reveals the metadata. For example, the student may e-mail a draft of a settlement agreement to the client for review and embedded in that draft is old, deleted language from earlier drafts or comments from the supervisor that do not show up on the face of the document, but can be found within the metadata. The old drafts or comments could inadvertently disclose that the client was willing to concede to terms that were successfully avoided in the negotiation. The client may be unaware of the hidden information and forward the electronic document to the opposing party or to someone else who gets it to the opposing party. The hidden information can then be used against the client. If the document is a pleading, electronic filings would permit the other side to see the metadata, and if opposing counsel receives the metadata, many jurisdictions entitle them to use it.

Other sources for inadvertent disclosure of client information are law school websites or electronic teaching programs that contain embedded information. Clinics should have a system for cleansing documents that are ultimately transmitted to the outside. If someone in the clinic receives inadvertently disclosed information, either via fax, U.S. mail, or electronically, it is a perfect teachable moment to research whether the student must inform the opposing party, may look at the information, or use the information.

Confidentiality can be breached in more old fashioned ways because of a lack of clinic resources. For example, if the clinic is

know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures.” *Id.* Rule 4.4(b), however, does not require the receiving attorney to refrain from examining the materials or to abide by the sending attorney’s instructions regarding what to do with them. *Id.* There have been a host of state ethics opinions that have come to conflicting results on the responsibilities and liabilities of both the sender and receiver. In particular, some do not prohibit review or use of inadvertently transmitted confidential information. For current information on the topic, see the American Bar Association Legal Technology Resource Center at http://www.abanet.org/tech/ltrc.

54. The American Bar Association Legal Technology Resource Center (http://www.abanet.org/tech/ltrc) can help programs identify appropriate scrubbing systems and software.
sharing copy and fax equipment with other units in the law school, client information can be inadvertently left in non-secure locations. Case storage can become a serious problem if there is limited space because old files can end up in places where many people unaffiliated with the clinic have access. One dreads to think how many case files are in a general storage space in the basement of law schools.  

As careful as clinics might be about internal confidentiality and technology, clinic students must take into account that their impoverished clients may not be communicating under ideal circumstances. For example, some clients may not be able to afford their own computers so are using e-mail systems in public places such as libraries or on home computers that other members of a household access. If the clients are working and rely on an office e-mail system, it is likely they signed privacy waivers so that employers have access to all of their e-mail communications. Organizational clients may share office space and technology services with other poverty groups and therefore do not have private systems. When students discuss communications with their clients, it is imperative that they inquire where and how the client will receive electronic communications to avoid breaching confidentiality.

V. SELECTING CLIENTS, CASES, AND PROJECTS—WHO DECIDES AND FOR WHAT REASONS?

There are few circumstances under which the law compels a private lawyer to accept a client, and law school clinic programs are free to accept or decline clients for the same reasons as other law offices. Many low-income people in this country do not have

55.  See infra Part XIV (discussing file maintenance and storage).
56.  For the most up-to-date information on technology and ethics, refer to the American Bar Association Legal Technology Resource Center at http://www.abanet.org/tech/ltrc. The website provides invaluable, current information and links to resources such as other helpful websites. The ABA staff is available for consultations that will direct lawyers to where they can find answers to specific questions.
58.  See MODEL RULES OF PROF'L CONDUCT R. pmbl. ¶ 6, 1.2(b), 6.1 (2008); (encouraging, but not requiring, attorneys to provide services to those unable to pay). Model Rule 6.2, however, allows a lawyer to avoid a client appointment if such representation will violate the Model Rules or other law, financially burden
access to lawyers for either their criminal or civil needs, and access to free legal services has been diminishing rather than growing. 59

the lawyer, or if the client or cause is "so repugnant" to the lawyer that it will "impair the client-lawyer relationship or the lawyer's ability to represent the client." Model Rules of Prof'L Conduct R. 6.2 (2008). But see Wishnatsky v. Rovner, 433 F.3d 608, 612–13 (8th Cir. 2006) (suggesting that personal conflict is not enough to deny representation without first considering "whether a fresh start, common purpose, and agreement to bury the hatchet might overcome previous discord."); Nathanson v. Mass. Comm'n Against Discrimination, No. 199901657, 2003 WL 22480688 (Mass. Super. Ct. 2003) (holding that a female divorce attorney must end the discriminatory practice of refusing to represent men in divorce cases).


In 1975, LSC inherited a program that was funded at $71.5 million annually. By 1981, the LSC budget had grown to $321.3 million. Most of this increase went into expanding to previously unserved areas, creating new legal services programs and greatly increasing the capacity of existing ones. Based on the 1970 census figures, out of a total of 29 million poor people in 1975, 11.7 million had no access to a legal services program, and 8.1 million had access only to programs that were severely under-funded. In contrast, by 1981 LSC was funding 325 programs that operated in 1,450 neighborhood and rural offices throughout all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Micronesia, and Guam. Although legal services program resources were still extremely limited, by 1981 LSC had achieved, albeit briefly, the initial goal of reaching “minimum access.” Each legal services program received LSC funding at a level sufficient to theoretically support two lawyers for every 10,000 poor people in its service area. Id. at 24.

The Reagan years, however, brought huge cutbacks in federal funding that resulted in a significant decrease in the number of legal-services offices and the number of legal-services lawyers. See id. at 29–33. Houseman and Perle report the following occurred during this time period:

Programs were forced to close offices, lay off staff, and reduce the level of services dramatically. In 1980, there were 1,406 local field program offices; by the end of 1982 that number had dropped to 1,121. In 1980, local programs employed 6,559 attorneys and 2,901 paralegals. By 1983, those figures were 4,766 and 1,949, respectively. Id. at 30.

Regulations restricting activities of LSC offices also mandated that they have private bar involvement, which replaced a small portion of the losses of LSC lawyers. Id. at 33. IOLTA-funded programs also provided some replacement of legal aid lawyers. Id. at 34. Most recently, the following has occurred: Legal services has seen a reduction in the total number of LSC grantees from more than 325 programs in 1995 to 138 in 2006, and the geographic areas served by many of the remaining programs have increased dramatically. These changes were the result of the
According to a report from the Federal Legal Services Corporation, either a legal aid office or a private attorney is meeting only one out of every five legal needs of poor people. Law school clinics help ameliorate the gap between need and services by training the next generation of lawyers who will represent poor people and by providing services. While enrolled in clinics, many law students contemplate what kind of professionals they will be in the future and whether representing poor people or their organizations will be a full-time career or part of their pro bono work. A clinic that is focused on ethics and professionalism will provide students some opportunities for processing what cases are taken and why, including whether access to legal services for the underserved is an important value. Students’ long-term wellbeing and ability to thrive will depend on their ability to know their own value systems.

Congressional elimination of funding for state and national support entities and the mergers and reconfigurations promoted or sometimes imposed by LSC. Id. at 41. There has been a growth of non-LSC funded programs that are not subject to the restrictions of the federal program, but need continues to be unmet. Id.

Currently in the United States, government expenditures for the delivery of civil legal services is $2.25 per person while England spends $32. Id. at 47. See also LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2d ed. 2007), http://www.lsc.gov/justicegap.pdf (measuring the funding needed to respond to the need for services) [hereinafter JUSTICE GAP]; ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID 161–65 (2006), http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf [hereinafter ABA STANDARDS].

60. JUSTICE GAP, supra note 59, at 13. As this ABA report points out, poor people have the same legal needs as middle-class people, but significantly less access to lawyers. Id. at 17.

61. The Reagan Administration even hoped to replace Legal Services Corporation offices with law school clinics. HOUSEMAN & PERLE, supra note 59, at 29. The ABA’s Standards for Providers of Civil Legal Services to the Poor, Standard 2.9, encourages law school clinics that provide services to poor clients to comply with the ABA Standards. ABA STANDARDS, supra note 59, at 83.

62. See infra Part VIII (discussing pro bono work).

Law clinics’ decisions whether to accept cases, clients, and projects are slightly different from other law firms because of the multiple, sometimes competing goals that the program must meet. The program is often attempting to reconcile its educational goals of teaching substance, procedure, ethics, and skills; the expertise of the faculty member; student interest and demand; community and client need; and the resources that the school is willing to dedicate or that are available through outside funding. There are programs that give a high priority to reflection, and students work on fewer cases so that each experience can be dissected and examined to the fullest. Although the quality of the service that clients may receive in these clinics can be extraordinarily high, the emphasis on reflection may mean that the students do not work efficiently and clients pay the cost with time and delays. Some of these clients may feel there is a lack of “diligence” by the students because of the delays. An interesting professionalism issue that has come up in some clinics is whether it is reasonable to expect low-income clients to pay for their legal services with time—the clinic clients do not get the efficiency of an experienced lawyer, and sometimes time is the most precious commodity to people who have little or no money.

One clinic decided to focus on the skills of pretrial discovery so the students only work on part of a larger, complex case in

64. For instance, some clinics have a social justice mission in addition to educational goals. See Steven K. Berenson, A Primer for New Civil Law Clinic Students, 38 McGeorge L. Rev. 603, 615–20 (2007). Some clinicians believe clinics should not limit student caseloads so that students are exposed to actual practice conditions while others believe low caseloads enhance student learning by ensuring adequate preparation. Id. at 619–20. See also David F. Chavkin, Symposium, Spinning Straw Into Gold: Exploring the Legacy of Bellow and Moulton, 10 Clinical L. Rev. 245, 262–66 (2003) (arguing that students benefit most from a model that allows them to take responsibility of a case from beginning to end and thus advocating selection of smaller cases that will not extend over a period of time); Diane E. Courselle, Symposium, When Clinics Are “Necessities, Not Luxuries”: Special Challenges of Running a Criminal Appeals Clinic in a Rural State, 75 Miss. L.J. 721, 731–38 (2006) (noting that a rural setting has implications on how clinics select cases); Joy & Kuehn, supra note 14, at 563 (noting that lack of financial or staff resources can impact which cases a clinic can select); Joan L. O’Sullivan et al., Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice, 3 Clinical L. Rev. 109, 145–46 (1996) (arguing that clinical teachers should have substantial discretion in case selection because it will make them better lawyers and teachers if they can choose cases in areas of interest).

65. See Chavkin, supra note 64, at 262–63.

collaboration with outside counsel.\textsuperscript{67} Such an arrangement must be reconciled with the rules on limiting the scope of representation.\textsuperscript{68} It is critical that clients give informed consent.\textsuperscript{69} The sharing of cases between a law clinic and outside law firm raises questions regarding the limitation of services, any exchange of confidential information,\textsuperscript{70} whether one firm is really acting as a “consultant,”\textsuperscript{71} if fees are being shared,\textsuperscript{72} or if conflicts will arise.\textsuperscript{73}

At the other end of the spectrum, in terms of service choices, are the clinics that have large caseloads because of commitments to provide all legal services in a particular geographic region, grants that require certain “output” of cases for a particular population, pedagogical positions of the faculty, or some combination of reasons. Large caseloads can mean more people are served in some capacity, but the level of service may be limited to advice or routine completion of forms, which raises issues of consent to limit services,\textsuperscript{74} competency,\textsuperscript{75} unauthorized practice of law if there is inadequate supervision,\textsuperscript{76} conflicts,\textsuperscript{77} and confidentiality.\textsuperscript{78} However, state ethics rules that replicate Model Rule 6.5, which supports the use of nonprofit and court-annexed limited legal services programs, may allow for some leniency regarding conflicts.\textsuperscript{79} Beyond the scope of this article, but an issue that

\textsuperscript{68} See Model Rules of Prof’l Conduct R. 1.2(c) (2008). Some commentators believe limiting the scope of representation harms the educational goals of clinics, as it can deny students the opportunities to develop important lawyering skills and suggests to students that limited service is sufficient for those in poverty. See Mary Helen McNeal, Unbundling and Law School Clinics: Where’s the Pedagogy?, 7 Clinical L. Rev. 341, 359–378 (2001).
\textsuperscript{69} See Daniel S. Medwed, Actual Innocents: Considerations in Selecting Cases for a New Innocence Project, 81 Neb. L. Rev. 1097, 1126 (2003); Joy & Kuehn, supra note 14, at 563.
\textsuperscript{70} See Model Rules of Prof’l Conduct R. 1.6 (2008).
\textsuperscript{71} Model Rules of Prof’l Conduct R. 1.2 (2008).
\textsuperscript{72} Model Rules of Prof’l Conduct R. 1.5(e) (2008).
\textsuperscript{73} Model Rules of Prof’l Conduct R. 1.7–1.10, 1.18 (2008).
\textsuperscript{74} Model Rules of Prof’l Conduct R. 1.2 (2008).
\textsuperscript{75} Model Rules of Prof’l Conduct R. 1.1 (2008).
\textsuperscript{77} Model Rules of Prof’l Conduct R. 1.7–1.10 (2008).
\textsuperscript{78} Model Rules of Prof’l Conduct R. 1.6 (2008).
should be discussed amongst those deciding on who should be represented and how, is the debate on the unbundling of legal services in which lawyers do bits and pieces of cases. Moreover, a recent ABA Opinion sanctioned lawyers engaging in “ghostwriting” of letters and court documents, which is the sort of activity high-volume clinics may engage in.  

It is a maxim of legal ethics that third parties may not interfere with the attorney-client relationship. The Model Rules address the situation where someone besides the client is paying the lawyer, and explicitly prohibits the lawyer from allowing the non-client to direct or regulate the lawyer’s professional judgment in providing those legal services. Nevertheless, in some law schools, faculty clinic committees, administrators, or even alumni boards may take it upon themselves to scrutinize case selection and assume that they have a “right” to intervene.

Competence is also a factor in case and project selection. There is a base level of competence required by state rules of professional responsibility, the law of malpractice, and in criminal cases, the constitutional right to effective assistance of counsel. Model Rule 1.1 mandates that a lawyer must provide competent representation to a client, which is defined as having the “legal knowledge, skill, thoroughness and preparation that is reasonably necessary for the representation.” The comments to Model Rule 1.1 explain that the level of competence may depend on the means to alleviate the unmet legal needs of poor New Yorkers . . . .


82. MODEL RULES OF PROF’L CONDUCT R. 5.4 cmt. 2 (2008).

83. MODEL RULES OF PROF’L CONDUCT R. 5.4(c) (2008).

“relative complexity and specialized nature of the matter,” and the most critical skill is the ability to determine the nature of the legal problem. The comments encourage gaining competence by study and affiliation with a more experienced lawyer.

Some clinics are the sole legal services provider or public defender for low-income people in their region and the students are expected to handle extremely high caseloads. Funding sources, such as grants or special gifts, might limit the types of cases or client population, or require high numbers of served clients. These expectations can raise competency questions. Courts may want latitude in appointing clinics in both criminal and civil cases, and like the private sector, law clinics should be mindful of both the obligation to serve the court and the countervailing obligation to provide competent representation.

VI. CONFLICTS

As a threshold issue, clinics must have some kind of conflict-checking system that has sufficient, accurate information to protect against the representation of clients with concurrent conflicts of interest, or the acceptance of cases where the clinic’s ability to represent the client is materially limited. Conflicts arise in both litigation and non-litigation work. Clinics must screen against conflicts to avoid violating the Rules of Professional Responsibility, but an even bigger risk is the possibility of a court granting the opposition’s motion to remove counsel because of a conflict.

86. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 2 (2008).
87. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 2; Joy & Kuehn, supra note 14, at 563.
88. See Courselle, supra note 64, at 738 (noting that distance problems make advocacy a challenge).
89. Rule 6.2(a) allows a lawyer to decline representation if it would cause the lawyer to violate the Rules of Professional Responsibility or other laws. MODEL RULES OF PROF’L CONDUCT R. 6.2(a) (2008). Rule 6.2(b) allows a lawyer to decline if the representation will cause unreasonable financial burden. MODEL RULES OF PROF’L CONDUCT R. 6.2(b) (2008).
90. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2008). See also Joy & Kuehn, supra note 14, at 527 (noting that clinic students and faculty, like all lawyers, must take reasonable steps to avoid undue influence by third parties, other clients, or personal interests). The ABA Legal Technology Resource Center at http://www.abanet.org/tech/ltrc can help a program identify electronic conflict-checking systems that would fulfill specified needs.
92. See, e.g., Cinema 5 Ltd., v. Cinerama, Inc., 528 F.2d 1384, 1385–86 (2d Cir.
The first step in developing a conflicts policy flows from the conclusions regarding who and what constitutes the law firm. Some conflicts are imputed to the entire law firm and other individuals in the firm. Other situations may allow for the screening of lawyers and students, but in the jurisdictions that allow screens or walls, the clinic must ensure the efficacy of the screen.

In order to be most cautious, clinics should keep information on students’ employment as conflicts can stem from students’ previous or simultaneous jobs, clinic experiences, or externship programs in the private and public sector. There is some argument that law students do not carry conflicts with them that are imputed to the rest of the firm. A student might have a conflict if he or she has a concurrent conflict because of another 1976) (disqualifying counsel and two law firms where he was a partner); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1322 (7th Cir. 1978) (“past representations for two specific matters unrelated to the present case did not warrant disqualification of [attorney].”); Armstrong v. McAlpin, 461 F. Supp. 622, 623, 626 (S.D.N.Y. 1978) (declining a motion to disqualify an attorney who had been in government before entering private practice); Hughes v. Paine, Webber, Jackson & Curtis Inc., 565 F. Supp. 663, 673 (N.D. Ill. 1983) (motion to disqualify denied); Pfizer, Inc. v. Stryker Corp., 256 F. Supp. 2d 224, 227 (S.D.N.Y. 2003) (same). Model Rule 1.11 addresses the issue of sequential government-private employment. MODEL RULES OF PROF’L CONDUCT R. 1.11 (2008).

95. See supra Part II (discussing what constitutes a “law firm”).
95. MODEL RULES OF PROF’L CONDUCT R. 1.10 (2008).
96. As of 2008, twenty-one states allow for timely and effective screens. STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS 147 (2009 ed.). As of the date of this article and the Gillers’ publication, the ABA did not have provisions in its Rules to allow for screens, but proposals were pending. Id. See also MODEL RULES OF PROF’L CONDUCT R. 1.18 cmt. 7 (2008) (imputation may be avoided if certain conditions are met and “all disqualified lawyers are timely screened”); Robert H. Mundheim, The Ethical Problems in Hiring Laterals: Imputation and the Effectiveness of Screening, 1712 PRACTISING L. INST. 989 (2009) (describing the history and debate in the ABA); Reich et al., supra note 41, at 1023–24 (describing some of the criteria a court might use to determine whether a screen is sufficient and discussing the implications of screens in multidisciplinary practice); Joy & Kuehn, supra note 14, at 539 (discussing procedures used to avoid imputed conflicts in the private sector).
job, but the conflict might not be imputed to the rest of the firm. Additionally, if the student has conflicts growing out of relationships or information from former clients, or from previous legal work, that conflict might also not be imputed to the entire clinic. However, there still might be a need for adequate isolation of the student from the case if the clinic cannot create a screen due to lack of space, data systems, telephones, filing systems, computer access or shared computers, and classroom discussions or rounds.

Students may be hesitant to represent particular clients or participate in particular projects because they worry about conflicts that will hamper their employment opportunities. According to the Model Rules, the work a student does while in a clinic does not create conflicts that are imputed to future law firms, but students may worry about being affiliated with certain positions. For example, although the Model Rules indicate that representation of a client is not an endorsement of the client’s positions, students may anticipate that they will be “marked” in some manner that will implicate future employability. A clinic may consider a policy on whether a student can decline a case on such grounds. An

99. Model Rules of Prof’l Conduct R. 1.7 (2008). It is paramount that each potential conflict be examined because of variations in the jurisdictions and rule specifics may cause different results depending on the facts.
103. Joy & Kuehn, supra note 14, at 532.
interesting ethical discussion to have with students is how to approach the difficult question of accepting cases when the clinic is the only lawyer a client may get, but a student prefers not to take the case because of a potential conflict with future employment.

The source of conflicts in law school clinics is slightly different from law firms because of the faculty member’s multiple roles. All work for faculty—past, present, and future—can cause conflicts with potential clients or cases, or materially limit the ability to represent the clients fully. Faculty members might have a current law practice, pro bono work, consulting work, or even research projects that create conflicts. Faculty members’ previous practice, government work, or judicial clerkships also create conflicts. Faculty members who teach in the clinic may have professional pressures that lawyers in other settings do not have, such as an expectation to engage in scholarship, administration, or other service that distracts the focus on the clients’ needs. This loss of focus might threaten their competence, diligence, and duties as supervisors required under professional responsibility rules.

A computer system that identifies conflicts is only as good as the information that it contains. Consequently, a clinic must decide: Who will gather the information about potential clients and cases; when will the information be gathered; who will enter client data into any conflict-checking system; and how will conflicts be assessed? Unlike law firms, these choices may be complicated in law school clinics by the limited number of support staff, the desire to train the students on conflict checking, and the transient nature of the students’ involvement in the clinic. This means that the students may be unfamiliar with software programs or fail to grasp the importance of conflict checks. There are multiple steps in the conflict-checking process: after the initial contact with the client, once basic information is gathered, and after a full initial interview. At each stage, the information must be entered

110. If clinics prefer to conduct in-depth initial interviews before deciding to take a case, conflict checks should be done on the potential client prior to the initial interview. Joy & Kuehn, supra note 14, at 560.
promptly and completely in order to assess the case for conflicts. Regardless of whether staff or students are entering the information, a clear process must be in place to resolve whether conflicts exist. Even if the students participate in analyzing the issues, the faculty supervisor should play a role to ensure all facets are explored.

Some conflicts can be waived if the clients provide written, informed consent. But when the clinic is a client’s only option for legal services, the consent process can be delicate. What information is provided to clients regarding the potential conflict will be impacted by the clients’ ability to communicate and understand, and how much latitude the lawyer has in conveying the nature of the conflict. For example, Client A may not want Client B to know that Client A is income-eligible for a poverty law clinic. This dynamic creates a situation where adequate information cannot be conveyed to obtain a waiver. When speaking with clients who share the same issue, students should be aware that one aspect of the “material limitation” language in the conflict rules is the prohibition against aggregate settlements.

A few law school clinics provide legal services for students enrolled in the broader university through a student legal-services office. Regardless of a formalized legal service, if the clinic bases client eligibility on income, students and staff from the university might seek services. In university-based clinics, the clinic students cannot represent a client against the university itself. Moreover, faculty members and students should exercise caution if the opposing party is another student or member of the broader university community. Therefore, the clinic must assess whether there is unforeseen potential for its legal work to be materially limited because of a potential client’s relationship to the university.

VII. PERSONAL CONFLICTS OF INTEREST

The preceding section discussed the conflicts that arise with potential, existing, and former clients because of relationships to other clients or knowledge of information from other clients.

111. Model Rules of Prof’l Conduct R. 1.7(b) (2008).
112. See Joy & Kuehn, supra note 14, at 526.
What follows is a discussion of some conflicts that hamper a lawyer’s ability to represent clients objectively and effectively because of financial interests, personal relationships, and personal needs.\textsuperscript{117} For example, clinics that rely on donations, grants, and other outside sources of funding must develop and highlight policies that clarify that outside- funding sources cannot dictate the lawyer’s actions.\textsuperscript{118} Each clinic should have rules regarding whether students, faculty, or the program may accept any gifts from a client, in order to avoid dealing with the issue on an ad hoc basis.\textsuperscript{119} Clinics should also discuss the problems associated with providing financial assistance to clients except in the limited circumstances approved of by the Model Rules.\textsuperscript{120} Neither clinic faculty nor students should develop sexual relationships with their clients.\textsuperscript{121} If faculty or students are in intimate or familial relationships with people who are also practicing law in or outside the law school, measures must be taken to identify those relationships to avoid violating the rules that limit circumstances where family members or intimates can be opposing parties in a case.\textsuperscript{122} Finally, law school clinics should not enter into business transactions with their clients.

The Model Rules prohibit providing “financial assistance to a client in connection with pending or contemplated litigation” except if client is indigent, in which case the lawyer may pay court costs and expenses of litigation on behalf of the client without creating a conflict of interest between the lawyer and the client.\textsuperscript{123} When confronted with an indigent person, law students may feel an instinct to help the client with basic life necessities or to give the client gifts. For example, students may return from a home visit with a client and ask if they can buy the client’s children some toys, clothes, or books. Others wonder if they can, or should, help an evicted client by providing him or her with a truck and moving furniture or boxes. Some programs take a holistic approach to

\textsuperscript{117} \textit{Model Rules of Prof’l. Conduct} R. 1.8 (2008).
\textsuperscript{118} \textit{Model Rules of Prof’l. Conduct} R. 5.4, 1.7 cmt. 13, 1.8 cmts. 11, 12 (2008).
\textsuperscript{119} \textit{Model Rules of Prof’l. Conduct} R. 1.8(c) cmts. 6–8 (2008).
\textsuperscript{120} \textit{Model Rules of Prof’l. Conduct} R. 1.8(e) cmt. 10 (2008).
\textsuperscript{121} \textit{Model Rules of Prof’l. Conduct} R. 1.8(j) cmts. 17–19 (2008).
\textsuperscript{122} \textit{Model Rules of Prof’l. Conduct} R. 1.7 cmt. 11 (2008). This issue can be particularly awkward in the law school setting when some students are in the early stages of dating each other, but not ready to admit they are in a real relationship. Sometimes clinic faculty members are the last to know when students are dating each other.
\textsuperscript{123} \textit{Model Rules of Prof’l. Conduct} R. 1.8(e)(2) cmt. 10 (2008).
helping solve client problems, and clinics often encourage empathy and real understanding between the students and their clients, which makes establishing boundaries to avoid conflicts of interests difficult. In the private sector, a lawyer and his or her client may have a wide range of personal and economic connections that are not prohibited by either good practices or the Model Rules; so students may wonder why they should be prohibited from having similar relationships with a client.

Some clients are so appreciative of the legal services that they received or moved by their new relationship with the student that they offer gifts to the students. Although the Model Rules allow a lawyer to accept a gift from a client if the transaction meets “general standards of fairness,” each program should have a policy regarding whether students should accept gifts from clients—particularly monetary gifts. The least complicated rule is simply to prohibit students from accepting all gifts, but programs may make other choices. When a case is complete, clients may donate to the program without violating conflict rules unless there is a sense that an inappropriate, substantial gift was solicited from the client. Students must be instructed on how to respond if a client asks about donating to the clinic program. Program directors should consider what message is being sent to clients regarding these matters.

Faculty who teach in the clinic and engage in scholarship may be inclined to use the information and data from clients for the purposes of their scholarship. The rule that prohibits making or negotiating an agreement between a lawyer and a client regarding literary or media rights should be applied when asking clients to waive confidentiality for purposes of scholarship. Although the professor might not earn money for a law review article’s publication, the same concerns of overreaching, exploitation, and abuse of confidentiality rules can result from using client stories. Moreover, the practice can violate human-subject research laws. Because students may also want to use their clients’ experiences in their own scholarship, such as law review articles, students must be made aware of the limitations of such conduct. Finally, faculty should be cautious in retelling their students’ stories in their

124. Model Rules of Prof’l Conduct R. 1.8(c) cmt. 6 (2008).
125. Model Rules of Prof’l Conduct R. 1.8(c) cmt. 6 (2008).
126. Model Rules of Prof’l Conduct R. 1.8(d) cmt. 9 (2008).
academic scholarship for parallel reasons.

Historically, it was unlikely that most law clinics would have run afoul of the ethics rules prohibiting a lawyer from entering into a “business transaction with a client or knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to a client.”  However, the growth of transactional clinics that are working with business startups such as those found in university incubators raises a whole new spectrum of possible conflicts. For example, if a university is funding the law school clinic that is representing one of the startups in the university’s incubator, and the law clinic wants to get paid with profits once the business becomes profitable, a tangled web of potential conflicts of interest may emerge based on three things: competition between the programs within the university, the lawyer having insider information that it uses against the best interest of the business, and the clinic being too heavily invested in the startup to provide objective representation. The irony is that one solution to the potential conflict is for the client to consult with outside counsel. This issue is too fact specific to deal with in depth in this article, but those planning such clinics should bear in mind the potential conflicts and anticipate how they will be addressed.

VIII. PRO BONO AND BOARD WORK OUTSIDE THE CLINIC

Pro bono work can be a source of conflicts of interest depending on the nature of the activities. A system should be in place to ensure that faculty and students’ pro bono work is part of the data kept for checking conflicts. The debate about what constitutes pro bono work is the same for lawyers in law school clinics as for the rest of the profession, but there are several twists depending on the institution. The usual debates include: whether pro bono should be mandatory; what work constitutes “pro bono” must the work be done for indigent or low-income clients; how many hours should be required; and whether lawyers should be able to pay their way out of the requirements. In law schools that have a “pro bono” requirement or some kind of transcript recognition for pro bono work, a question arises whether the work

128. Model Rules of Prof’l Conduct R. 1.7(a) cmts. 1–4, 1.8(a) cmt. 1 (2008).
a student does in a clinic for academic credit should qualify as “pro bono” since the student is receiving academic credit and not simply volunteering. This is a school policy decision.

Another issue is whether the work done in a clinic program that provides free legal services to non-indigent individuals or organizational clients is in and of itself pro bono work. Programs have debated whether it is reasonable for a live client clinic to have a pro bono requirement in addition to the clinic work the students are doing. Clinic faculty must decide for themselves if they believe it is important to do unpaid legal work outside the clinic. Such activities provide a good model of behavior for the students regarding the importance of pro bono work. Yet, the outside work may cause conflicts in terms of time and resources so the counterargument is that the work within the clinic is a sufficient contribution. Some schools allow students and faculty to use clinic resources such as computers, research systems, printers, paper, and staff time for pro bono work, but others forbid this because of limited resources. Finally, there is always the question of whose malpractice is covering the extraneous pro bono work of the faculty and students.

Clinic faculty may find themselves serving as a director, officer, or member of a legal-services organization, and the Model Rules clarify that such positions do not establish an attorney-client relationship with those organizations. Nevertheless, those legal-services organizations may take positions contrary or adverse to the interests of the clinic clients. Under these circumstances, a faculty member may feel compelled to stop serving on the board of the legal-services office or, at a minimum, find a means to reassure the clinic clients or the organization that conflicting loyalties will not adversely affect either.

When clinics represent community organizations, nonprofits, and other groups, the faculty may be invited to serve on the boards of those non-legal services organizations. Some may accept such an invitation, but as a member of the board, the faculty member has now become his or her own client. Such role confusion is ripe for problems because of the risk that confidences from the management will either be thwarted or divulged, the lawyer

133. Management may fail to confide in the lawyer upon believing that there is information that it would provide to the lawyer for advice but that it does not want
may be conflicted about decisions the board is making and therefore no longer able to represent the board,\textsuperscript{135} and the faculty member may have to take actions as the attorney for the organization that are inconsistent with the board’s wishes.\textsuperscript{136}

**IX. POLITICAL INTERFERENCE**

Clinics that are attempting to make systemic changes may purposefully only accept clients whose cases fit into a particular pattern or political perspective. Such cases and clients may trigger political interference or pushback from both internal and external forces.\textsuperscript{137} For example, environmental work by Tulane University Law School students brought down the wrath of powerful industry players who influenced the Louisiana Supreme Court to change the student practice rule.\textsuperscript{138} In North Dakota, a disgruntled individual sued the law school and clinic director because he was denied representation.

As described in Part IV’s discussion on case selection, lawyers are generally free to accept or reject clients, and third parties may not interfere with the attorney-client relationship.\textsuperscript{139} Moreover, divulged to the board. See *Model Rules of Prof’l Conduct* R. 1.13 (2008).

\textsuperscript{134} *Model Rules of Prof’l Conduct* R. 1.6, 1.8(b) (2008).

\textsuperscript{135} *Model Rules of Prof’l Conduct* R. 1.7(a)(2), 1.8(b) (2008).


according to the ethics rules in most states, a lawyer’s work with a client is not an endorsement of that “client’s political, economic, social or moral views or activities.”140 Nevertheless, law clinics, particularly those associated with public institutions or those engaged in politically controversial work like environmental law clinics, are the target of attacks because of the work they do for clients and organizations.141 As state funding for public education diminishes, public law schools are functioning more like private institutions, but the affiliation or identification as a state school continues to create conflicts for the legal work the clinic might provide.

Political interference can take other forms in an academic institution. Most law faculty would claim that academic freedom assures them the autonomy to decide the content of their courses and the manner in which they are taught. Nevertheless, that same faculty either individually or through committees, and law school deans, might think it completely appropriate to inquire into and even insist on controlling those same choices for a clinic program. Rarely is a doctrinal teacher called upon to justify the efficacy or importance of his or her courses in the manner in which some clinic faculty are so required.

Alumni are major constituents of most law schools and can apply both positive and negative pressures involving law clinics.142 As donors, they can financially support clinics but may insist on a particular political bent or content, which can become almost a vanity project rather than a pedagogically sound endeavor. They may also put financial pressure on law school deans to eliminate a clinic that the donor perceives to be inconsistent with a particular perspective. Alumni are potential employers for the students and have sometimes been useful in supporting efforts to expand professional training in the school, but their perception of what is needed may not coincide with the clinic faculty’s opinions. Students rely heavily on alumni networks when job hunting, and if alumni are unhappy about a clinic, students may shy away from participating.

142. See Kuehn & Joy, Ethics Critique, supra note 84 (discussing the debate about the Tulane clinic).
Soft money and grants are another source of unwarranted interference in the work of clinics. The regulations that constrained the federal legal-services offices impacted clinics when they were able to obtain Legal Services Corporation money.\textsuperscript{143} Law school clinics no longer rely heavily on federal grants, but may still receive state, local, or foundation money that constrains the ability of the lawyers in the clinic to represent clients fully.

Law school clinics may be one of the few places that the law school intersects with the local community. For both good and bad, some clinics have set up advisory or community boards that can influence what types of cases are accepted, the focus of the programs, and other priorities. As with community boards that work with non-educational legal-services offices or legal-advocacy programs, the board must understand that it cannot interfere with the professional autonomy of the lawyers. This is a delicate message to send to people who are volunteering their time.

X. UNAUTHORIZED PRACTICE AND STUDENT PRACTICE RULES

Most states have statutes rendering it illegal to engage in the unauthorized practice of law, and Model Rule 5.5 is indicative of ethics rules that prohibit the unauthorized practice of law by lawyers who are not admitted in a particular jurisdiction. Faculty who function as lawyers in a clinic program violate these statutes and rules if they themselves are not licensed in the jurisdiction. This issue comes up as faculty move from one jurisdiction to another to teach in clinics, and as unlicensed classroom faculty assist on cases or spend a period of time as clinic supervisors. Some states have laws allowing for lawyers associated with legal-services offices or law clinics to be motioned into practice,\textsuperscript{144} but the faculty must still go through the process, which can be cumbersome and include character and fitness checks. Depending on the jurisdiction and the nature of the case, the supervising lawyer may be “motioned in” for a particular case or treated as a consultant to


\textsuperscript{144} \textit{MODEL RULES OF PROF’L CONDUCT} R. 5.5 cmts. 5, 6, 9, 12 (2008). The Model Rules also note the new provisions that allow lawyers to practice in jurisdictions in which they are not licensed after some kind of major disaster. \textit{MODEL RULES OF PROF’L CONDUCT} R. 5.5 cmt. 14 (2008). The Model Rules also address the practice of in-house counsel who travels from one jurisdiction to another on behalf of a client. \textit{MODEL RULES OF PROF’L CONDUCT} R. 5.5 cmt. 16 (2008).
the lawyer whose names are actually on the pleadings. Lawyers in non-litigation programs, such as transactional or mediation programs, cannot be motioned in for a particular case. As a cautionary note, the Model Rules are quite clear that when licensed lawyers are engaging in law-related activities, they are still subject to the Rules of Professional Responsibility because of the confusion that can arise to clients and others about the parameters of the lawyers’ role. For example, clients may be confused about whether information will be kept confidential or whether any privilege has attached. Programs that brush off the Model Rules because of expediency set a poor example for the students.

Most states now have special rules that allow law students who have completed some percentage of their law school career or course requirements to be admitted to practice for limited purposes. For example, some rules limit those with student practice licenses to work for low-income clients or other public interest activities. As clinics expand outside the public service and social justice arena, such as into entrepreneurial fee-generating programs, questions will arise whether the students are abusing the privilege of the student practice license rules in these new settings.

When students are working pursuant to a student practice license, programs differ significantly about when and where the clinical professor may or must either be present, participate as co-counsel, or take over completely. Students have very different experiences in a clinic depending on their degree of responsibility, independence, and supervision. The best practices will depend

148. This is a challenge for externship programs that want to place students in non-public interest jobs and allow them to use their student licenses.
149. For several perspectives on when and how a clinic professor should
on a number of variables including the preparation that the students have before or simultaneous to the clinic, their caseloads, and the nature of the work. The pedagogical issues flow into the professionalism issues broadly defined, but a starting point is the Model Rules that dictate the duties that both the supervising faculty member and the student have to clients such as competence, diligence, confidentiality, zeal, and communication. The student’s professional conduct as a counselor and an advocate are attributable to the supervising lawyer. Under Model Rules 5.1 and 8.4(a), supervising attorneys working with novices cannot neglect knowing what the students are doing in the name of student learning, autonomy, and independence.

A different set of issues about the unauthorized practice of law arise if students are in a jurisdiction that defines the requirements for student practice licenses, but the students have not yet completed the requirements to obtain such a license. Schools must sort out what work unlicensed students may perform in transactional, community and economic development, or mediation programs, without violating laws against the unauthorized practice of law. As the Model Rules point out, the definition of the practice of law varies from one jurisdiction to another. Some have argued that the work in transactional clinics is not the practice of law, yet the Model Rules repeatedly address the work that lawyers do for organizations, thus implying that such work is the practice of law. Model Rule 1.13 discusses a series of responsibilities for lawyers employed by an organization, and the
rules on conflicts warn that changes in organizations may result in conflicts.[^160] It is disingenuous to argue that clinic students doing work for nonprofits or other organizational work are not practicing law.

State law on licensing and accreditation as well as laws on the unauthorized practice of law may control mediation and alternative dispute clinics.[^161] Model Rule 2.4 discusses lawyers serving as third-party neutrals;[^162] Model Rule 1.12 indicates that lawyers who have acted in such a capacity are conflicted out of representing the parties in the future without informed consent, in writing from the parties;[^163] and Rule 5.5, Comment 12 notes that a lawyer who is licensed in another jurisdiction may temporarily engage in services associated with potential alternative dispute resolution (“ADR”) proceedings in another jurisdiction related to that case.[^164] Programs must simply be cautious in complying with local rules and statutes before flippantly assuming an ADR clinic is not engaged in the practice of law.

Certain tribunals, agencies, or other administrative bodies will allow law students to practice in front of them without student law licenses,[^165] and some, like the Internal Revenue Service, have particularized systems for allowing students to practice before them.[^166] Others, such as the Social Security Administration, allow non-lawyer advocates, and some have argued unlicensed students may represent clients without running afoul of the unauthorized practice of law. Similarly, there are clinics in which students are functioning as non-lawyer advocates on behalf of victims of domestic violence who are attempting to obtain civil orders for protection. These programs generate the following questions:

[^165]: Model Rules of Prof’l Conduct R. 5.5 cmt. 9 (2008).
[^166]: Some agencies, such as the United States Patent and Trademark Office, create their own student practice requirements. See, e.g., Press Release, USPTO, Law School Clinical Certification Pilot Program (July 22, 2008), available at http://www.uspto.gov/web/offices/dcom/olia/oed/lawschoolclinicalcertpilot.htm (announcing that seven law schools will participate in a pilot project that allows their students to practice).
What are the limitations of the students’ activities such as speaking in court in Order for Protection Hearings;
Must there be a licensed lawyer supervising or training the students;
Must a licensed lawyer be with the students at any point in the proceedings;
Who is responsible for malpractice or subject to disciplinary proceedings if there is a mistake or negligence; and
What information must the client be given about all of the above?

When students are functioning as non-lawyers, the clinical professors are in the position of a lawyer supervising a paralegal or other non-lawyer subordinate. 167

Clinic teachers and law students, whether licensed or not, who are working on law-related activities should be reminded that lawyers who are engaging in these activities must comply with the Model Rules of Professional Responsibility. 168 Community organizing, financial planning, lobbying, tax preparation, and safety planning in domestic violence cases must be done in a manner consistent with the rules of ethics. 169 The student lawyer, for example, cannot lie about the reason for his or her presence at a meeting in order to gain information surreptitiously. If doing something like public education with no intention of providing legal advice, student lawyers must “take[ ] reasonable measures under the circumstances” to make clear that they are not functioning as a lawyer. 170

XI. IDENTIFYING AND RESOLVING EXISTING ETHICAL ISSUES AND MANAGING PAST ETHICAL MISTAKES

Clinics must prevent malpractice and avoid ethical mistakes that impact clients and result in the discipline of the lawyer supervisors. Consequently clinics must ensure that student lawyers

170. MODEL RULES OF PROF’L CONDUCT R. 5.7 cmt. 7 (2008).
know their responsibilities and know how to process ethics issues. Clinics that do not require formal instruction in professionalism as either a prerequisite or co-requisite do so at considerable risk because some students may be unaware of the fundamentals such as confidentiality and conflicts. For example, a naïve clinic student investigating a case can suddenly find himself to be a witness or violating the rules that prohibit speaking with a person who is represented by counsel. Students who are working in clinics, like all lawyers, routinely find themselves confronted with ethical issues that should be brought to the attention of their clinical professor who should take the inquiry seriously. For whatever reason—overwork, ignorance, indifference, lack of expertise, or bad judgment—these issues get lost on their way from the student to the faculty member. Each program should ensure that there are incentives for students to identify ethical problems and for faculty to address them. In circumstances where the faculty member and the student disagree about how to resolve the issue, students should be aware that when the Model Rules are clear, the students are independently bound by the Rules of Professional Responsibility even if they are acting at the direction of another. However, if the questionable is arguable, the students are not violating the Model Rules when they defer to their supervisor.

In most situations, subordinate lawyers feel vulnerable or uninformed so they defer to their supervisors even if they feel the supervisor is incorrect in his or her judgment about an ethical dilemma. Yet, student lawyers may feel particularly incapable of confronting a supervising professor who seems to be making a professionalism mistake. Students will be particularly torn if they disagree with the person on whom they rely for grades and letters of recommendation. Larger firms now have formalized systems for dealing with ethics problems, particularly in situations where a junior lawyer may find himself or herself at odds with the conduct of a more senior lawyer. However, few clinical programs in law schools have such programs or people identified as ethics

172. Model Rules of Prof’l Conduct R. 3.4 (2008). The Federal Rules of Evidence can come into play if the only witness to someone’s statement is the lawyer or investigator and there is a need to admit that statement for either substantive or impeachment purposes. See Fed. R. Evid. 608, 613, 801–804.
consultants. Students therefore may not know whom to consult or to whom to report the ethical differences they may be having with their supervisors. Most clinicians would prefer that such issues stay within the program, but without a clear path for students, problems may make their way to faculty or administrators outside the clinic. In some circumstances this is appropriate, but a clear internal process could encourage disclosure, avoid problems from escalating, and prevent outside administrators from intervening into clinic management when clinic faculty and students differ on how to resolve an ethical dilemma.

Like the students, faculty may have a conflict with a “supervising” attorney in the clinic, law school administration, or university. There may be law school or university bylaws, policies, or handbooks that create professional conflicts for the faculty member regarding whom they should approach to consult about their disagreements. A proactive clinic administration that anticipates such conflicts is more likely to be in a position to resolve them before they explode.

The previous discussion recommends a system for dealing with ethical conflicts between students and supervisors after someone has recognized and articulated a difference of opinion about an ethical dilemma. Unfortunately, students and faculty may make serious ethical mistakes and fail to disclose the error or misrepresent what happened. Such mistakes can have a cascading effect for a client. Again, if a structured system is in place and everyone is aware of what will happen if they report past errors, it is less likely that mistakes will escalate into something worse for the student, their client, and their supervisor. Obviously such situations are extremely contextual and not every situation can be anticipated, but clinic programs want to avoid having to make decisions about how to proceed in a crisis. Moreover, the program should have standards and protocols regarding what types of ethical errors will be reported to the administration of the law school or university, treated as academic honor code violations, put into permanent academic records, reported automatically to character and fitness boards, exposed to opposing parties and courts, told to potential employers or existing employers if the student already has a job, disclosed to malpractice carriers, or even reported to the police.

Most jurisdictions have some kind of mandatory reporting requirements, such as Model Rule 8.3, that may compel disclosure
to the Character and Fitness Board or Board of Professional Responsibility, and that address when client confidences can or must be breached to do such reporting. Some states, like Illinois, make clear that failure to report is in and of itself a violation of the Rules of Professional Conduct in cases of serious professional misconduct. Such “snitch rules” also exist in law school or university honor codes. Students may therefore have an independent duty to either report each other or self-report to the administration or risk discipline. Since the academic honor codes are not designed to take into account client confidentiality, clinics should unravel what may be conflict duties for the students at the outset.

Law clinics should have malpractice insurance even in states where it is not required. Some programs have independent insurance and others are self-insured through the university. When mistakes are made, they must be reported to the insurer in a prompt and accurate manner. Arrangements to protect all interested parties should be made if there is a conflict between the interests of the supervisor, the student, and the institution.

XII. INFORMING OTHERS THAT THE LAWYER IS A STUDENT AND MATCHING STUDENTS WITH CLIENTS

Regardless of whether a clinic student has a student practice license, professionalism requires that the client be informed that the lawyer is a student and the name of the licensed lawyer who is supervising the student lawyer. When and how this is accomplished may differ depending on whether the state student-licensing scheme requires informed, written consent from the client, or whether the program has created its own protocol. It can be difficult and awkward for students engaging in initial interviews to disclose this information to the client while trying to gain the

177. Ill. Rules of Prof’l Conduct R. 8.3(a) (2001); In re Himmel, 533 N.E. 2d 790 (Ill. 1988).
178. From an ethical and professionalism perspective, who besides the client must be made aware that the lawyer handling the case is a student? This may be dictated by student practice rules in a particular state that require written permission for student representation to be made to the court and therefore served on opposing counsel. Otherwise, a purely legalistic approach is not informative because the ethics rules merely warn that a lawyer has an obligation to be truthful to others about material facts. Model Rules of Prof’l Conduct R. 4.1 (2008).
client’s confidence. Practicing what students should say to clients may therefore be time well spent. As discussed in Part XIII regarding attorney-client retainers, best practices would suggest this information be conveyed both orally and in a written document that the client signs. Students’ business cards, letterhead, correspondence, and pleadings should identify the status of the lawyer as a student. Once a client becomes aware that the assigned lawyer is a student, the client may want to speak with a supervising attorney rather than a student. Checks and balances about when such direct contact between the client and the supervising lawyer should be in place so that the student is confident that his or her professional relationship with the client will not be undermined.  

Clients are most likely to ask to speak with the supervisor rather than the student lawyer when there has been a poor matching of student and client. Assigning students to clients is a fine art and is related to the mission and culture of the program. Some use a random “taxi cab” system that requires each student in the queue to accept the next client that comes along, and others have complex formulas that account for issues such as student workloads, benchmarks, and other criteria like gender and multiculturalism. In clinics where the students work in teams, the matching can be very complex. Indigent clients may have no access to a lawyer other than that provided by the law clinic, and the clinic program should have clear policies regarding under what circumstances the client may switch students and continue to receive services. Unlike the private client who can fire the lawyer and find a new one, many clinic clients do not have that choice. Periodically, students may want to withdraw from representing a particular client. Programs should anticipate such requests in order to deal with them fairly and equitably and the change may trigger questions whether the clinic will assign a new student or terminate the attorney client relationship. The attorney-client retainer discussed below should address some of these situations. In addition, Model Rule 1.16 delineates when and how a lawyer may terminate representation and states may have other specific rules about the process that the clinic must follow if withdrawing from representing the client.  

179. See Grose, supra note 149 (discussing when a supervisor should intervene).
XIII. ATTORNEY-CLIENT RETAINERS OR CONTRACTS AND FEE AGREEMENTS

Basic contract law would indicate that the best practice is for law school clinics and their clients, whether individual or organizational, to have a written contract agreement (also referred to as attorney-client retainers) so that there is no confusion regarding a wide range of issues. These documents can include information such as the name of the student lawyer with a disclosure whether the student is working pursuant to a student practice license; the name of the supervising lawyer; contact information; what will happen if a case is transferred between students; the name of the client, which is particularly important when working with organizational clients; the nature and limitation of the work that will be done; rights and responsibilities of the client regarding communication; clarification if the client wants to fire the lawyer, or if the law clinic wants to withdraw; confidentiality; clear information regarding how costs, fees, expense and attorneys’ fees will be handled; and any necessary consents. The contract could also include information regarding the client’s rights to information and to make certain decisions such as whether to testify or plead in a criminal case.

Although it is best if all lawyers have written contracts with their clients, it is particularly important in law school clinics because there is no guarantee that all of the information that must be communicated at the outset will be clearly presented to the client. The students are inexperienced and their clients may lack the sophistication to understand the breadth and limitations of the attorney-client relationship. For example, some clinics may limit their representation to Orders for Protection and not handle a divorce matter in a domestic violence case. Other clinics do trial

181. Model Rule 1.5(c) requires a written agreement only in contingency cases. Model Rules of Prof’l Conduct R. 1.5(c) (2008). However, the attorney-client relationship is a contractual one that can be implied or express. It is best if the terms are clear to avoid confusion.

182. Clinic students, before seeking consent to limited representation, should advise the potential client about what services will not be provided and that another attorney, not operating under any limitations, might be able to obtain a quicker or more favorable result. Kuehn & Joy, Ethics Critique, supra note 84, at 2043. See also N.J. Rules of Prof’l Conduct R. 1.2(c) (2008) (permitting an attorney to limit the scope of representation after the consent of the client); Lerner v. Laufer, 819 A.2d 471 (N.J. Super. Ct. App. Div. 2003); Ethics Comm., Az. St. B. Ass’n, Op. 91-03 (1991).
work but not appeals. In situations like these, clients may not understand the limited scope of the representation.  

Although the Model Rules do not require written fee agreements between lawyers and their clients, except for contingency agreements that must be in writing, the Rules recommend that other fee arrangements should be communicated to a client, preferably in writing. These should include clear information about all costs as well as fees. When representing indigent clients in litigation cases, filing fees may often be waived, but discovery costs and other expenses may be incurred. Programs should have clear policies that are communicated to the client regarding whether the client will be expected to pay costs either before they are incurred or whether the clinic will bill the client later, and whether the clinic will attempt to collect on unpaid bills. Clients should understand what role they play in deciding whether costs will be incurred because they will be expected to pay them or because the cost of some cases is prohibitive for the clinic. Like all law firms, a law school clinic should assess cases before accepting them to determine whether there are sufficient funds to represent the client adequately and fully. Some law schools have independent litigation funds set aside to support their work and others rely on the general law school budget to pay the costs. Law school administrators and the clinics may engage in a certain amount of denial and wishful thinking about litigation expenses, which can result in the potential for inadequate funds for competent representation and malpractice.

Some programs rely on attorneys’ fees as a source of supporting the program or paying the clinic faculty. These clinics can have fee arrangements similar to lawyers in the private sector, and the arrangements will have both the same problems and benefits of any attorney-client fee arrangements such as flat fees, hourly fees, statutory fees, and contingency fees. Yet, the situation is complicated by the reality that students are working on the cases. Clients should understand at the outset what rate fees

183. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2008).
184. MODEL RULES OF PROF’L CONDUCT R. 1.5(c) (2008).
185. MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (2008).
186. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) cmt. 2, 1.4, 1.5(b) (2008).
are attributable to students because they are less efficient and less competent; how “team” work involving multiple students will be billed; whether supervision time will be billed to the case for the faculty member and the student; and what rate the faculty member will use.

Students and faculty obviously must keep excellent records of the time and nature of their work so that clients are informed of what they are paying for. Even when institutions do not rely on attorneys’ fees for funding, programs may be entitled to attorneys’ fees or costs in certain types of cases such as civil rights cases. When attorneys’ fees are awarded to law clinics, all of the same issues arise regarding how to bill student and faculty time and the rates at which they should be compensated. The amount of fees will depend on the nature of the case, but it often comes down to a “reasonableness” standard that reflects factors such as those suggested in Model Rule 1.5. To maximize the fees, it is best if a clinic program has protocols that require accurate time records that show who worked on the case and the nature of the work performed, plus expense records that support the reasonableness of the fees to the court and opposing party.

XIV. IOLTA ACCOUNTS, CLIENT PROPERTY, AND CLIENT FILES

Every clinic program should maintain an account for client funds that is separate from the law school’s operating money to avoid any allegation of commingling of funds. At some universities, this is a completely alien concept because it removes money from the normal flow. When clients bring in money for any purpose or money is delivered to the clinic for a client for any purpose, it should be clearly recorded, a receipt provided and recorded in the file, and the money kept separately. Other client property must also be kept in a safe, separate place to be protected. For example, if a client brings in a deed, the students must know where it will be stored and how to access it. Maintaining security for client’s property and money when there is repeated turnover in students may pose a challenge.

Although a fair amount of work is being done electronically, which has its own risks, most client files contain hard copies of a

variety of documents. Clinic students who are allowed to take files out of a clinic office may complete their case work in a variety of settings: law school libraries or classrooms, their homes, coffee shops, cars, subways, court houses, or affiliated agencies to name a few. Moreover, if the students are working in teams, maintaining the location and contents of a file can become very complicated. Misplaced client files can have consequences including lost evidence, disclosure of confidential or privileged information, or delay, any of which may result in incompetent representation, negligence, and malpractice. The worst situation is the student who graduates from law school and does not return client files to the clinic office.

Best practices in law office management require some system for closing files that ensures clients receive back all money and property that belongs to them. Students may have created multiple drafts of documents and other materials may have ended up in the file that should be cleaned out before the file is closed. Some kind of closing memo should be drafted so that subsequent people affiliated with the clinic can open the file and easily determine what was previously completed on the file. This is particularly helpful for situations when clients or their cases return to the clinic for new matters, if some of the legal work becomes useful in subsequent cases, or if potential conflicts arise. The status of the case should be entered into the electronic data system, and all information should be checked for accuracy, especially information that will allow for future conflict checks of former clients. Thus, if a client or organization changed names in the course of the representation, the conflict system should be updated. Ideally, there should be a file-destruction protocol in place managed by the electronic data system that alerts whoever is responsible when a file may be destroyed. Storage of client files, either in hard copy or electronically, creates different problems for law schools than law firms because the client files should not be kept where people not affiliated with the clinic might have access.

XV. CONCLUSION

This article grows out of my experience as a poverty lawyer, a professional responsibility professor, and a participant in the clinical legal-education movement. My goal in writing this article was to share my observations about the complexity of managing a law school clinic according to the current Model Rules of
Professional Responsibility so that others do not have to recreate the wheel. Law clinics provide vital services to communities, students, law schools, and the Bar. We train the next generation of public interest lawyers who will take the lessons we model into practice as they represent indigent clients and organizations in full-time positions or as pro bono lawyers. Consequently, those involved in designing, administering, and supporting law school clinics must carefully scrutinize the ethical management of their programs. I anticipate that this is only the beginning of an exchange on these topics, and I look forward to the dialogue that it generates.