

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 14, 2011

RESOLUTION

RESOLVED, That the American Bar Association reaffirms its support for the ethical independence of law school clinical programs and courses consistent with the ABA Model Rules of Professional Conduct;

FURTHER RESOLVED, That the American Bar Association opposes attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses; and

FURTHER RESOLVED, That the American Bar Association will assist law schools, as appropriate, in preserving the independence of clinical programs and courses.

REPORT

Clinical legal education has become an important part of the curriculum of the modern American law school. Beginning in the 1920s and accelerating in the latter half of the 20th Century, law schools have been offering in-house clinics and externships that enable students to learn essential lessons about the law and legal practice by engaging in student practice on behalf of clients. In addition to enhancing legal education, these law school clinics provide a public service by offering free legal services to clients who otherwise could not afford them. As the recent Carnegie Foundation Report, *Educating Lawyers: Preparation for the Profession of Law*, states, clinical legal education “provide[s] students with a much-needed bridge between the formal skills of legal analysis and the more fluid expertise needed in much professional work.”

To effectively provide this education, law school clinics must be free to operate like other lawyers, zealously pursuing their clients’ interests and fulfilling their ethical obligations of loyalty, diligence, and confidentiality. Only then can they help law students form an appropriate professional identity grounded in the attorney’s responsibility to further the public interest through service to the client.

Specifically, according to a 2007-2008 report by the Center for the Study of Applied Legal Education, law clinic students annually provide 2.4 million hours of free legal services (1.8 million hours on civil matters and 600,000 hours on criminal matters) and represent more than 128,000 clients (90,000 clients in civil matters and more than 38,000 clients in criminal cases). In the criminal cases, the state would otherwise pay an attorney to represent the defendant. Related data suggests that law students who work at clinics continue their commitment to pro bono work after graduation.

Over the years, law school clinics have faced significant threats to their independence from outside institutions, groups, and individuals. For example, the Maryland state legislature recently considered legislative action that tied funding for the University of Maryland to providing information about the clinic clients, finances, and cases. In Louisiana, a recent proposed bill would have targeted clinics even more directly by prohibiting any clinic at a public or private university that receives state money from suing a government agency or seeking monetary damages from an individual or business.

Fortunately, neither of these efforts was successful, thanks in part to the efforts of ABA President Carolyn Lamm, who issued statements opposing both legislative efforts. In her statement of April 1, 2010, President Lamm said:

Our legal system, and in fact our very democracy, is founded on the concept that all persons and organizations, including government itself, are bound by the law. For the law to have effect, lawyers must be allowed to fulfill their ethical obligations to provide effective representation, to protect client confidences and to resist interference or pressure that seeks to compromise their professional judgment. The proposal currently before the Maryland legislature could make it more difficult for lawyers to comply with these important ethical duties and protect their clients’ interests.

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As president of the American Bar Association, I urge those who would undermine clinical law school programs to step back and remember that the rule of law cannot survive if pressure prevents lawyers from fulfilling their responsibilities to their clients. I call on lawyers in every state to remember their professional obligation to uphold the independence of their profession, and speak out against intimidation whenever they see it. Just as lawyers who represent unpopular clients are fulfilling the responsibilities of all lawyers, so too are law students who assist clients in clinical legal programs.

There have been many other similar attempts to control law school clinics and there unfortunately will likely be more in the future. As reported in the October 2010 ABA Journal "...clinics are facing pressure to abandon clients, as well as threats to ban hiring of graduates and attempts to bankrupt their universities."

The United States Supreme Court has recognized the constitutional importance of academic freedom to our educational system and society as a whole. As the Court has said, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment". Students share this freedom for the First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. Clinics have become the law school's research laboratory for the development of new ideas. Litigating actual cases, clinical educators train their students in developing new legal theories and in expanding existing legal doctrine. In view of the benefits of clinical legal education and scholarship to the growth and development of the law and the education of future lawyers, the protections of academic freedom are especially applicable to clinical programs and must be respected.

In assessing the ethical issues involved in interference with representation provided clients by law school clinics, there would appear to be several values represented by ethical rules at stake- confidentiality; the obligation not to refuse unpopular or controversial clients or cases; the obligation to act independently of third party interference; the duty not to prejudice the administration of justice; and the prohibition on use of means that have no substantial purpose other than to embarrass, harass or delay a third person. Additionally a lawyer's freedom to choose clients and cases could be implicated by these attempts to interfere with clinic representation of unpopular clients or cases. Since clinics are an educational vehicle for imbuing students with the "history, goals, structure, values, rules and responsibilities of the legal profession and its members", it is critically important that those values and responsibilities be reinforced, not diminished, by the clinical program and its ability to represent clients ethically and competently. Self-governance of law school clinics further enhances these ethical values of independence and client-based decision-making.

The Council of the Section of Legal Education and Admissions to the Bar issued a statement opposing improper interference with law school clinics in 1983. Given the frequency of improper attacks on law school clinics' independence, it is essential that the ABA take a public position on this issue. As ABA President Lamm said in her statement regarding the proposed legislative action in Maryland, "the rule of law cannot survive if pressure prevents lawyers from fulfilling their responsibilities to their clients".

The proposed policy statement is modeled on the Statement of the Council of the Section of Legal Education and Admissions to the Bar adopted in 1983. In the years that this policy statement has been in existence, the Section has found that it aptly frames the issues and appropriately sets forth the relevant principles in support of protecting law school clinics from improper interference. It is appropriate for the House of Delegates to adopt a similar policy statement in order to guide the response of ABA leadership in the future should such clinical interference issues occur again.

Respectfully submitted,

Hon. Christine M. Durham, Chair
Section of Legal Education
and Admissions to the Bar

February 2011

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association
Section of Legal Education and Admissions to the Bar

Submitted By: Hon. Christine M. Durham, Chair

1. Summary of Recommendation(s).

This recommendation urges the ABA to: 1) reaffirm its support for the principles of law school self-governance, academic freedom and ethical independence as outlined in the ABA Model Rules of Professional Conduct; 2) oppose improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses; and 3) assist law schools, as appropriate, in preserving the independence of these clinical programs and courses.

2. Approval by Submitting Entity.

The recommendation was approved by the Council of the Section of Legal Education and Admissions to the Bar on August 6, 2010.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The *Standards and Rules of Procedure for Approval of Law Schools* require in Standard 302(b)1 and Interpretation 302-5 that law schools offer substantial opportunities for live-client or other real-life practice experiences through clinics or field placements. The adoption of this recommendation would strengthen the ability of law schools to offer independent clinical experiences that meet this requirement.

5. What urgency exists which requires action at this meeting of the House?

Given the frequency of improper attacks on law school clinics' independence, it is essential that the ABA take a public position on this issue.

6. Status of Legislation. (If applicable.)

Not applicable

7. Cost to the Association. (Both direct and indirect costs.)

None

8. Disclosure of Interest. (If applicable.)

Not applicable

9. Referrals.

Concurrently with the submission of this report, it is being circulated to all ABA entities and other interested parties for comment and sponsorship, including:

1. ABA Standing and Special Committees, Task Forces, and Commission Chairs and Staff Directors
2. ABA Section Chairs and Delegates
3. Conference of Chief Justices
4. National Conference of Bar Presidents
5. National Conference of Bar Examiners
6. Standing Committee on Client Protection
7. National Organization of Bar Counsel
8. Association of Professional Responsibility Lawyers
9. National Client Protection Organization
10. Law Student Division and Young Lawyers Division

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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EXECUTIVE SUMMARY

A. Summary of Recommendation

This recommendation urges the ABA to: 1) reaffirm its support for the principles of law school self-governance, academic freedom and ethical independence as outlined in the ABA Model Rules of Professional Conduct; 2) oppose improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses; and 3) assist law schools, as appropriate, in preserving the independence of these clinical programs and courses.

B. Issue Recommendation Addresses

This recommendation addresses the ability of law schools to offer in-house clinics and externships that enable students to learn essential lessons about the law and legal practice by engaging in student practice on behalf of clients. To effectively provide this education, law school clinics must be free to operate like other lawyers, zealously pursuing their clients' interests and fulfilling their ethical obligations of loyalty, diligence, and confidentiality. Over the years, law school clinics have faced significant threats to their independence from outside institutions, groups, and individuals.

C. How Proposed Policy Will Address the Issue

The adoption of this recommendation sets forth the relevant principles in support of protecting law school clinics from improper interference. Given the frequency of improper attacks on law schools clinics' independence, it is essential that the ABA take a public position on this issue and that the House of Delegates adopt this policy statement in order to guide the response of ABA leadership.

D. Minority Views or Opposition

Not that the Section is aware of.