

# Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility

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## Introduction

Like most law professors and deans, we left jobs as practicing lawyers to become law teachers and teach a variety of traditional doctrinal courses, both large classes and seminars. As what some refer to as “classroom” or “podium” law professors, we exercise the same professional judgments regarding course content, casebooks, class lectures and discussion, and grades as other professors. In making those judgments, we look to legal academy norms of academic freedom and the allocation of decision making between deans and faculty to guide decisions and resolve disagreements over teaching approaches and materials.

But we have not just been teaching in the classroom. We also have been practicing law as clinical teachers. Unlike other courses where the teaching usually influences only the students in the classroom, law clinic courses also influence clients, opposing parties, and others. These external effects of lawyering in the academy raise a set of academic freedom and professional responsibility issues distinct from law school classroom teaching.

The professional standard for academic freedom traditionally guarantees teachers “freedom in the classroom in discussing their subject” provided the teachers do not “introduce into their teaching controversial matter which has no relation to their subject.”<sup>1</sup> Such freedom protects the learning process and promotes the common good, which “depends upon the free search for truth

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1. American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, *reprinted in* AAUP, Policy Documents & Reports 3, 10th ed. (Washington, D.C., 2006) [hereinafter Redbook]. The 1940 Statement and 1970 Interpretive Comments were jointly drafted by the AAUP and the Association of American Colleges and Universities.

and its free exposition.”<sup>2</sup> As Matthew Finkin and Robert Post point out, the underlying premise for pedagogical academic freedom “is that students cannot learn how to exercise mature independence of mind unless their instructors are themselves free to model independent thought in the classroom.”<sup>3</sup> Teaching through experiential learning methods in the sciences, medicine, law, and other fields defines the “classroom” broadly to include wherever the teaching and learning take place, which may be in a field setting, hospital, law clinic office, or courtroom.

Lawyering in the academy has become increasingly prevalent since the 1970s when law school clinics started to flourish. Today, the American Bar Association (ABA) requires every accredited law school to offer substantial opportunities in live-client or other real-life practice experiences.<sup>4</sup> As a result, there are law clinics in almost every law school, with the *AALS Directory of Law Teachers* listing nearly 1400 full-time faculty teaching clinical courses.<sup>5</sup> In addition to lawyering in clinics, a number of law professors act as attorneys in cases handled as part of law school seminars,<sup>6</sup> applied legal research and writing classes,<sup>7</sup> or live-client components of related upper-level substantive courses.<sup>8</sup>

The legal academy has given little thought to how practicing law within law schools affects professional responsibilities and is different from representing clients in a traditional law firm or how notions of academic freedom affect lawyering in law schools. Yet repeated attempts to interfere with law clinic representation starkly illustrate how lawyering in the academy might be different, under notions of professional responsibility and academic freedom, from other lawyering or typical law teaching.<sup>9</sup>

2. *Id.*

3. Matthew W. Finkin & Robert C. Post, *For the Common Good* 81 (Yale University Press, New Haven, Conn. 2009).

4. Section of Legal Education and Admissions to the Bar, ABA, Standards and Rules of Procedure for Approval of Law Schools, Std. 302(b)(1) (2007) [hereinafter ABA Standards].

5. Association of American Law Schools, *AALS Directory of Law Teachers* 1218–27 (2007).

6. *See, e.g.*, Elizabeth M. Schneider, Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom, 11 *J.C. & U.L.* 179, 185–86 (1984) (describing an effort in Colorado to prevent a law professor from handling civil rights cases in a constitutional litigation seminar).

7. *See* Michael A. Millemann & Steven D. Schwinn, Teaching Legal Research and Writing With Actual Legal Work: Extending Clinical Education Into the First Year, 12 *Clinical L. Rev.* 441, 446–47 & n.106 (2006) (discussing legal writing courses doing work to be used in the client’s legal representation).

8. John B. Mitchell et al., And Then Suddenly Seattle University Was on Its Way to a Parallel, Integrative Curriculum, 2 *Clinical L. Rev.* 1, 2 & n.4 (1995) (identifying six substantive courses with one-credit live client components).

9. *See* Robert R. Kuehn & Peter A. Joy, An Ethics Critique of Interference in Law School Clinics, 71 *Fordham L. Rev.* 1971, 1976–92 (2003) (chronicling interference in law clinic case and client selection).

Scholarship on interference in clinical programs has focused primarily on the impropriety of interference with the institutional autonomy of law schools by those outside the university, such as politicians or business interests attempting to pressure universities and law schools not to represent or to abandon the representation of some clients.<sup>10</sup> Conversely, internal intrusions on law clinic lawyering, usually by university or law school administrators seeking to influence whether and how clinical faculty and students represent some clients, have not been well-publicized. Consequently, there is virtually no scholarly attention to the tension between the individual lawyer-professor's academic freedom and professional responsibility to clients and the law school's decision-making authority.

We are motivated to write this article because of some of the more egregious instances of interference with lawyering in the academy. The earliest reported instance is the firing of two clinical faculty members for their involvement in a civil rights case.<sup>11</sup> More recently, university administrators, responding to complaints from state legislators, local business leaders and others, sought to pressure an environmental clinic director to avoid taking on certain potentially controversial cases, slashed the clinic's available funding, and threatened to separate the clinic from the law school.<sup>12</sup> In another instance, a law school dean and associate dean, without first discussing the matter with the clinic director, notified a clinic client that the law school was withdrawing representation in a high profile human-rights case.<sup>13</sup> In still another instance, clinical program co-directors instructed a clinical faculty member not to follow the client's request to seek attorney fees in a successful housing discrimination case after opposing counsel, two alumni of the law school, complained to the dean.<sup>14</sup> In these

10. Some examples of outside interference are criticisms and attempted reprisals against the environmental law clinics at the University of Oregon, University of Pittsburgh, and Tulane University. See *id.* at 1992-2030; Schneider, *supra* note 6, at 188-92.
11. In 1968, the dean of the University of Mississippi School of Law, at the direction of the chancellor but over the objections of the law faculty, fired the professors after their participation in a school desegregation lawsuit prompted complaints from some state legislators and university trustees. The two professors successfully challenged their treatment in federal court. *Trister v. Univ. of Miss.*, 420 F.2d 499 (5th Cir. 1969). Facing possible expulsion from the Association of American Law Schools, the University later offered re-employment to the clinical professors. Kuehn & Joy, *supra* note 9, at 1976-77; AAUP, *The University of Mississippi*, AAUP Bulletin, Spring 1970, at 75, 84-85.
12. Kuehn & Joy, *supra* note 9, at 1986-88 (reporting events at the University of Pittsburgh). A faculty senate committee found that the administrators' actions infringed on principles of academic freedom. University of Pittsburgh Senate, Report of the Tenure and Academic Freedom Committee on the Environmental Law Clinic (Jan. 28, 2002) (on file with authors).
13. Kuehn & Joy, *supra* note 9, at 1988-89 (reporting on events involving the International Human Rights Clinic at St. Mary's University School of Law). In addition to forcing the clinic to withdraw from the case, the associate dean entered the clinic file room and reviewed case files without permission from the clinic director or client. *Id.* at 1989.
14. Letter from Amy F. Robertson, Attorney for Doug Smith, to Paul Chan, University of Denver Counsel (Nov. 12, 2002) (on file with authors).

instances, the interference with the faculty representation of clients as part of their teaching was not motivated by educational or professional responsibility concerns but, apparently, to mollify critics of the faculty member.

Because of the potential for internal influence on their teaching, law faculty teaching real-life experiential learning courses often experience a tension in carrying out their educational mission that classroom faculty do not. A 2005 survey of law clinic teachers found that one-third “worried” about the reaction of the law faculty or administration to their clinic casework.<sup>15</sup> Seventeen percent of clinic faculty reported making changes in their case selection choices because of those worries, and more than ten percent reported making significant or major changes.<sup>16</sup>

In a more recent survey of clinical faculty, fifteen percent of clinical teachers reported that the clinical program director had suggested they avoid a particular case.<sup>17</sup> Nine percent of teachers stated that their law school dean had made the same suggestion, and seven percent responded that on their own initiative they had avoided a case because they suspected the dean would prefer they did so.<sup>18</sup>

Against this backdrop, this article considers how the practice of law in the legal academy is both similar to and different from the typical practice of law in a firm or public interest organization and the teaching that law faculty do in the classroom. We focus in particular on how notions of academic freedom apply to professors lawyering in the academy and how the professional responsibilities of attorney-professors influence their teaching pursuits and relationships with the dean, other faculty members, and the university administration.

Our inquiry focuses on two underlying questions. First, how much discretion should individual faculty have in selecting cases for their courses? Second, once a faculty member undertakes to represent a client within a course, should a dean, clinical program director, or other person not involved in the client’s representation be able to direct the faculty member’s decisions on how to handle the matter? In the process of addressing these issues, we suggest an approach that seeks to be true to the professional rights and responsibilities of law faculty both as academics and attorneys.

We have chosen not to address two related but distinct academic freedom issues. First, the Supreme Court has not clearly defined the First Amendment

15. Bridget McCormack, *Academic Freedom for Clinical Law Faculty* (Jan. 6, 2006) (unpublished survey results, on file with authors). Surveys were sent by e-mail to clinical faculty members at every AALS-member school. Of the approximately 300 clinicians surveyed, 147 responded.

16. *Id.*

17. Bridget McCormack, *Academic Freedom in Clinical Teaching* (June 4, 2008) (unpublished survey results, on file with authors). An invitation to respond to an on-line survey was sent by e-mail to clinical faculty at every AALS-member school. Of the 334 clinicians invited to respond, 251 completed the survey.

18. *Id.*

contours of academic freedom and commentators disagree about its scope, especially in internal disputes between a professor and the university.<sup>19</sup> For that reason, we do not address it here. Second, because we focus on the practice of law within the law school's educational mission, we also do not address lawyering by faculty as pro bono or outside paid work for which the law school does not assume oversight, although the school may retain a veto right where the professor's outside legal work might conflict with the interests of the university.<sup>20</sup> Instead, our focus is on academic freedom as a professional norm and instrumental right promoting legal education as expressed by the American Association of University Professors (AAUP) and recognized and protected by the Association of American Law Schools (AALS) and the ABA.<sup>21</sup>

19. See *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (holding that the First Amendment only protects a public employee's speech when the employee speaks as a citizen but leaving for another day "whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching"). Peter Byrne argues that the First Amendment gives university administrators "extensive control over curricular judgments so long as they do not penalize a professor solely for his political views." J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 *Yale L.J.* 251, 301-02 (1989). David Rabban, however, argues that the Supreme Court's recognition of institutional academic freedom "does not support the conclusion that the Court has rejected a constitutional right of individual professors to academic freedom against trustees, administrators, and faculty peers." David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 *Law & Contemp. Probs.* 227, 280 (Summer 1990). Michael Olivas characterizes the constitutional contours of academic freedom as paradoxical: "It protects quite expansively the scholarly enterprise from outside interference (grand juries, witch-hunting officials, funding agencies, and other assorted patrons, critics, and 'do-gooders'), but only grants limited protection to professors' intramural speech or classroom activities against *institutional* interests." Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 *Stan. L. Rev.* 1835, 1837 (1993).
20. For a discussion of the ethical considerations involved in professors practicing outside the law school, see Michael H. Hoefflich & J. Nick Badgerow, *Law School Faculty, LLP: Law Professors as a Law Firm*, 53 *U. Kan. L. Rev.* 853 (2005). For a discussion of the ethical issues involved when a classroom professor helps with a law clinic case, see Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 *U. Cin. L. Rev.* 1113 (2007).
21. As noted previously in the text, our discussion focuses on the generally shared understanding of the custom and usage of academic freedom, especially among law faculty, and not upon academic freedom as a First Amendment right. Matthew Finkin has observed that the AAUP's 1940 Statement represents a "professional common or customary law of academic freedom and tenure." Matthew W. Finkin, *Towards a Law of Academic Status*, 22 *Buff. L. Rev.* 575, 577 (1972). Several courts have recognized that the customs and practices at a university or among the academic community as a whole are important to understanding the rights of individual faculty. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (noting that the "unwritten 'common law' in a particular university" may create a right to tenure even if an explicit tenure system does not exist); *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 848 n.8 (D.C. Cir. 1975) (finding that the statements of the AAUP, such as the 1940 Statement, and other statements of higher education organizations "represent widely shared norms within the academic community" and may be used in interpreting faculty contracts); *Greene v. Howard Univ.*, 412 F.2d 1128, 1135 (D.C. Cir. 1969) (reasoning that faculty "[c]ontracts are written, and are to be read, by reference to the norms of conduct and

### Background on the Law Professor as Lawyer

When a dean, the law faculty, or the university administration seeks to influence a professor acting as a lawyer in a law school course, a common response is to say that the professor enjoys the same academic freedom as other members of the legal academy. Some have compared a professor's decisions about which legal matters to undertake to a classroom teacher's choice of textbooks, and the professor's decisions on handling cases similar to a classroom teacher's decisions about what to teach in class.<sup>22</sup> But not all underlying issues are comparable, and the shield of academic freedom may not be so obvious or impenetrable. Decisions about which matter to undertake or strategy to pursue may affect not only student learning and the client's interests but also the interests of the university and, in public universities, the state.

Additionally, professors practicing law within the academy often argue that their professional responsibility obligation to exercise independent judgment in client representation should shield them from attempts to influence or interfere with their work.<sup>23</sup> But it's not that simple. In the typical law firm, senior partners direct the actions of subordinate attorneys, and lawyers in legal services offices report to supervising attorneys as well as non-lawyer directors, oversight boards, and even Congress. Also, most professional responsibility rules only apply once an attorney has commenced the attorney-client relationship, not at the earlier stage of considering whether to undertake the representation. Therefore, in some instances, telling a dean, clinical program director, faculty, or university president that it is unethical to question a lawyer-professor's professional decisions may overstate ethical norms in a particular situation.

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expectations founded upon them.”).

22. *See, e.g.,* Schneider, *supra* note 6, at 190 (“Selection of individual cases to handle and methods of handling those cases, like the selection of casebooks and classroom teaching approaches, lies at the very heart of the educational function of clinical programs. So long as the decisions made by a clinical teacher reasonably serve that educational function, a judgment that only the law school faculty is capable of making, these decisions should be protected by academic freedom.”). Although many of the examples we cite involve litigation, the academic freedom principles and ethical concerns are applicable to courses engaged in non-litigation work for clients.
23. *Id.* at 191-92. For the purpose of our analysis, we accept the current state of ethics rules and do not recommend different standards for faculty lawyering in the academy for two reasons. First and foremost, we believe that the practice of law as part of a course should model the ethical norms the student will likely face upon graduation. This approach places the student in the role as a practicing lawyer and better prepares the student for practice. Second, faculty lawyering in the academy have the same underlying fiduciary obligations to their clients as other lawyers, and it is beyond the scope of this article to analyze whether there are substantial policy reasons that would justify different ethical standards for lawyering in the academy. Instead, we prefer to accept the existing ethical rules in order to suggest a workable approach for addressing the academic freedom and professional responsibility issues for faculty lawyering in the academy.

Interference with law practice in the academy typically occurs after client representation has begun, through efforts to control or veto individual faculty decisions over which matters to undertake or which strategies to employ. Before turning to some concrete examples, we will briefly analyze the relevant norms of academic freedom and professional responsibility.

### Academic Freedom and the Practice of Law

The AAUP, AALS, and ABA each promote academic freedom principles in law school teaching. The AAUP separates academic freedom into three elements: freedom of inquiry and research; freedom of teaching, including both what may be taught and how it shall be taught; and freedom of extramural utterance or action.<sup>24</sup> The AAUP notes that academic freedom in teaching is “fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.”<sup>25</sup> Through its bylaws, the AALS and its member law schools have adopted the AAUP academic freedom principles,<sup>26</sup> and stated that law professors must enjoy the benefit of academic freedom to pursue their teaching obligations effectively.<sup>27</sup> The ABA endorses these same AAUP academic freedom principles in its law school accreditation standards.<sup>28</sup>

One justification for respecting academic freedom and deferring to the professional judgment of an individual faculty member is that the professor is the expert on a particular subject. Deference is also necessary to nourish an environment of discovery and intellectual experimentation and prevent what the Supreme Court, in *Keyishian v. Board of Regents*, called the “pall of orthodoxy over the classroom.”<sup>29</sup> Giving the professor the ultimate choice about what and how to teach when the course’s influence reaches beyond the classroom also promotes the university’s neutrality by allowing the school to disavow responsibility for controversial materials or methods and avoid taking sides in a dispute.<sup>30</sup>

24. See 1940 Statement, *reprinted in* Redbook, *supra* note 1, at 3. Justice Frankfurter described the four essential freedoms of a university as “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

25. 1940 Statement, *reprinted in* Redbook, *supra* note 1, at 3.

26. “A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors.” AALS, Bylaws § 6-6(d), available at [http://www.aals.org/about\\_handbook\\_bylaws.php](http://www.aals.org/about_handbook_bylaws.php); see also AALS, Exec. Comm. Regs. 4.3, available at [http://www.aals.org/about\\_handbook\\_regulations.php](http://www.aals.org/about_handbook_regulations.php).

27. AALS, Statement of the Association of American Law Schools in Support of Academic Freedom of Clinical Faculty (Jan. 3, 2001) (on file with authors). The AALS has identified academic freedom as one of its core values and expects its member schools to value academic freedom. AALS, Bylaws § 6-1(a) & (b)(ii), available at [http://www.aals.org/about\\_handbook\\_bylaws.php](http://www.aals.org/about_handbook_bylaws.php).

28. ABA Standards, *supra* note 4, at Std. 405(b) & App. 1.

29. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

30. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom*

AALS regulations explicitly state that academic freedom applies to all engaged in teaching, including in a clinical program, without regard to whether the professor is eligible for tenure.<sup>31</sup> In response to attacks on clinics from outside the legal academy, the AALS Executive Committee stated in 2001: “The Association reaffirms that academic freedom is critical to achieving the objectives of clinical legal education and that the principle of academic freedom applies equally to clinical law faculty.”<sup>32</sup>

The AALS has been vigilant in defending law clinics and professors against “external” threats to academic freedom from politicians, alumni, university donors, and corporate interests.<sup>33</sup> However, apart from its opposition to the University of Mississippi School of Law’s attempt to sanction two clinical professors in the late 1960s for their involvement in a school desegregation lawsuit,<sup>34</sup> the AALS has not offered guidance on how to resolve a conflict between an individual professor and the dean, faculty, or clinical program director over case decisions. The ABA too has focused its attention on repelling attacks from persons or institutions outside law schools and has not provided guidance on resolving disputes over interference within law schools.<sup>35</sup>

This silence may be due to the confidential nature of AALS and ABA proceedings designed to protect academic freedom.<sup>36</sup> Except for the firing of clinical faculty at the University of Mississippi, no other publicized instance of internal interference with faculty representation of clients has come before either the AALS or the ABA.

The AAUP has stated that “[t]he faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction.”<sup>37</sup>

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in America, 66 Tex. L. Rev. 1265, 1281 (1988).

31. AALS, Exec. Comm. Regs. 4.2.

32. AALS, *supra* note 27.

33. *See, e.g.*, Brief of Amicus Curiae Association of American Law Schools, *Wishnatsky v. Rovner*, 433 F.3d 608 (8th Cir. 2006) (supporting the right of the clinical faculty at the University of North Dakota to retain full decision-making authority over the selection of cases consistent with their academic freedom and professional responsibility rights and responsibilities); Brief for Amici Curiae, the Association of American Law Schools et al., *S. Christian Leadership Conference v. Supreme Court of the State of La.*, 252 F.3d 781 (5th Cir. 2001) (arguing against a restrictive student practice rule that denied law clinic students the ability to represent certain controversial clients because “[f]aculty have the right to determine what may be taught and how it may be taught, whether in a law school clinic or a traditional classroom”).

34. *See supra* note 11 and accompanying text.

35. *See* Section of Legal Education and Admissions to the Bar, ABA, *Interference in Law School Clinical Activities* (June 1997).

36. *See* AALS, Exec. Comm. Regs. 4.5; ABA Standards, *supra* note 4, at Rules of Procedure 24 & 25.

37. AAUP, *Statement on Government of Colleges and Universities* (1966) (jointly formulated by the AAUP, American Council of Education, and Association of Governing Boards of Universities and Colleges), *reprinted in* Redbook, *supra* note 1, at 135.

This statement reflects the faculty's role as a collective body and reinforces its role in determining the academic content of a program of study. More recently, the AAUP stated:

[I]n many institutions the contents of courses are subject to collegial and institutional oversight and control; even the text of course descriptions may be subject to approval. Curriculum committees typically supervise course offerings to ensure their fit with programmatic goals and their compatibility with larger educational ends (like course sequencing). Although instructors are ethically obligated to follow approved curricular guidelines, "freedom in the classroom" affords instructors wide latitude to decide how to approach a subject, how best to present and explore the material, and so forth.<sup>38</sup>

Another AAUP policy statement further explains:

[S]ince the faculty has primary responsibility for the teaching and research done in the institution, the faculty's voice on matters having to do with teaching and research should be given the greatest weight.... Since such decisions as those involving choice of method of instruction, subject matter to be taught... bear directly on the teaching and research conducted in the institution, the faculty should have primary authority over decisions about such matters—that is, the administration should "concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail."<sup>39</sup>

These AAUP statements clarify the contours of academic freedom as a professional norm and recognize the role of the faculty and curriculum committees, but they do not extend the same oversight and control of teaching matters to law school deans or other university officials. In medical schools, the AAUP defends the ability of professors to select materials and determine the approach to the subject "without having their decisions subject to the veto of a department chair, dean, or other administrative officer."<sup>40</sup> This statement seems equally applicable to law schools—while the faculty as a whole may have a legitimate role to determine policies affecting some aspects of what professors may do as lawyers in the academy, a law school dean or university administrator acting alone rarely would.

Although they may not be perfect analogies, clinical professors and others have argued that courtrooms, administrative hearings, and other practice settings are the classrooms and that cases are the teaching materials. A law professor would be free to choose a certain textbook, provided it addressed the relevant subject area and was not so outdated as to be detrimental to student

38. Committee A on Academic Freedom and Tenure, AAUP, *Freedom in the Classroom* (2007).

39. AAUP, *On the Relationship of Faculty Governance to Academic Freedom* (1994) (quoting AAUP, *Statement on Government of Colleges and Universities*), *reprinted in* Redbook, *supra* note 1, at 141.

40. AAUP, *Academic Freedom in the Medical School* (1999), *reprinted in* Redbook, *supra* note 1, at 125.

learning. By analogy, the same academic freedom norm that favors the rights of an individual professor in textbook selection supports a professor lawyering in the academy in the selection of individual cases and other legal matters for teaching purposes.<sup>41</sup>

In this way, a law professor in a clinic or other course with a real-life experiential component is analogous to a professor who teaches real-life experiential courses in medical, social work, architecture, and other schools and university departments. In every instance, the professor has the academic freedom to structure the experience, such as by choosing the patients, clients, or projects that will best foster the student's learning, provided the choices are consistent with the subject matter and professional skills being taught.

However, academic freedom is not absolute. Not only must the professor refrain from introducing controversial material unrelated to the subject being taught,<sup>42</sup> but a dean or department head usually decides which courses the faculty member will teach, in the process dictating the general subject matter the faculty member may pursue in the classroom. In addition, faculties usually approve new courses, and that approval generally involves review of a proposed coursebook and syllabus. Although that approval may occur long before a professor makes her choice about materials and assignments, the approval process underscores the fact that the individual faculty member does not have unfettered freedom to teach whatever she desires.

The ABA has recognized these limitations, stating that the dean and faculty shall formulate and administer the educational program of the law school, including curriculum and instructional methods.<sup>43</sup> As previously discussed, the AAUP also recognizes the faculty's collective responsibility in this regard.<sup>44</sup> Michael Olivas explains that although professors have wide ranging discretion to formulate teaching methods, "this autonomy is, within broad limits, highly contingent upon traditional norms of peer review, codes of ethical behavior, and institutional standards."<sup>45</sup>

41. See note 22 and accompanying text; see also *Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule*, 4 *Clinical L. Rev.* 539, 557 (1998); James J. Fishman, *Tenure: Endangered or Evolutionary Species*, 38 *Akron L. Rev.* 771, 786 (2005).

42. The AAUP's admonition to avoid unrelated controversial matter is not intended "to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject." 1940 Statement, *reprinted in Redbook*, *supra* note 1, at 3.

43. ABA Standards, *supra* note 4, at Std. 205(b).

44. AAUP, *supra* note 39.

45. Olivas, *supra* note 19, at 1856; see also David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?* 66 *Tex. L. Rev.* 1405, 1409-12 (1988) (explaining that the AAUP's conception of academic freedom limits the autonomy of professors by requiring adherence to professional norms but that administrators and governing boards should overturn decisions of faculty bodies only where there is improper application of professional standards).

Within law schools, faculties and curriculum committees sometimes dictate which book or syllabus all teachers of a certain subject will use. For example, program directors or a faculty committee may determine the materials used in some first-year law school courses, particularly legal writing courses. Faculty members teaching those subjects are expected to comply. However, efforts to impose such conformity on law faculty generally, or, some would argue, upon faculty with more status than those usually teaching legal writing,<sup>46</sup> would likely be met with considerable objection unless there was a valid educational reason for such conformity and those faculty agreed to coordinate their selection of teaching materials.<sup>47</sup>

Complicating the analogies between legal matters and textbooks and lawyering courses and classrooms is the impact cases and other legal matters may have beyond the students in the classroom. Some cases may create difficulties, politically and economically, for the university, law school, or other law faculty. Courses in which professors act as lawyers not only help law students learn, they also influence the behavior of nonstudents and other institutions. But does that impact allow the dean or faculty more leeway under academic freedom principles to control what (the legal matters selected) or how something (the representational strategy) is taught in the law school course?

Unfortunately, there appears to be little guidance on how academic freedom applies when teaching outside the traditional classroom. We have not found any discussion of how the principles of academic freedom apply to the clinical experience in medical or other professional schools or in undergraduate experiential or service-learning courses. But as a recent special ABA committee noted, nothing in AAUP statements on academic freedom “says or implies that it might be permissible to discriminate among fields of study by allocating more academic freedom to some and less to others.”<sup>48</sup> In addition, the AAUP’s staff counsel has argued that “[clinical faculty], too, need academic freedom to make decisions about how best to educate students.... If academic freedom is

46. Many commentators note that legal writing faculty, who are usually women, generally have less status, and thus fewer rights, than other law faculty. *See, e.g.*, JoAnne Duranko, *Second Class Citizens in the Pink Ghetto*, 50 *J. Legal Educ.* 562 (2000).

47. In selecting textbooks, law professors appear to enjoy more academic freedom than some other university professors. For example, it is not uncommon for undergraduate university departments, through committees or some other mechanisms, to select a single textbook for foundational or entry-level courses taught by several different faculty members. Telephone Interview with Michael A. Olivas, Professor, University of Houston Law Center and former General Counsel, AAUP, in Santa Fe, N.M. (Aug. 1, 2008). Nonetheless, the selection is based upon educational considerations. *Id.*; *see also* AAUP, *supra* note 40 (noting that where teaching duties are shared among faculty members and require coordination and structure, the decisions of the group on course content, syllabi, and examination may prevail over the dissenting position of a particular individual).

48. ABA, Report of Special Committee on Security of Position (May 2008).

intended to protect the learning process and the search for truth, it cannot be a privilege enjoyed solely for faculty and students in traditional classrooms.”<sup>49</sup>

It is also important to note that law schools, as professional schools, have an obligation to train students to be effective attorneys and that the ABA has acknowledged that some legal skills may be best learned in the context of actual litigation or other practice settings.<sup>50</sup> If recent calls for legal education reform are heeded, this will likely become more of an issue as law schools provide additional opportunities to learn legal skills in the context of real-life experiences.<sup>51</sup> Moreover, both the ABA and AALS stress the need for law schools to advance the legal profession’s responsibility to ensure that legal assistance is available to those who cannot afford the services of the private bar.<sup>52</sup> The AALS further highlights the responsibility of professors, and hence the legal academy, to “assist students to recognize the responsibility of lawyers to advance individual and social justice.”<sup>53</sup>

Given the growing consensus of opinion that more experiential learning opportunities are needed and that law schools have the obligation to advance access to justice for those unable to secure private counsel, the legal academy should embrace academic freedom norms broad enough to recognize and defend the decisions that professors make in pursuing those experiences for students. At the same time, academic freedom should not be so broadly construed to permit the professor to disregard established educational guidelines for the types of cases appropriate for a particular course.

49. Jonathan R. Alger, *Legal Watch: Academic Freedom in the “Real World,”* *Academe*, Mar.-Apr. 2000, at 119.
50. ABA Standards, *supra* note 4, at Std. 302(b)(1).
51. Both the Carnegie Foundation for the Advancement of Teaching and the Best Practices Project have called for greater integration of legal theory and experiential learning. William M. Sullivan et al., *Educating Lawyers* (Jossey-Bass, San Francisco, 2007); Roy Stuckey et al., *Best Practices for Legal Education* (Clinical Legal Education Assn., New York, 2007).
52. ABA Standards, *supra* note 4, at Std. 302(b)(2); AALS, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* (2003).
53. AALS, *supra* note 52. We do not suggest that a university or law school may not choose the appropriate focus for a clinic for strategic reasons, for example a clinic to represent children. A particular subject matter focus may assist a school with fundraising, generate positive publicity, or differentiate the law school from competing schools. Indeed, some schools adopt particular clinic courses because there is grant support for that specific clinic. Although one may argue that such motivations have little to do with identifying the best teaching cases or assessing the best way to provide needed legal services to underserved communities, these strategic motivations, for clinics and other aspects of the law school curriculum, are part of the accepted norms for law schools. Thus, we focus solely on the issues presented by intrusions into educational decisions of faculty in experiential courses that are at odds with academic freedom and professional responsibility norms.

### The Professional Responsibilities of a Practicing Professor

In addition to their academic role as professors, law teachers handling legal matters in their courses are lawyers. As such, they have professional responsibilities toward clients that other members of the legal academy do not. Also, like a lawyer in a law firm, the typical clinical professor usually has ethical duties and reporting obligations as a subordinate or supervising attorney.

When a dean, clinical program director, or law faculty seeks to influence a law professor's case decisions, four primary ethical concerns arise: the roles and responsibilities of law school administrators; client confidentiality; conflicts of interest; and the allocation of authority between client and attorney.

#### *Law School Administrators as Law Firm Managers*

When analyzing lawyering in the academy, the roles and responsibilities of law school administrators, especially the clinical program director, in relation to the individual professor are important. To understand this relationship, it is necessary to define the law office within which the professor practices. If no one else is involved in the client representation and sufficient measures are taken to avoid inadvertently creating a program-wide law firm through shared office space, the law firm could be the individual law clinic or course the professor teaches.<sup>54</sup> Where professors work together on cases or share office space and personnel, the entire clinic program may be defined as a law firm.

Whatever the size and composition of the firm, an ABA ethics opinion makes clear that no lawyer-client relationship exists between clinic clients and the governing body of a law clinic, defined as the law school dean, faculty, and university officials.<sup>55</sup> Hence, as a general rule, school administrators not working in the clinic are not part of the law clinic firm, do not have an attorney-client relationship with clinic clients, and are not entitled to confidential client information unless the client has consented to the disclosures.

Most schools portray their various law clinics to the public as parts of a single law school clinical program or law firm.<sup>56</sup> In almost all cases, clients agree to be represented by "the law clinic," not solely by an individual faculty member.<sup>57</sup> Whenever a clinical program operates as a law firm, the clinical

54. See Model Rules of Prof'l Conduct R. 1.0(c) & cmt. [2] [hereinafter Model Rules]; Restatement (Third) of the Law Governing Lawyers § 123(3) & cmt. e [hereinafter Restatement]. "[H]ow the clinical program is structured and held out to the public will determine whether or not for conflicts purposes each individual clinic will be considered a separate law firm or all of the clinics in the entire clinical program will be treated as one law firm." Peter A. Joy & Robert R. Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 *Clinical L. Rev.* 493, 529 (2002); see also Rovner, *supra* note 20, at 1122-25.
55. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).
56. Joy & Kuehn, *supra* note 54, at 530.
57. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1428 (1979) (stating that "absent a special agreement, the client employs the legal services office as a firm and not a

program director takes on managerial authority over the work of the clinic and may also have direct supervisory authority over some or all of the other faculty lawyering in the clinic law office. Prevailing ethics rules define the rights and responsibilities of the clinic director in relation to the other clinical faculty.<sup>58</sup>

These same rules designate other clinical faculty as “subordinate” lawyers.<sup>59</sup> By operating within a law firm and not as sole practitioners, clinic professors may have to yield some professional autonomy to the firm’s supervising attorney—the clinic director—just as lawyers in a firm or a legal services office do.<sup>60</sup> As the ABA explained in the context of a legal services office:

Staff lawyers of a legal services office are subject to the direction of and control of senior lawyers, the chief lawyer, or the executive director (if a lawyer), as the case may be, just as associates in any law firm are subject to the direction and control of their seniors. Such internal communication and control is not only permissible but salutary. It is only control of the staff lawyer’s judgment by an external source that is improper.<sup>61</sup>

As the managing attorney, the clinical program director assumes some responsibility for the actions of other clinic lawyers when the clinical program operates as a single law firm. Professional responsibility rules require attorneys with managerial authority to establish internal policies and procedures to provide reasonable assurance that all lawyers in the firm conform to ethics rules.<sup>62</sup> As a managing lawyer, the program director may be responsible if the director has knowledge of another clinic lawyer’s violation of rules of professional conduct.<sup>63</sup> Clinical program directors have similar obligations toward the actions of nonlawyers, including law students and staff.<sup>64</sup> Therefore, where a clinical program director assumes authority comparable to that of a partner in a law firm, that director is at least indirectly responsible for all the work done in the law clinic and generally would be expected to prohibit

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particular lawyer”); accord ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974).

58. Model Rules, *supra* note 54, at R. 5.1. Ethics rules note the distinction between a lawyer with managerial authority and one who may have supervisory authority. A lawyer with “managerial authority over the professional work of a firm” may be a partner or may be a lawyer “having comparable authority in a legal services organization or a law department of an enterprise or government agency.” *Id.* at R. 5.1 cmt. 1. A lawyer also may have direct supervisory authority over the work of another lawyer that is distinct from the managerial authority. *Id.* at R. 5.1(b).

59. *Id.*, at R. 5.2.

60. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974); ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1428 (1979).

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

62. Model Rules, *supra* note 54, at R. 5.1(a), (b); Restatement, *supra* note 54, at § 11(1), (2).

63. Model Rules, *supra* note 54, at R. 5.1(c); Restatement, *supra* note 54, at § 11(3).

64. See Model Rules, *supra* note 54, at R. 5.3; Restatement, *supra* note 54, at § 11(4).

actions by a subordinate clinic attorney or students that would violate rules of professional conduct.

In addition, the clinical program director may have direct supervisory authority over another faculty member lawyering in the clinic firm, for example in a clinic that is co-taught by the clinic director and other faculty or in a clinic organized so that the clinical program director has some lawyering involvement in all cases. Indeed, a clinic may be organized in such a way that some faculty other than the clinical program director have direct supervisory authority over other clinic lawyers. This may occur when a clinic uses lawyers who are clinical fellows or when newer clinical faculty are paired with more experienced clinical faculty.

Thus, in considering the propriety of internal influences on a professor's judgment as a lawyer, some ethics rules recognize that, as a lawyer operating within the clinic law firm, the professor is subject to the authority of the clinical program director in the director's managerial role and subject to the program director or any other lawyer who has a direct supervisory role over the professor's lawyering. Only when the professor is the sole instructor in a clinic or other course with a real-life experiential component and not as part of a "firm" within the law school would the professor essentially be acting as a sole practitioner.

The law school's hierarchy also may be a complicating factor in resolving issues of professional responsibility. A clinical program director who holds a faculty rank equal to or less than another faculty member in the program may encounter difficulty in presuming to supervise the professional judgments of other faculty. Many program directors are treated as a "first among equals" and given only administrative responsibilities over others in the program. Additionally, junior faculty on tenure track or long-term contracts may be particularly sensitive to the opinions of senior colleagues, and faculty on short-term or at-will contracts may feel that vulnerability even more keenly.

#### *Client Confidentiality*

Unless sharing the information with a dean or other official outside the course advances the client's interests, the professor-attorney must protect confidential client information.<sup>65</sup> While this principle may not prevent outside influences on clinic decisions, it at least means that, in the absence of client consent, professors may only provide outsiders limited information about

65. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-393 (1995) (holding that a lawyer employed in a government office may disclose to a nonlawyer supervisor information relating to the representation of a client only if such disclosure would help carry out the client's representation, unless the client consented to the disclosure after consultation or the information was disclosed in a way that does not compromise client confidentiality); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (reiterating that any information sought by a board of directors of a legal services office must be reasonably required for a legitimate purpose and not used to restrict the office's activities); *see also* Model Rules, *supra* note 54, at R. 1.6 cmt. 5; Restatement, *supra* note 54, at § 60 cmt. f.

their cases. Therefore, when a university official or law school dean seeks to influence a faculty member's representation of a client, they may be acting on incomplete information.

The confidentiality responsibilities of the clinical program director may be much different. If the program is organized as a joint law office in which all client information is presumed to be shared, then the director is privy to client confidences just as are lawyers in a private law firm.<sup>66</sup>

If the clinical program is organized as distinct law offices for each particular clinical course, then the program director may not have any more access to confidential client information than any other faculty member not teaching in the particular clinic. To attain that status, each clinical course would have to be "held out to the public as a separate law office entity with separate support staff, separate filing systems, separate computer systems, and other adequate measures to assure that confidential information from clients in one clinic will not be shared among the students and faculty in other clinics."<sup>67</sup> In such an arrangement, steps must also be taken to prevent the director of the clinical program from accessing confidential information about clients not in her particular clinic.

#### *Conflicts of Interest*

Attempts to influence case decisions of faculty lawyering in the academy also may present conflict of interest issues. A professor practicing law cannot permit a person who provides compensation or employment, be it a dean, university president or trustee, to interfere with, direct, or regulate that lawyer's independent professional judgment or otherwise interfere with the client-lawyer relationship.<sup>68</sup> The lawyer's obligation to a client is not modified by a third-party's employment of the lawyer.

One way clinical programs may avoid potential conflicts of interest between a client and a law professor's obligations to the law school or university is by implementing policies that prohibit representing clients in disputes with the university or law school.<sup>69</sup> Many law school clinics have such policies.<sup>70</sup>

Another area for potential conflicts arises when a professor represents a client in a controversy with a member of the governing body of or a major donor to the university or law school. To represent a client in such a matter, the faculty member must reasonably believe that her professional judgment would not be adversely affected by her personal interests—that the donor does not have control or influence over the faculty member's salary, contract

66. Model Rules, *supra* note 54, at R. 1.10 cmt. [2], 1.9 cmt. [6]; Restatement, *supra* note 54, at § 123 cmt. b.

67. Joy & Kuehn, *supra* note 54, at 529-30.

68. Model Rules, *supra* note 54, at R. 1.8(f)(2), 5.4(c); Restatement, *supra* note 54, at § 134.

69. Joy & Kuehn, *supra* note 54, at 551.

70. *Id.* at nn.217-18 and accompanying text.

renewal, or tenure. In such situations, conflict of interest rules do not prohibit representation, so long as there is full disclosure and client consent.<sup>71</sup>

Still, in some instances, it may be unreasonable for a faculty member to believe that her professional judgment may not be impaired by litigating against a member of the university or law school governing body or influential donor. Such persons may have substantial influence with the university president or law school dean, and those administrators do have authority over the faculty member's terms and conditions of employment.

Additionally, junior faculty who do not have tenure or others without presumptively renewable long-term contracts may be particularly cautious about taking on any potentially controversial matter. They may feel conflicted between their professional responsibility to provide legal services to those otherwise unable to obtain counsel and their personal interest in avoiding controversies that may threaten their employment. No matter how mundane the legal matter, clinical faculty can become unwittingly embroiled in a controversial matter that threatens their job security if the opposing party, opposing counsel, or someone else interested in the matter believes that outside pressure will cause a university administrator or the law school dean to intervene. Whenever there is an attempt to influence how a faculty member represents a client, a potential conflict of interest is present.

#### *Allocation of Authority Between Client and Attorney*

The allocation of authority between the client and attorney may become an ethical issue particular to lawyering in the academy where a faculty member seeks to limit the scope of services to a client due to law school or university restrictions on client representation, such as a restriction on suing the state or seeking certain types of relief, like attorney's fees. Ethics rules require a lawyer to abide by the client's decisions concerning the objectives of representation and consult with the client as to the means.<sup>72</sup> If a client has a viable cause of action against a particular party, offering to represent the client on the condition that the professor would not sue certain defendants or only seek certain remedies against a particular party may waive important legal rights for the client.

To be sure, ethics rules permit some limitations on the scope of representation, but only if the limitation is reasonable under the circumstances and the client gives informed consent.<sup>73</sup> To obtain that consent, the faculty member must advise the client how the limitation might negatively impact the client.<sup>74</sup> Such limitations can be problematic when dealing with an indigent client unless the

71. *Id.* at 552-55; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 688 (1997).

72. Model Rules, *supra* note 54, at R. 1.2(a); Restatement, *supra* note 54, at § 21.

73. Model Rules, *supra* note 54, at R. 1.2(c) & cmts. 6-8; Restatement, *supra* note 54, at § 19.

74. Kuehn & Joy, *supra* note 9, at 2043-44.

faculty member can identify alternative legal representation if the client does not consent.

Once representation has begun, ethical norms permit the lawyer-professor to withdraw from the representation only if there is a fundamental disagreement with the client, the representation may result in an unreasonable financial burden on the lawyer, or other good cause exists. To ethically conclude the representation, the attorney-client representation must be terminated in a way that protects a client's interests, including notice to the client and an opportunity to obtain other counsel.<sup>75</sup>

### **An Academic Freedom and Professional Responsibility Framework for Lawyering in the Academy**

With this overview of academic freedom principles and professional responsibility rules in mind, in this section we consider the three most prevalent types of internal influences on case or legal matter decisions: 1) university policies limiting case selection or means of representation; 2) administration control over individual case selection; and 3) intervention in ongoing cases and legal matters. These real-world examples highlight the need to consider the point in the attorney-client relationship at which the intervention occurs and the relationship between the person seeking to influence case decisions and the professor handling the matter.

#### *Policies Limiting Case Selection or Means of Representation*

The first type of internal influence occurs when university officials establish policies that limit client representation decisions. In the 1970s and 1980s, several states attempted to enact legislation or take other measures that would prohibit law professors at state law schools from bringing suits against the state or representing certain types of clients such as prisoners.<sup>76</sup> In most instances, the measures failed or were temporary, but university officials at some schools have imposed restrictions on their law school clinics bringing actions against the state.<sup>77</sup> These restrictions typically prohibit even cases that clearly fall within the mission and types of matters handled by the clinic and do not apply to lawsuits against other parties.

In addition to limitations on types of cases, the university or law school may limit how a lawyer-professor's course may represent a client. For example, clinics at some state-funded schools have policies that forgo requests for

75. Model Rules, *supra* note 54, at R. 1.16(b)-(d); Restatement, *supra* note 54, at §§ 32-33.

76. See Kuehn & Joy, *supra* note 9, at 1977-81 (discussing examples from Arkansas, Colorado, Idaho and Iowa).

77. For example, the University of Tennessee Board of Trustees adopted a policy that clinics cannot bring significant litigation against the state. Douglas A. Blaze, *Déjà vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 Tenn. L. Rev. 939, 960 & n.180 (1997).

attorney's fees when a state entity is the opposing party.<sup>78</sup> Policies also prohibit pursuing claims as a class action or engaging in legislative lobbying.<sup>79</sup>

These types of restrictions have been adopted prior to a client's request for assistance, and in some instances prior to the opening of the law clinic. The motive usually is not related to the educational mission of the university or a concern about the allocation of scarce resources. Instead, the policies seek to protect certain parties or avoid potentially controversial cases in order to shield the university from criticism by politicians and possible threats to state funding.

There is no educationally sound justification for intruding on the decision-making authority of the attorney-professor by imposing such restrictions. In addition, it has generally been university administrators, not the faculty governing body, that have adopted the restrictions. The AAUP has stated that on such fundamental areas as curriculum and instructional methods, the power of review lodged in the university governing board or president "should be exercised adversely only in exceptional circumstances and for reasons communicated to the faculty."<sup>80</sup> Thus, in our view, such efforts to avoid controversy or appease certain influential persons or groups infringe on both the faculty's collective right to establish educational policies and undermine the academic freedom of the individual professor to choose the most appropriate and effective means to educate students.<sup>81</sup>

Nevertheless, we are not aware of any instance of a law school or university faculty directly challenging or resisting such restrictions. To date, it appears that faculties have acquiesced to university administrators who have established policies that control the subject matter and general content of clinic and other client representation classes, even where those policies may not advance the educational purposes of the institution.

As for professional responsibility considerations, ethical norms disfavor, but do not preclude, such prior restrictions. ABA ethics opinions have repeatedly noted that boards that oversee legal services offices are vested with the authority to choose the types of cases and clients that will be represented.<sup>82</sup> However, these opinions caution against establishing guidelines that prohibit acceptance of controversial clients or cases that align the legal services office

78. See Kuehn & Joy, *supra* note 9, at 2036 & n.300.

79. For example, the University of Alabama School of Law has a policy that its clinics will not lobby on behalf of clients.

80. AAUP, *supra* note 39.

81. Such restrictions also run contrary to the AALS's exhortation that law professors, and likewise law schools, have an enhanced obligation to pursue justice and "should assist students to recognize the responsibility to advance individual and social justice." AALS, *supra* note 52.

82. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 343 (1977); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1252 (1979).

against government agencies or officials.<sup>83</sup> Rather, case intake policies should encourage, not restrict, acceptance of unpopular clients and cases, particularly where the clients may not otherwise be able to obtain legal assistance.

Although ethical precepts strongly urge lawyers not to preclude such cases, disciplinary rules do not prohibit such restrictions. Because these restrictions are imposed prior to the formation of the attorney-client relationship, it cannot be said that this is an instance where third-parties are interfering with the professional judgment of an attorney in the representation of a client.<sup>84</sup> Even a prior restriction on what an attorney-professor may do within a case may be permissible if the client gives informed consent and the limitation does not result in the attorney violating other ethical rules.<sup>85</sup>

Thus, while both academic freedom and professional responsibility norms argue against broad case restrictions, university officials have so far been able to adopt such prohibitions without challenges to their authority.

#### *Control Over Individual Case Selection*

A few law schools have adopted policies that vest pre-approval in school officials of certain types of law clinic cases that might bring the school into conflict with politicians, donors, or alumni. These policies usually require the faculty member to disclose to the dean information concerning the proposed case and obtain approval before commencing to represent the client.<sup>86</sup>

Decanal control over individual case selection is usually motivated by a desire to avoid bad publicity or outside attacks on the school. For example, a dean may block the efforts of a constitutional rights clinic or litigation seminar to represent individuals wishing to challenge a local government's crèche for fear of backlash against the school. Unlike restrictions barring representation of certain categories of clients or suits against certain parties, the professor may initially evaluate whether the matter would be appropriate for representation rather than face a blanket prohibition against certain types of matters. This second type of restriction is potentially narrower than a blanket prohibition

83. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

84. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1252 (1972) (explaining that provision prohibiting interference "is directed against interference with the exercise of the attorney's independent professional judgment in those matters which they do undertake on behalf of a client").

85. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1252 (1979); Model Rules, *supra* note 54, at R. 1.2(c); Restatement, *supra* note 54, at § 19.

86. See, e.g., Department of Clinical Legal Studies, University of South Carolina School of Law, Client Matter Selection Policy to Address Potential Conflicts with Institutional Interests (Nov. 2000) (on file with authors); Chris Saporita & Andrew Yoder, Practicing for the Earth: Training Law Students Through Environmental Law Clinics 12 (Bloomington, Ind., July 18, 2002) (referring to a review process then in effect for cases by the environmental clinic at Washington University) (unpublished report, on file with authors).

against certain types of cases, because the dean may agree to approve all of the matters. However, the case-by-case approval is also more expansive, because a dean may reject more matters than fixed case intake restrictions would have prohibited.

A dean who rejects such a potentially controversial case acts in the same manner as a dean who, by analogy, would seek to veto a professor's lecture topic after the faculty has approved the general scope and syllabus of the course. One difference, however, in this analogy is that since client matters come in one-by-one during the semester, there is no prior opportunity for the faculty or dean to review and approve all of the cases at the start of the course.

With respect to case-by-case review of matters by a dean or others outside of the clinic, a special committee of the AALS Section on Clinical Legal Education concluded:

The Committee believes strongly that case selection decisions should be based on articulated educational goals so as to minimize conflicts between the personal preferences of individual clinicians and educational objectives.... Once a clinic has articulated pedagogical goals, and made decisions about the types of cases that the clinic will accept based on those goals, the clinical faculty's choices about educational objectives, case selection, and case handling should be protected as part of the clinical faculty's academic freedom.<sup>87</sup>

Similarly, in arguing that external restrictions on the types of matters that clinics may handle would impinge on the academic freedom of law teachers, the AALS stated:

[I]t is clear that clinical teachers...have a First Amendment right to select cases as their course materials for their clinics....Law schools...have hired clinical teachers to teach law students lawyering skills and professional values through the representation of actual clients. Once these teachers have been hired for that purpose, they must have the right, like any other law professor, to choose the materials which in their opinion are best suited to performing their objective.<sup>88</sup>

Notwithstanding these statements, the potentially adverse impacts of clinic cases for the law school and university as a whole appear to have convinced some deans and faculties that case-by-case review of a professor's professional judgment is justified. It is unclear to us how the deans and faculties who have adopted such policies have aligned their positions with the academy's position on academic freedom. Perhaps the generally weaker status of clinicians in the legal academy explains why some faculties and deans impose such constraints.

87. Report of the Committee on the Future of the In-House Clinic, 42 J. Legal Educ. 508, 554 (1992).

88. Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule, *supra* note 41, at 557-58.

We have observed that in almost all instances of internal interference, the affected professor was untenured.

In response to a proposal to require a law clinic to obtain the dean's or a faculty committee's prior approval of clinic matters, the ABA's Committee on Ethics and Professional Responsibility concluded that such limits likely impair the independent judgment of clinic lawyers and their loyalty to clients.<sup>89</sup> The Committee reasoned that such case-by-case prior approval would "violate the professional ethics and responsibilities of the dean and of the lawyer-directors of the clinic."<sup>90</sup>

Unquestionably, pre-approval requirements run counter to the ethical norm that representation should not be denied to clients whose cause is controversial, especially where law clinics may be the "last lawyer in town."<sup>91</sup> But professional responsibility rules are "directed against interference with the exercise of the attorney's independent professional judgment in those matters which they do undertake on behalf of a client."<sup>92</sup> Hence, it is more accurate to say that such pre-approval is counter to the values and goals of the legal profession, but not an actionable ethics violation by the dean or faculty committee.

#### *Intervention in Ongoing Cases and Legal Matters*

Some law school officials have also attempted to override decisions by professors concerning ongoing legal matters. As discussed in the Introduction, some of the more troubling examples include notifying a client that the clinic was withdrawing from a human rights case without first discussing the matter with the clinic professor and instructing a clinic lawyer not to file a fee petition in a successful housing discrimination case where the opposing counsel were law school alumni.<sup>93</sup>

More commonly though, the intervention is indirect and even unintentional. There are likely few deans who have not been called by an alumnus, university donor, or government official about a law clinic case. If the dean asks the lawyer-professor for an explanation, or more pointedly for a justification, the inquiry can be perceived as pressure, particularly by junior faculty or those serving at the dean's pleasure. As noted above, surveys demonstrate that a significant number of clinical faculty worry about reactions to their client representation.<sup>94</sup>

One could perhaps analogize the most severe intrusions into ongoing case representation to a dean interrupting a class and instructing the professor

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

90. *Id.*

91. See Model Rules, *supra* note 54, at R. 1.2(b) & cmt. 5.

92. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1252 (1972).

93. See *supra* notes 11-14 and accompanying text. We are aware of additional examples of intervention in ongoing cases but those instances have not been publicized.

94. See *supra* notes 15-18 and accompanying text.

to end or modify the discussion or lecture. When such drastic intervention has occurred in a case, to our knowledge there has never been a claim that the professor was failing to provide proper legal representation for clients or educational opportunities for students. Intervening officials have usually claimed that the faculty member violated a policy or pre-filing procedure, albeit unwritten and unannounced, which forfeited any claim of academic freedom to proceed as the professor so chose.

Such severe actions undermine the credibility of the teacher, prevent the students from completing their course project, and inhibit the professional judgment of the clinical teacher, all harms antithetical to academic freedom norms. It is hard to imagine how a law school or law professor could model, as the AALS's best practices urge, the highest standards of ethics and professionalism for students when the school's actions show such lack of respect for the professor's academic freedom and professional responsibilities.

Where there is a question or complaint about a case, it is appropriate for a dean to request a brief explanation of the situation, just as the dean would with a complaint involving a classroom course. But, absent a gross breach of teaching standards or improper action that exposes the school to malpractice or other liability, school officials should wait until after the case is resolved to discuss the matter in detail and develop, with the faculty, appropriate prospective policies. Similarly, given the respect in law schools for the professional judgment of faculty, a school official must in all instances consult the professor before taking any action that might adversely affect a course or client.

Professional responsibility rules clearly prohibit interference in an ongoing legal matter, stating repeatedly that those who employ a lawyer to render legal services to another cannot be permitted to direct or regulate the lawyer's professional judgment.<sup>95</sup> One justification for such intervention could be that the lawyer's professional judgment was under the direction and control of the dean or clinical program director. As supervisors, those officials could assert that they are allowed in some circumstances to override the subordinate lawyer's professional judgment. Under this view, the dean or clinical program would not be an unauthorized outsider interfering in the client's case.

Yet the claim that decisions by a lawyer practicing in the academy are under the professional direction of a dean seems unfounded. To our knowledge, no dean claims to be the supervising lawyer with responsibility for making case-by-case decisions about the handling of a professor-lawyer's client matters in her school. If she did, then she must be appropriately licensed in that state, identified in malpractice insurance policies as such, and willing to assume the same ethics responsibilities as those borne by senior partners in law firms. Even if the dean did agree to assume such supervisory authority and duties, any action taken must comport with rules regarding the relationship between a supervising and subordinate lawyer and governing withdrawal from a case.

95. Model Rules, *supra* note 54, at R. 1.8(f)(2), 5.4(c).

On the other hand, as we explained when the clinical program is structured as a single law office, there are instances where a clinical program director may rightly claim to be the supervisory attorney of the clinic and intervene where a clinic lawyer acted contrary to ethics rules or clinic office policies. The ABA ethics committee has stated that only control of a staff lawyer's judgment by those outside the clinic law office, such as a dean or faculty committee, is improper under rules of professional conduct.<sup>96</sup>

Nevertheless, if the right to direct a subordinate lawyer resides with a clinical program director, that should be made clear in advance. While junior lawyers at a law firm or legal services offices may understand that partners or managing attorneys can direct them in a particular case or legal matter, most professors would be surprised if a clinical program director claimed such absolute authority unless this control was made explicit. Clarifying this relationship is especially important when the program director holds a faculty rank equal to or less than other faculty in the clinical program.

### **Defining the Boundaries of Academic Freedom and Professional Responsibilities When Lawyering in the Academy**

Having analyzed three types of internal influences on case decisions, we offer the following framework for defining the boundaries of academic freedom and professional responsibility norms when a professor practices law in the academy.

First, there is no professional responsibility norm that prevents administrators or faculty from imposing prior restrictions on the types of cases or other legal matters that a professor may undertake. Academic freedom norms recognize that the faculty acting collectively has the authority to impose limits on a course's subject matter and methods of instruction. However, the limits the faculty as a group imposes on client representation courses should be consistent with limits it imposes on other types of courses. Academic freedom norms also allow intervention by a dean or other university official only in exceptional circumstances. In addition, limits based on grounds other than educational merit or ethical norms are contrary to the educational mission of the law school.

Law schools also should follow the ABA's ethics opinion that schools not reject otherwise appropriate legal matters in order to avoid creating public controversy or antagonizing influential public officials.<sup>97</sup> Where the faculty believes that limitations on the legal matters or clients represented or on the means of representation are justified, the faculty should act in a way that is consistent with academic freedom norms applicable to other courses. The faculty also should strive to avoid possible disputes and misunderstandings with individual faculty members by making explicit, in writing, the types of

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

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

legal matters that may and may not be accepted for representation and the procedures for determining which particular matters to accept.

Second, once the faculty has approved the types of matters a clinic or seminar may handle, it should not vest case-by-case veto authority in the dean or other outside authority. Doing so infringes on the academic freedom traditionally vested in the teacher. Leaving case-by-case decision making with the professor also helps insulate the law school and dean from outside attacks, especially if there are clear case acceptance guidelines.<sup>98</sup> In a sense, if a dean can choose the case, then it would appear that Colin Powell's Pottery Barn rule of foreign policy would apply—"you break it, you own it."<sup>99</sup> That is, if the dean can veto legal matters, then the dean assumes responsibility for the legal matters that are accepted. In addition, when the dean keeps her distance, the law school and university authorities are able to attribute case decisions to the professor's academic freedom.<sup>100</sup> Indeed, some law school faculty reiterate the school's neutrality by inserting disclaimers in clinic documents indicating that the clinic does not purport to represent the position of the law school or university on the matter in dispute.<sup>101</sup>

Unfortunately many nonlawyers, and even some lawyers, have a difficult time separating the lawyer from the client represented even when there is a claim of neutrality. A law school dean often has to educate the university administration, both administrators and trustees, about the role of lawyers in representing clients. New deans, and even experienced deans who have not yet faced questions concerning clinic matters, would benefit from discussing strategies to deflect interference with more experienced deans and clinical faculty.<sup>102</sup> We do not underestimate how difficult it may at times be to fend off this outside interference, but we believe that ultimately this is the wisest approach and most consistent with academic freedom norms.

Each law school should also make explicit the role of the clinic director in the undertaking of new legal matters.<sup>103</sup> In the absence of a prior policy

98. See Susan Hansen, *Backlash on the Bayou*, *American Lawyer*, Jan.-Feb. 1998, at 51 (reporting on the dean's justifications for not intervening in a controversial law clinic case).

99. Bob Woodward, *Plan of Attack 150* (Simon & Schuster, New York, 2004).

100. See, e.g., Eamon N. Kelly, *Faculty Views Are Their Own, Not Tulane's*, *Times-Picayune* (New Orleans, La.), Sept. 30, 1993, at B6.

101. Kuehn & Joy, *supra* note 9, at 2004 n.151.

102. External interference in clinical programs is a frequent topic at new dean training sessions and most deans experience some inquiry over the work done by their clinical programs from alumni, trustees, university administrators, and others. Interview with Kent Syverud, Dean, Washington University School of Law in St. Louis, in St. Louis, Mo. (Aug. 6, 2008).

103. Indeed, when the clinical program is organized as a single law firm, the best practice is to have a written policy clearly delineating the authority structure and the rights and responsibilities of all faculty in the clinic. A written policy may especially benefit junior faculty and others without security of position by providing them with clear lines of authority for their lawyering.

granting the director supervisory authority over the professional legal work of the clinical professor, the director should respect the academic freedom of a particular professor to decide which legal matters are best for students, provided the faculty member's decision is consistent with established case guidelines. Should the director disagree with the professor's decision, the director should seek a prospective change in the types of legal matters that the clinic or professor may handle in the same way that prospective changes are made to the coverage of other courses in the law school's curriculum.

Third, with respect to ongoing cases, once the attorney-client relationship is formed, professional responsibility norms are paramount, generally granting the professor sole discretion, in consultation with the client, to make case decisions. Absent professional misconduct by the professor or a pre-existing agreement allowing the clinical program director's explicit involvement as a supervisory attorney, the fact that the professor is paid by the law school or has a subordinate faculty rank does not justify interference.

Even if the clinical program director has a case-by-case supervisory role, the director must always consider whether intervention in an ongoing matter is worth the potential damage to the director's relationship with the other professor. In addition, the program director must consider how such intervention might affect the goal of modeling the highest professional ideals in the clinic and the relationship between the professor and his students. Any intervention is likely to stigmatize the professor among students and should be avoided unless required to prevent or correct professional misconduct or liability. Academic freedom norms require, at the very least, that any intervention into a professor's representation of a client should be limited in scope and respectful of the professor's existing relationship with the students and client. Interventions also have a chilling effect on how other professors exercise their professional judgment whenever an administrator or other influential person expresses disapproval. Except in rare situations, disagreements about the handling of a case are best left for discussion and possible policy changes after the matter is resolved.

Fourth, but no less important, a faculty member lawyering in the academy should not face discharge, contract non-renewal, or other penalty over a case or client decision. As we have noted throughout, these decisions are educational as well as professional—educational because the case or other legal matter is the means to teach students and professional because the decisions are a necessary part of client representation. Only actions that violate a clearly articulated law school policy or a significant ethical obligation to the client rise to the point of “good cause” for personnel actions under academic freedom principles.<sup>104</sup>

104. See William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *The Concept of Academic Freedom* 59, 71 (Edmund L. Pincoffs ed., University of Texas, Austin, 1975) (arguing that academic freedom provides faculty with the freedom to pursue teaching “without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of that freedom”).

As discussed previously, academic freedom norms apply to all engaged in teaching, without regard to whether the person is eligible for tenure or teaching outside the classroom. Therefore, those norms should provide the same protection against employment sanctions that a tenured classroom faculty member enjoys.<sup>105</sup> Unless the faculty member is free to pursue a client's objectives without fear of retribution for displeasing a dean or others who control salary, promotion and perquisites, the faculty member will be placed in a personal conflict situation with the client that would require the client's informed consent.

Thus, it is generally only in prospective case selection that the faculty as a whole or the clinical program director may seek limits on the professional decisions of a professor lawyering in the academy. The faculty, on its own or through delegating the right to the dean or a committee, may set intake guidelines if such action is consistent with the academic norms of the law school and the limits the faculty imposes in other courses. Once the case is accepted, the dean or faculty has no right to intervene in the ongoing professional relationship between the professor-attorney and client. Where the clinical program is organized as a single law office, the clinical program director may be involved in establishing intake guidelines and other intake decisions. Even if a clinical program director has a supervisory role over the clinical faculty member, a director's intervention in ongoing matters should be very limited. Finally, a faculty member who does not violate stated law school policies and acts ethically in making a case decision or other professional judgment should not face negative repercussions in the law school.

### Conclusion

As a practical matter, we do not suggest that a professor's academic freedom rights and professional responsibility obligations should govern all issues involving lawyering in the academy. The dean, clinical program director, and faculty acting as a governing body all have a role in the development and implementation of the law school's instructional program. Nevertheless, when the issue is not whether the legal matter handled by the professor-lawyer has appropriate educational merit but, instead, whether it might put the university or law school in an uncomfortable position, schools should respect the academic freedom of the professor and the professional responsibilities of the lawyer. Everyone in the legal academy should model the highest professional and ethical ideals and recognize the important place of law professors and law schools in providing representation for indigent and unpopular clients and in

105. "Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens." AAUP, Recommended Institutional Regulations on Academic Freedom and Tenure Reg. 5(a) (2005), in Redbook, *supra* note 1, at 22, 26.

advancing social justice. If these higher ideals are kept in mind, then disputes over the proper role of professors in a particular case can be resolved in a way that does not harm students, clients, or the principles to which the legal profession and the legal academy aspire.