

# CONTROVERSY, CONFLICTS, AND LAW SCHOOL CLINICS

ADAM BABICH\*

*This article is about the risk of retaliation that is inherent in a law school clinic's decision to help clients express views that influential members of society may find controversial. The article examines a series of issues related to clinicians' management of this risk, including (1) whether cases that offend university donors or other powerful defendants create ethical conflicts for clinics, (2) whether clinicians should consider potential impacts on their home institutions when selecting cases, (3) whether clinicians and administrators of educational institutions should share information about case selection in an effort to manage risk; (4) whether clinicians can insulate their programs from criticism by a) representing only the poor, b) preserving spotless ethical records, or c) handling only claims that are worthy of vindication; and (5) whether law schools should limit clinical offerings to subject areas that are relatively unlikely to annoy society's movers and shakers. The article suggests resolutions to each of these issues, offers advice about clinicians' best tools for managing controversy, and urges law school clinics—and the institutions that house them—to live by their values.*

Academics' ideals of professionalism and integrity meet reality in the world of law school clinics, especially when clinics represent clients who take on powerful interests. By helping make their clients' voices heard on socially significant issues, clinics can offend people who are in a position to retaliate, testing the will of law schools and universities to live up to their own standards. Academic freedom, professional independence, and the lawyer's duty to broaden access to the legal system are all well and good in theory. But what happens when clinics' activities threaten to cost their home institutions real money? Should clinicians "rise above" their principles for the good of the university as a whole?<sup>1</sup> On one hand, no reputable law school would teach students to shirk their duties to expand access to the legal sys-

---

\* Adam Babich is a professor of law at Tulane University and directs the Tulane Environmental Law Clinic. Thanks to everyone who helped defeat Sen. Bill 549. Thanks also to Rebecca Lasoski and Zoe R. Wilde for their research assistance. And thanks to Professors Oliver Houck, Jamie Roskie, and Tania Tetlow, and to Walter and Jo Babich for their helpful comments.

<sup>1</sup> See JOHN KENNEDY, *PROFILES IN COURAGE* 8-9 (HarperCollins 2009) (1956) (discussing the political adage that "there are times when a man in public life is compelled to rise above his principles") (quoting FRANK R. KENT, *POLITICAL BEHAVIOR* 300 (1928)).

tem.<sup>2</sup> On the other, the Model Rules do not require clinics to accept cases without regard to consequences.<sup>3</sup> How, then, should clinicians manage the risk of retaliation inherent in an educational program that challenges the rich and powerful on behalf of clients?

This article explores questions relevant to efforts to keep law school clinics—and their universities<sup>4</sup>—out of political trouble. It begins with a brief description of a failed 2010 legislative attack on Tulane University, launched in retaliation for the Tulane Environmental Law Clinic's (TELC's) advocacy on behalf of clients. Next, the article analyzes a series of questions sparked in large part by that experience. First, does representing clients on controversial cases create a conflict between clinicians' duties to their clients and their loyalty to the institutions that employ them? The answer, as shown below, is no. Conversely, do clinicians have a duty to ignore all institutional ramifications when accepting cases? Again, the answer is no. Should university administrators be informed in advance about potentially controversial cases? Should these administrators be barred from sharing their concerns about representations with clinicians? No and no. Is it wrong for law school clinics to ever represent a client that might be capable of hiring a lawyer? Will clinics remain above reproach if they preserve spotless ethical records and avoid all marginal cases? No and not necessarily. Would it be better, then, for law schools to run clinics that stick to areas of the law where the risk of controversy is more remote? Of course not! The article shows that institutions which are serious about teaching law cannot afford to ignore one of the profes-

<sup>2</sup> The study of law is about more than mastery of a body of knowledge, an understanding of trial techniques, or tactical savvy. Instead, successful law students internalize the core values of the profession and learn to live by them. See Adam Babich, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447, 452-54 (2005).

<sup>3</sup> Once a clinic accepts a case, of course, it is clear that decisions about how to conduct the litigation must be made in the best interest of the client, consistent with clinicians' duty of loyalty to clients. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2009) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); *id.* R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . ."); *id.* R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment . . ."). RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. b (2000) ("[T]he law seeks to assure clients that their lawyers will represent them with undivided loyalty. A client is entitled to be represented by a lawyer whom the client can trust."); see also, e.g., LA. SUP. CT. R. XX § 6(g) (requiring law school clinic student practitioners to promise that they will not place their own interests or those of the clinic above the interests of their clients). If a clinician is unable to live with the ramifications of loyally representing an existing client, the clinician has the option of seeking to withdraw from the case. See *infra* note 86 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2009)).

<sup>4</sup> Some law schools, of course, are stand-alone entities while others are units within universities. For simplicity's sake, this article uses the term "universities" to refer to law clinics' mother institutions.

sion's highest callings: representation of "clients whose causes are in disfavor."<sup>5</sup> The article argues that the best tools for managing controversy are (1) education of law school constituents; (2) consistent and collective opposition to attacks on clinical education; (3) a principled but common-sense approach to case selection; and (4) maximum transparency to clinic students.

### I. AN ATTACK ON TULANE UNIVERSITY

This article grew from reflections on Tulane University's experience in 2010, when it faced a legislative attack inspired by opposition to TELC.<sup>6</sup> Louisiana Senate Bill 549, introduced on March 29, 2010, threatened to cut off an estimated \$45 million per year in state funds unless the University shut down or crippled most of its litigation clinics.<sup>7</sup> TELC's experience over the following month and a half was nail-biting because the industries that led the charge against Tulane have a history of getting their way before the Louisiana Legislature.<sup>8</sup> But it

<sup>5</sup> Am. Bar Assoc. & Assoc. of Am. Law Schools, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) ("One of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public."); see also *infra* notes 23 and 54.

<sup>6</sup> Senator Robert Adley, R-Benton, introduced the bill. S. B. 549, 2010 Leg., Reg. Sess. (La. 2010), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=690665>; see also, Adam Babich, *De-Lawyerling Legislation & Environmental Law Clinics: Can the Preemption Doctrine Protect Public Participation Rights?*, 61 CASE W. RES. L. REV. \_\_ (forthcoming 2011) (providing a detailed description of the history of Senate Bill 549).

<sup>7</sup> See Jordan Blum, *Industry Targets Law Clinics*, BATON ROUGE ADVOCATE, May 14, 2010, at 4A, available at <http://www.2theadvocate.com/news/93747274.html> ("Tulane currently receives close to \$45 million a year from in state funds for activities such as endowed professorships, cancer research, sickle cell clinics, medical residency training and state psychiatric care services, according to the university."); Editorial, *A Good Kill*, NEW ORLEANS CITYBUSINESS, May 24, 2010, p. 22, available at <http://neworleanscitybusiness.com/blog/2010/05/20/opinion-law-clinic-ban-dies-a-good-death> (The bill "would have effectively forced Tulane to decide between accepting state money and shutting down its law clinic" which "receives virtually no public funding.").

The proposed legislation would have been a blunt instrument, attacking most litigation clinics in the state. It would have prohibited civil litigation clinics from (1) filing "a petition, motion, or suit against a government agency," (2) "seeking monetary damages," and (3) "raising state constitutional challenges in state or federal court." S.B. 549, 2010 Leg., Reg. Sess. (La. 2010) p. 2, lines 15-19. It would also have required that law school clinics "be subject to oversight by the House Committee on Commerce and the Senate Committee on Commerce, Consumer Protection and International Affairs." *Id.* at 3, lines 8-10. But the bill's sponsor argued that his intent was only to go after TELC. See Editorial, *Law Clinic Bill Is a Bad Idea*, BATON ROUGE ADVOCATE, May 19, 2010, at 8B, available at <http://www.2theadvocate.com/opinion/94220164.html> ("Although the Tulane Environmental Law Clinic is the target of Adley's bill, his bill would hamper other university law clinics in the state.").

<sup>8</sup> See John Maginnis, *Oil Mess Puts Lawmakers on Slippery Slope*, NEW ORLEANS TIMES-PICAYUNE, June 9, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/oil\\_mess\\_puts\\_lawmakers\\_on\\_sli.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/oil_mess_puts_lawmakers_on_sli.html) ("When the Louisiana Chemical Association pushed

was also gratifying due to an outpouring of support from clients and the legal and education communities.<sup>9</sup> The bill died in committee on May 19, 2010.<sup>10</sup> About two months later, in what felt like a happy ending, the Federal Bar Association's New Orleans Chapter honored TELC with its Camille F. Gravel Jr. Award for *pro bono* service.<sup>11</sup> A month after that, one of TELC's 26 student-attorneys began the first day of a new semester by arguing and winning his first case before a Louisiana district court.<sup>12</sup>

Law school clinics, however, are never permanently out of the woods. Senate Bill 549 was not the first political attempt to de-lawyer a clinic's clients and it is unlikely to have been the last.<sup>13</sup> Moreover,

---

its bill aimed at impeding the Tulane Environmental Law Clinic from suing state agencies or businesses on behalf of poor citizens, it experienced the rare sensation, usually reserved for its opponents, of being ganged up on in committee and sent packing"); Bill Barrow, *Senator, Louisiana Chemical Association Get No Support For Bill to Limit Student Law Clinics*, NEW ORLEANS TIMES-PICAYUNE, May 19, 2010, at A2, available at [http://www.nola.com/politics/index.ssf/2010/05/senator\\_louisiana\\_chemical\\_ass.html](http://www.nola.com/politics/index.ssf/2010/05/senator_louisiana_chemical_ass.html) (noting that the outcome was "a rare defeat for the chemical, oil and gas industries").

<sup>9</sup> See, e.g., ACLU of Louisiana e-mail to senators (May 18, 2010) (on file with author); Bogue Lusa Waterworks District Letter to Sen. Ann Duplessis (May 17, 2010) (on file with author) (note: former Senator Ann Duplessis chaired the Louisiana Senate Committee on Commerce, Consumer Protection and International Affairs during the hearing on bill 549); New Orleans City Council Member Susan Guidry Letter to Sen. Ann Duplessis (May 13, 2010) (on file with author); Statement of ABA President Lamm Re: Louisiana Senate Bill 549 to Restrict Law School Clinic Activities (May 12, 2010), <http://www.abanow.org/2010/05/statement-of-aba-president-lamm-re-louisiana-senate-bill-549-to-restrict-law-school-clinic-activities>; Paincourtville Volunteer Fire Department Letter to Sen. Adley (May 11, 2010) (on file with author); Clinical Legal Education Association Letter to Sen. Ann Duplessis (May 10, 2010), <http://www.cleaweb.org/CLEA%20ltr%20La.%20SB%20549.pdf>; American Association of Law Schools Letter to Sen. Ann Duplessis (May 10, 2010), <http://aals.org/documents/PragerLetterMay10.pdf>; Louisiana Environmental Action Network Letter (on behalf of more than 20 community groups) to Tulane President Cowen (May 7, 2010) (on file with author); Society of American Law Teachers Letter to Sen. Ann Duplessis (April 29, 2010), [http://www.saltlaw.org/userfiles/file/SALT%20PDF%20Documents%20/LAClinic\\_4-29-10\\_Senator%20Ann%20Duplessis.pdf](http://www.saltlaw.org/userfiles/file/SALT%20PDF%20Documents%20/LAClinic_4-29-10_Senator%20Ann%20Duplessis.pdf); Louisiana State Bar Association Bill Status Report 5 (June 2, 2010), <http://www.lsba.org/2007InsideLSBA/2010PositionBillsOPPOSE.pdf>.

<sup>10</sup> Jordan Blum, *Panel Derails Law Clinic Bill*, BATON ROUGE ADVOCATE, May 20, 2010, at 1A, available at <http://www.theadvocate.com/news/94371459.html>.

<sup>11</sup> See Press Release, *Tulane Environmental Law Clinic Honored with Camille F. Gravel Jr. Pro Bono Award by Federal Bar Association* (July 27, 2010), <http://www.law.tulane.edu/tlsNews/newsItem.aspx?id=14150>. The Honorable Sarah S. Vance, Chief Judge of the U.S. District Court for the Eastern District of New Orleans, presented the July 23, 2010 award and New Orleans Mayor Mitch Landrieu, the luncheon speaker, spoke up for the Clinic at the event.

<sup>12</sup> Jason Brown, *Judge Vacates Gueydan Facility's Permit*, BATON ROUGE ADVOCATE, Aug. 24, 2010, at 1BA, available at <http://www.theadvocate.com/news/101355389.html?showAll=y&c=y> ("It was great to see the reaction of the clients," the student attorney told the press. "This is the community that they live in."). The court vacated a state permit for an underground injection well for oil and gas waste in Vermilion Parish, Louisiana. *Id.*

<sup>13</sup> Editorial, *First, They Get Rid of the Law Clinics*, N.Y. TIMES, April 11, 2010, <http://www.nytimes.com/2010/04/12/opinion/12mon3.html> (noting that "Maryland's lawmakers

even a failed attack can give clinic opponents hope of chilling clinic representation of clients on controversial cases.<sup>14</sup> For example, shortly after Louisiana Senator Robert Adley introduced Senate Bill 549, the Maryland House of Delegates dropped a similar threat to withhold funding from the University of Maryland in retaliation for an environmental law clinic's handling of a case against Purdue, a politically influential company.<sup>15</sup> A Maryland House member explained that he believed "the message had been heard"—implying that he thought the threat to cut funding would be enough to back the clinic off.<sup>16</sup> The University of Maryland School of Law's environmental law clinic was not noticeably cowed, however. It went on to achieve a significant legal victory for its clients over Perdue.<sup>17</sup>

---

[had] been wrestling over a bill that threatened the funding of the University of Maryland's law clinic . . . "); see generally Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971, 1989 (2003) (discussing examples of attacks on law school clinics); Babich, *supra* note 2, at 447 (arguing that for clinics whose clients "challenge powerful interests or affect issues of community or state-wide concern, controversy becomes almost inescapable").

<sup>14</sup> Indeed, it is questionable whether Senate Bill 549's drafters expected the proposed legislation to survive legal challenge. See *Succession of Wallace*, 574 So. 2d 348, 350 (La. 1991) (holding that the Louisiana Supreme Court "has exclusive and plenary power to define and regulate all facets of the practice of law . . ."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (overturning a law prohibiting Legal Services Corporation lawyers from raising constitutional challenges to state or federal laws because, *inter alia*, "the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"); see also *infra* note 109.

<sup>15</sup> Karen Sloan, *Partial Victory for Law Clinic in Fight With Legislature*, NAT'L L.J., April 6, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202447579670>; David A. Fahrenthold, *Md. Legislature Scrutinizing Law Clinic Over Chicken Farm Suit*, WASH. POST, March 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/27/AR2010032702380.html> (According to a Perdue spokesperson, "Eastern Shore legislators raised objections about the clinic after a talk with the company chairman, Jim Perdue.").

<sup>16</sup> Annie Linskey, *Md. House of Delegates OKs \$13 Billion Operating Budget*, THE BALTIMORE SUN, April 3, 2010, [http://articles.baltimoresun.com/2010-04-03/news/bal-md.budget03apr03\\_1\\_eastern-shore-democrat-fund-law-school](http://articles.baltimoresun.com/2010-04-03/news/bal-md.budget03apr03_1_eastern-shore-democrat-fund-law-school); Robert R. Kuehn & Peter A. Joy, "Kneecapping" *Academic Freedom: Attacks on Law School Clinics*, 96 *ACADEME* (Nov. - Dec. 2010), <http://www.aaup.org/AAUP/pubsres/academe/2010/ND/feat/kueh.htm> ("While the threat of cuts was finally withdrawn, one legislator boasted that the university now knows 'we'll be watching' if it takes on other business interests favored by politicians.").

<sup>17</sup> *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, No. WMN-10-cv-0487, 010 WL 2924661, at \*9 (D. Md. July 21, 2010) (holding that as an "integrator" that contracts with [farmers] to raise [its] chickens," Perdue may be liable for discharges of poultry waste from the farm depending "on the basis of its level of control" over the farm's operations). Granted, this victory was the "mere" denial of a defendant's motion to dismiss. But whether or not the Assateague Coastkeeper goes on to win or lose on the merits, it has likely put a significant dent in the ability of poultry companies to avoid Clean Water Act liability by hiding behind small farmers. See Ian Urbina, *School Law Clinics Face a Backlash*, N.Y. TIMES, April 3, 2010, <http://www.nytimes.com/2010/04/04/us/04lawschool.html> (describing the lawsuit as "the first effort in the state to hold a poultry company accountable for the environmental impact of its chicken suppliers").

## II. IS CONTROVERSY A CONFLICT?

Some scholars argue that controversial cases create potential conflicts of interest.<sup>18</sup> A controversial case in the context of a law school clinic might be adverse to a university donor or to someone else with sway over the university.<sup>19</sup> It might also involve a project that politicians or other powerful people care about.

Proponents of the controversy-is-a-conflict theory base their argument on clinicians' vulnerability to retaliation if their clients' positions upset the clinicians' academic employers or cause opponents to pressure those employers. The resulting threat to the clinicians' job security, according to this theory, may create an ethical conflict. Specifically, this would be a "personal interest conflict" under Model Rule 1.7(a)(2), arising because clinicians' fear of retaliation supposedly creates a "significant risk" that their work on behalf of clients

<sup>18</sup> See Robert R. Kuehn & Peter A. Joy, *Lawyer in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 J. LEGAL EDUC. 97, 113 (2009) (arguing that clinicians may become "embroiled in a controversial matter that threatens their job security" if someone interested in the case "believes that outside pressure will cause a university administrator or the law school dean to intervene" and "[w]hen there is an attempt to influence how a faculty member represents a client, a potential conflict of interest is present"). Defendants in TELC's clients' cases have also advanced the argument. See, e.g., Frilot LLC Letter on behalf of Murphy Oil USA, Inc. to Adam Babich (Dec. 10, 2008) (on file with author) ("In light of Tulane's financial interest in Murphy, we believe that the law clinic may have a conflict of interest under Louisiana Rule of Professional Conduct 1.7(a)(2).").

Professors Kuehn and Joy advance the argument in the context of law clinics, but the analysis would apply equally to other contexts, such as law firm practice. See Matthew W. Bish, *Revising Model Rule 5.4: Adopting A Regulatory Scheme That Permits Nonlawyer Ownership And Management Of Law Firms*, 48 WASHBURN L.J. 669, 695-96 (2009) (asserting that when nonlawyers have ownership interests in law firms, "[t]he lawyer has a personal interest in retaining his or her employment with the firm and may fear that a shareholder with enough voting power will pressure the firm's board of directors to 'punish' the attorney for representing a client whose interests are adverse to the shareholder's interests" and "[t]he lawyer's fear that his or her representation of the client may lead to repercussions creates a significant risk that his or her representation of the client may be materially limited."); Edward A. Bernstein, *Structural Conflicts of Interest: How a Law Firm's Compensation System Affects Its Ability to Serve Clients*, 2003 U. ILL. L. R. 1261, 1264 (2003):

[A] partner with a significant fear of losing a client may have more to lose (or less to gain) personally by acting in the best interest of the client than by acting otherwise because he will bear most of the burden of losing the client, whereas any reputational benefit to the firm from his acting properly and any potential malpractice liability will be shared with all partners. In such situations, there is a conflict between the personal interest of the partner and his client that may be detrimental to the interests of the client and the law firm.

<sup>19</sup> See Kuehn & Joy, *supra* note 18, at 113 (arguing that "it may be unreasonable for a faculty member to believe that her professional judgment may not be impaired by litigating against [an] influential donor."). My response to this assertion is at *infra* notes 39-41 and accompanying text.



"will be materially limited by . . . a personal interest of the lawyer."<sup>20</sup> In essence, therefore, the theory seeks to establish an academic equivalent to private law firms' notorious practice of turning away needy clients because of so-called "business conflicts," *i.e.*, the risk of offending movers and shakers who might influence a firm's profitability.<sup>21</sup>

The controversy-is-a-conflict theory is appealing to powerful defendants for an obvious reason: it discourages clinics from annoying influential members of society, *i.e.*, people with the means to retaliate. The theory may also appeal to university administrators because—if valid—it would provide a principled basis for behavior that might oth-

<sup>20</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2009) (A lawyer has a conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000) ("A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.").

The types of interests usually analyzed as personal interest conflicts include things like an "adverse financial interest in the object of the representation," an interest in "furthering a charity favored by the lawyer," an interest created because "the opposing party is the lawyer's spouse or long-time friend or an institution with which the lawyer has a special relationship of loyalty," or the lawyer's "deeply held religious, philosophical, political or public-policy beliefs." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125, cmt. c (2000); *see also* *Beets v. Scott*, 65 F.3d 1258, 1270 (5th Cir. 1995) ("Sources of potential conflict [between self-interest and duty to the client] include: matters involving payment of fees and security for fees; doing business with a client; the use of information gained while representing a client; a lawyer's status as a witness; and a lawyer's actions when exposed to malpractice claims.").

A personal-interest conflict is generally not imputed to an entire law office if it "does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(1) (2009); *see also id.* R. 1.7 cmt. 10 ("[P]ersonal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm."). Thus, where one firm member "could not effectively represent a given client because of strong political beliefs . . . but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified." *Id.* R. 1.10 cmt. 3.

<sup>21</sup> Professor Helen A. Anderson explains:

Business conflicts are not necessarily ethical code violations, but the term used to describe economic pressures lawyers face to favor one case over another. For example, where a client provides repeat business, a lawyer would not want to offend that client by taking on a case or making an argument of which that client disapproves. Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: a "Foolish Consistency"?*, 111 PENN ST. L. REV. 1, 3 (Sum. 2006); *see also* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 61 (1988) (describing a "business conflict" as "not a properly disqualifying conflict of interest, but merely the risk of loss of business . . ."); Professor Gordon comments that "[w]hat is especially interesting about such [business conflict] prohibitions is not so much that partners impose them, but that the partners are so *unembarrassed* about doing so . . ." He argues that "the practice violates . . . every conceivable traditional ideal of independence their profession had ever entertained." *Id.* at 61-62 (emphasis in original).

erwise be viewed as cowardice. The theory suggests that it is ethically more problematic to accept cases against influential members of society than to litigate against the "small people."<sup>22</sup> If one buys the theory, standing up against the rich and powerful is not only a questionable career move; it is dubious as a matter of professional ethics!

The problem with the controversy-is-a-conflict theory is that it is wrong. Whenever a lawyer represents a client against powerful or influential opponents, that lawyer faces some risk of public disapproval or loss of future business. To conclude that such risks create "conflicts" under Rule 1.7(a) would upend basic tenets of our profession and discourage lawyers from engaging in conduct that the profession encourages.<sup>23</sup> As a matter of pedagogy, the theory points law school clinics in the wrong direction—toward training lawyers who will duck their professional responsibilities and happily rely on so-called business conflicts to avoid facing up to their duty to expand access to justice. The ethical rules do not preclude such a "me-first" approach to the practice of law, but it is hardly in line with our highest aspirations for the profession to curry favor with wealthy constituents by turning away clients who need help.<sup>24</sup> Further, if making a ruckus about clinic-handled lawsuits had the side benefit of creating ethical conflicts for clinicians, defendants would have an incentive to ratchet up the level of controversy in every case.<sup>25</sup> The controversy-is-a-conflict theory

<sup>22</sup> The reference is to a phrase that BP used to describe people affected by the disastrous deep water oil blow-out in the Gulf of Mexico. See Jeffrey Zaslow, *Keeping Your Foot Away From Your Mouth*, WALL ST. J., July 7, 2010, <http://online.wsj.com/article/SB10001424052748704178004575350940170440292.html?KEYWORDS=%22small+people%22> ("BP Chairman Carl-Henric Svanberg was drubbed as a tone-deaf elitist when he said 'we care about the small people' . . .").

<sup>23</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 5 (2009) ("Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."); *id.* pmbl. ¶ 1 ("A lawyer, as a member of the legal profession, is . . . a public citizen having a special responsibility for the quality of justice."); *id.* pmbl. ¶ 6 (Lawyers "should seek improvement of [inter alia] access to the legal system" and "be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance."); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972) ("Lawyer-members of a governing body of [a] legal aid clinic should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases . . ."); see also Peter Elikann, *Commentary: Attacks on Detainees' Lawyers Show Lack of Understanding*, R. I. LAW. WKLY., March 22, 2010 (2010 WLNR 6738428) ("[T]he American tradition of zealous representation of unpopular clients is at least as old as John Adams' representation of the British soldiers charged in the Boston massacre."); *supra* note 5 and *infra* note 54.

<sup>24</sup> See *supra* notes 21 and 23.

<sup>25</sup> See Kuehn & Joy, *supra* note 18, at 113 (arguing that a mere "attempt to influence" a clinician's representation creates a potential conflict). Similarly, university administrators—who cannot lawfully control the case-selection process, see *infra* note 57—could



might also pose problems in criminal cases, where attorney conflicts can form the basis for appeals alleging violation of defendants' right to counsel under the Sixth Amendment.<sup>26</sup>

A. *Did Atticus have a conflict in "To Kill a Mockingbird"?*

Harper Lee's novel, "To Kill a Mockingbird," and her fictional lawyer Atticus Finch help illustrate that the controversy-is-a-conflict theory is contrary to fundamental principles of the legal profession. The novel takes place in Alabama in the 1930s. Atticus Finch is the court-appointed lawyer for Tom Robinson, an African American accused of raping a white woman. Atticus intends to mount a serious defense, despite the disapproval of his family and neighbors.<sup>27</sup> This disapproval not only affects Atticus, it also creates stress for his children. As the story progresses, Atticus persists in representing Tom Robinson even after he and his children are threatened with, and narrowly avoid, physical violence. For decades, readers have interpreted Atticus' determination to provide professional services to Tom Robinson as an act of courage emblematic of society's aspirations for the legal profession.<sup>28</sup>

Under the controversy-is-a-conflict theory, however, Atticus would be in violation of Model Rule 1.7(a)(2).<sup>29</sup> This is because At-

---

nonetheless seek to interfere with clinicians' professional independence by complaining about clinic representations and thus creating "personal interest" conflicts.

<sup>26</sup> If controversy creates an ethical conflict, how could high-profile criminals' Sixth Amendment right to counsel ever be satisfied absent a waiver? See *Alberni v. McDaniel*, 458 F.3d 860, 869 (9th Cir. 2006) ("The Sixth Amendment right to counsel includes a correlative right to representation free from conflicts of interest.") (quoting *Lewis v. Mayle*, 391 F.3d 989, 995 (9th Cir. 2004)) (internal quotations omitted); but see *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."); *Beets v. Scott*, 65 F.3d 1258, 1274 (5th Cir. 1995) ("Notwithstanding [the lawyer's] apparent breach of his ethical obligations, this court sits not to discipline counsel but to determine whether Beets was thereby deprived of a fair trial.").

<sup>27</sup> HARPER LEE, *TO KILL A MOCKINGBIRD* 218, (Grand Central Publ'g 1982) (1960) ("Atticus aims to defend him. That's what I don't like about it.").

<sup>28</sup> See, e.g., Rena Steinzor & Robert Kuehn, *Clinics and the Creed of Atticus Finch*, AMERICAN CONSTITUTION SOCIETY BLOG (Apr. 8, 2010), <http://www.acslaw.org/node/15814>; David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?* 63 GEO. WASH. L. REV. 1030, 1036-37 (1995) ("[L]awyers who represent unpopular clients are celebrated in professional lore for providing a vital service to society. . . . [O]ne of the most commonly cited examples in this lore is the fictional lawyer Atticus Finch . . .") (footnote omitted); James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 740 (1992) (discussing Atticus Finch as "a wonderful literary example" of professional values).

<sup>29</sup> Under Rule 1.7(b), however, such conflicts may be waived if (1) "the lawyer reasonably believes that [he or she can] provide competent and diligent representation to each affected client," (2) "the representation is not prohibited by law," (3) the case will not

Atticus' personal interest in his children's happiness and health is arguably adverse to Tom Robinson's interest in vigorous representation. Under the controversy-is-a-conflict theory, that presumably means that there is "a significant risk that the representation . . . will be materially limited" by Atticus' "personal interest." This may come as a surprise to Atticus, of course, who appears to believe that his personal interest lies in acting consistently with his sense of personal integrity. He explains to his daughter, Scout, that if he refused to take the case he "couldn't hold up my head in town."<sup>30</sup> If he failed to live up to his duty as a lawyer, Atticus felt, he would lack the authority to tell his children how to behave.<sup>31</sup> He also explained, "before I can live with other folks I've got to live with myself. The one thing that doesn't abide by majority rule is a person's conscience."<sup>32</sup>

To be fair, the controversy-is-a-conflict theory would not require Atticus to drop the case. If Atticus wanted to take the case despite the risk of retaliation and had confidence in his ability to do so, he could simply explain the situation to Tom Robinson and obtain a written waiver.<sup>33</sup> Presumably, Atticus would inform Tom that (1) from an objective standpoint,<sup>34</sup> there is "significant risk" that public pressure will "materially" limit the services he can provide,<sup>35</sup> but (2) Atticus has enough confidence in his own integrity and courage that he "reasonably believes that [he] will be able to provide competent and diligent representation."<sup>36</sup> In this context, however, to require a waiver would

---

involve "assertion of a claim by one client against another," and (4) "each affected client gives informed consent, confirmed in writing." MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009).

<sup>30</sup> LEE, *supra* note 27, at 100.

<sup>31</sup> *Id.* ("[I]f I didn't [defend Tom Robinson] I couldn't even tell you or Jem not to do something again.").

<sup>32</sup> *Id.* at 140.

<sup>33</sup> Tom Robinson, of course, is aware of the racial climate in his community. See *Centra, Inc. v. Estrin*, 538 F.3d 402, 415 (6th Cir. 2008) (noting that "a conflicted attorney does not need to disclose 'facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.") (quoting MODEL RULES OF PROF'L CONDUCT 1.0 cmt. 6 (2006) on the definition of "informed consent"). But Model Rule 1.7(b) requires more than "informed consent," the consent must be "confirmed in writing." See *supra* note 29. The actual rules, of course, may vary with jurisdiction. See, e.g., 538 F.3d at 414 (noting that Michigan's version of Rule 1.7(a) "is not identical to the Restatement or the ABA Model Rules . . .").

<sup>34</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iv) (2000) ("This Section employs an objective standard by which to assess the adverseness, materiality, and substantiality of the risk of the effect on representation"); *id.* § 121 cmt. c(iii) ("In this context, 'substantial risk' means that in the circumstances the risk is significant and plausible, even if it is not certain or even probable that it will occur. The standard requires more than a mere possibility of adverse effect.").

<sup>35</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2009).

<sup>36</sup> See *supra* note 29 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009)).

simply add ammunition to those seeking to de-lawyer Tom Robinson. If the controversy-is-a-conflict theory is taken seriously, Atticus' friends and family will be armed with the argument that Atticus is involved in an ethically dubious undertaking—he had a conflict that required a waiver and took the case anyway. When Atticus tries to explain to Scout that his professional duty requires him to ensure that Tom is not denied representation, Scout may wonder how Atticus can have such a professional duty when he needs to invoke an exception to the legal profession's rules in order to take the case.

Moreover, if Atticus needs a waiver to ensure that his client is fully informed about the risk that Atticus' courage will flag, would lawyers not also need waivers for other risks of personal weakness? Litigation is a demanding task; what if our work ethic fails us and we spend a key evening watching reruns on television rather than preparing for a cross examination? We may not expect this to happen, but because we are all only human, there is some risk that laziness will win out. Similarly, if continued representation of a client will require us to turn down more lucrative cases, is that a personal interest conflict? Might greed cause us to recommend an early and inadvisable settlement? The fact is that *every* representation requires that lawyers preserve their loyalty to clients in the face of personal preferences and distractions, including lawyers' desires to be liked, to engage in more leisure activities, and to make more money.<sup>37</sup>

*B. Do clinicians have "personal interests" in pleasing university supporters?*

In general, clinicians have no personal interest in the relationships between their universities and the universities' alumni, donors, or other supporters. These are institutional interests of the mother institutions, not personal interests of the clinics' lawyers. One might argue that such lawyers have a "personal interest" in pleasing university administrators and therefore might limit their approach to litigation to follow those administrators' instructions.<sup>38</sup> Model Rule 5.4(c) is clear,

---

Tom may, however, wish to decline to sign a waiver and thus preserve a Sixth Amendment argument for appeal. See *supra* note 26.

<sup>37</sup> See *supra* note 3 (discussing the lawyer's duty of loyalty).

<sup>38</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 13 (2009) states that if a lawyer is paid by someone other than the client, and if that arrangement "presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee," then the lawyer must "determin[e] whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation."

Where "the person paying the lawyer's fee" is a university paying a clinician's salary, however, the lawyer's responsibility to the payer, *i.e.*, the university, is to provide competent and ethical representation to the client that provides an example to student attorneys.

however, that an employer may not "direct or regulate" an attorney's rendering of legal services on behalf of a client.<sup>39</sup> Thus, to conclude that there is a significant risk that a university's institutional interests will materially limit clinicians' representation, one must assume there is a "significant risk" that administrators and clinicians lack the integrity to abide by the rules that forbid such interference. Such a cynical view of our motives and those of our colleagues is not required by the rules of ethics, especially when the activity giving rise to the supposed conflict advances important social goals.<sup>40</sup>

Admittedly, some university administrators may be unfamiliar with the rules governing the legal profession and may try to interfere. In such an event, however, is there really a significant risk that clinicians will ignore Rule 5.4(c), knuckle under, and follow inappropriate instructions to the detriment of their clients? If so, those clinicians are in the wrong job and probably the wrong profession.<sup>41</sup>

### C. What about clinicians' duties to employers?

Rule 1.7 also recognizes that a "conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . responsibilities to . . . a third person . . . ." Clinicians' responsibilities to their universities, however, are to act in an ethical and professional manner, to be mentors and role models for their students, and to provide the best educational experience practical for their students.<sup>42</sup> University administrators are accustomed to the concept of academic freedom and few of them could realistically expect to regulate the content of their academic employ-

<sup>39</sup> MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2009) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

<sup>40</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iv) (2000) ("The standard of this Section allows consideration in a given situation of the social value of the lawyer's behavior alleged to constitute the conflict.").

<sup>41</sup> See *Professional Responsibility: Report of the Joint Conference*, *supra* note 5, at 1218 ("To meet the highest demands of professional responsibility the lawyer must not only have a clear understanding of his duties, but must also possess the resolution necessary to carry into effect what his intellect tells him ought to be done."); *Beets v. Scott*, 65 F.3d 1258, 1270 (5th Cir. 1995) ("Ultimately, the duty of loyalty in its broad sense resonates against the lawyer's obligation to perform competent, effective work.").

<sup>42</sup> *Cf. Polk County v. Dodson*, 454 U.S. 312, 321 (1981). In that case, the U.S. Supreme Court emphasized that lawyers' duties are to their clients, regardless of who pays them: [A] public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior.

ees' professional activities.<sup>43</sup>

Law school clinicians are not responsible for representing the legal positions of their employers.<sup>44</sup> No doubt clinicians want only the best for their universities, just as they want the best for the nation and their cities and states.<sup>45</sup> But this desire to see worthy institutions prosper does not mean that clinicians distort their representation of clients to advance those institutions' goals or to protect particular university constituents. Indeed, it is the nature of educational institutions to have multiple and diverse goals, some of which inevitably conflict. When a university decides to establish a law clinic, however, it adopts for that unit goals of educational excellence and public service that require clinicians to resist pressures to be swayed by other—perhaps equally worthy—goals that are within the purview of other university employees. In other words, clinicians are “team players,” but the best service they can perform for the team is to teach students to follow faithfully the precepts of the legal profession and to follow those precepts themselves. It would disserve their employers for clinicians to put expediency above their professional duties by turning down clients to curry favor with influential members of society.

*D. “Conflict” is not a value-neutral term.*

For some lawyers faced with the question “does controversy create conflicts?” the obvious response might be “who cares?” If a lawyer wants to take a controversial case, the lawyer's client would almost certainly waive any supposed conflict.<sup>46</sup> If the lawyer does not want the case, he or she is not obligated to take it anyway—except for court appointments<sup>47</sup>—and thus need not rely on the excuse of a “con-

<sup>43</sup> See *Sweezy v. N.H. by Wyman*, 354 U.S. 234, 250 (1957) (plurality opinion) (“The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”).

<sup>44</sup> Cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (noting that “a [state-employed] public defender does not act ‘under color of state law’ because he ‘works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client’ and because there is an ‘assumption that counsel will be free of state control.’”) (quoting *Polk County v. Dodson*, 454 U.S. 312, 321-322 (1981)).

<sup>45</sup> Cf. *In re Exec. Com'n on Ethical Standards Re: Appearance of Rutgers Attorneys*, 561 A.2d 542, 549 (N.J. 1989) (holding that lawyers in a state clinical teaching program may represent clients before state agencies because “a Rutgers University professor in a teaching clinic of this type is not to be regarded as a State employee for purposes of the conflicts-of-interest law”).

<sup>46</sup> See *supra* note 29 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009) (regarding waiver of personal interest conflicts)).

<sup>47</sup> See MODEL RULES OF PROF'L CONDUCT R. 6.2 (2009) (“A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause.”); see also *id.* R. 6.2(c) (allowing lawyers to decline appointment if “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's

flict."<sup>48</sup> In some contexts, however, the use of "conflict" terminology to describe a controversial representation may change the considerations that determine whether or not a client finds a lawyer.

The legal profession's rules generally encourage lawyers to avoid conflicts of interest.<sup>49</sup> Thus, "conflict" is not a value-neutral term, regardless of whether clients can waive particular conflicts.<sup>50</sup> Instead, categorizing a type of representation as presenting a conflict creates a stigma that may chill lawyers' willingness to engage in that representation.<sup>51</sup> Further, treating controversy as a conflict would encourage law firm intake committees to veto *pro bono* cases by reducing lawyers' embarrassment over turning away the needy to please the rich and powerful. In the context of clinics, the theory could support efforts to de-lawyer some of the most vulnerable members of clinics' client base—those whose cases might annoy a university's more influential constituents. University administrators would view such cases as not only potentially expensive but—if they take seriously the controversy-is-a-conflict theory—also as ethically questionable and therefore

ability to represent the client."). Even in the context of a court appointment, the controversy-is-a-conflict argument would provide a poor excuse. See *infra* note 54 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 2-28 (1986)).

<sup>48</sup> "In distilled form, under the ABA code a lawyer has professional discretion to accept or reject any proposed representation." CHARLES W. WOLFRAM, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, in *THE GOOD LAWYER* 214, 217 (David Luban ed. 1983); see also Wilkins, *supra* note 28, at 1036 ("[T]he ethical commitment to make legal counsel available is a background norm that does not compel a [private practitioner's] specific decision in any particular case."); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION* 31 (1994) ("Everyone is entitled to a lawyer . . . but they are not entitled to you.") (internal quotations marks and attributions omitted); but see MODEL RULES OF PROF'L CONDUCT R. 6.2 cmt. 1 (2009) ("The lawyer's freedom to select clients is, however, qualified. . . . An individual lawyer fulfills [the responsibility to assist in providing *pro bono* service] by accepting a fair share of unpopular matters or indigent or unpopular clients."); *Wishnatsky v. Rovner*, 433 F.3d 608, 611 (8th Cir. 2006) (rejecting as inconsistent with the First Amendment the proposition that "a public law school could announce that its clinical program will accept as clients only persons who belong to one political party or espouse particular views on controversial issues of the day") (emphasis added).

Lawyers and their clients may also agree to reasonable limitations on the scope of representation. MODEL RULES OF PROF'L CONDUCT 1.2(c) (2009) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."); see also MODEL RULES OF PROF'L CONDUCT 1.2 cmt. 6 (2009) ("[T]he terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions . . . that the lawyer regards as repugnant or imprudent.")

<sup>49</sup> See, e.g., Fred C. Zacharias, *Integrity Ethics*, 22 *GEO. J. LEGAL ETHICS* 541, 556, tbl. 1 (2009) (summarizing Model Rule 1.7 as follows: "Lawyers should avoid conflicts of interest and serve clients loyally").

<sup>50</sup> *Supra* note 29 (on the availability of waivers).

<sup>51</sup> Cf. *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 *HARV. L. REV.* 1284, 1320 (1981) ("Unnecessary disqualification may blemish the attorney's professional reputation with an 'undeserved and unfair stigma.'") (quoting *Gov't of India v. Cook Indus.*, 569 F.2d 737, 741 (2d Cir. 1978) (Mansfield, J., concurring)).



counterproductive as a matter of pedagogy. Indeed, because law school clinicians serve as role models for their students, university administrators may not want to hear that their clinics are leading students into grey areas that require waivers from ethical prohibitions. Treating controversy as a conflict therefore may make clinics' reluctant to represent controversial or unpopular points of view—a result contrary to the purposes of the rules of professional responsibility.<sup>52</sup>

The controversy-is-a-conflict theory fails to shed light on the question of how lawyers should face up to their duties to expand access to the justice system despite risks of retaliation. Granted, no lawyer should accept a case for which he or she does not have the stomach. Granted also, lawyers should keep their clients informed about all significant circumstances surrounding representations, including the potential for controversy and pressure.<sup>53</sup> But there is no need to justify such common-sense conclusions in terms of the “personal interest conflict” rule, especially when such a justification would carry with it a requirement for written waivers and an implicit suggestion of impropriety. How can we equate controversy to a conflict when we know that a client's alignment against powerful or influential people is no excuse for “rejection of tendered employment”?<sup>54</sup> Further, how can we buy the controversy-is-a-conflict theory in light of the “social value of the lawyer's behavior alleged to constitute the conflict”?<sup>55</sup> Let's not trivialize the “personal interest” conflict as an excuse, or worse, an encouragement for lawyers to turn away inconvenient clients.

### III. ARE INSTITUTIONAL CONCERNS IRRELEVANT TO CLINIC CASE SELECTION?

Perhaps the next best thing to being able to blame the “personal interest conflict” rule for decisions to turn away inconvenient clients

---

<sup>52</sup> See *supra* note 23 and accompanying text.

<sup>53</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2009) (“A lawyer shall: . . . keep the client reasonably informed about the status of the matter” and “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); *id.* 2.1 (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”).

<sup>54</sup> See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-28 (1986) (“The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.”); *id.* EC 2-27 (1986) (“Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.”).

<sup>55</sup> *Supra* note 40 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iv) (2000)).

would be to blame a rule that forced clinicians to ignore institutional concerns for any unfortunate consequences of a decision to accept a case. No such luck, however.<sup>56</sup> Clinicians are responsible for their own decisions, whether they are criticized as cowardly or as reckless.<sup>57</sup> If case selection decisions were always easy, and free of potential ramifications, we would not need lawyers to make them.

We know that institutional concerns are relevant to case selection because law school clinics routinely consider their own needs when selecting cases. For example, clinics seek cases which present the best available educational opportunities for their students, a calculus that might include a preference for cases with a reasonable chance for success, and cases that present opportunities for student appearances.<sup>58</sup> They might avoid cases likely to tie up an excessive percentage of the clinic's resources. More controversially, some clinicians might turn down a case because they do not agree with the potential client's goals, even when they do not view those goals as irresponsible or unlawful.<sup>59</sup> But is it appropriate for clinicians to turn down cases to pro-

<sup>56</sup> Although ethical considerations establish that lawyers *should* be courageous in selecting cases without regard to public opinion, the rules do not require them to do so. See *supra* note 48 (discussing lawyers' freedom to select clients). Once lawyers accept a case, of course, the rules require them to put their clients first. See *supra* note 3 (discussing the lawyer's duty of loyalty).

<sup>57</sup> Indeed, clinicians are ethically precluded from allowing university administrators to make, or exercise case-specific approval authority over decisions to accept representations. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972) (It would be improper to require clinic directors "to seek, 'on a case-by-case basis,' the prior approval of the dean or a faculty committee before accepting a case involving an affirmative lawsuit against a federal, state or municipal officer."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (It would not be improper to require prior consultation with an Advisory Committee that "consisted entirely of lawyers" if the committee "had no power to veto the bringing of a suit" and "did not in practice result in interference with the staff's ability to use its own independent professional judgment as to whether an action should be filed."); see generally Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1067 (2006) (describing ethics opinions that "condemn efforts to restrict the clients or causes that legal assistance programs may represent").

<sup>58</sup> See Babich, *supra* note 2, at 460-67 (discussing TELC's approach to case selection).

<sup>59</sup> *Professional Responsibility: Report of the Joint Conference*, *supra* note 5, at 1216: [T]he lawyer renders an equally important, though less readily understood, service where the unfavorable public opinion of the client's cause is in fact justified. It is essential for a sound and wholesome development of public opinion that the disfavored cause have its full day in court, which includes, of necessity, representation by competent counsel.

See also MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2009) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."); *id.* R. 1.2 cmt. 5 ("[R]epresenting a client does not constitute approval of the client's views or activities."); *Wishnatsky v. Rovner*, 433 F.3d 608, 611-12 (8th Cir. 2006) ("Excluding a prospective client from consideration for government-funded legal services simply because he has engaged in protected speech that the director of the program finds disagreeable violates [federal constitutional] principles.").

tect their law schools or universities from political fallout or financial retaliation?

In general, law school clinics—like other free lawyers—have a special responsibility to expand access to justice. Thus, the ABA Committee on Ethics and Professional Responsibility has recognized an (unenforceable) duty for clinics to establish policies to “encourage, not restrict, acceptance of controversial clients and cases,” particularly “if laymen may be unable otherwise to obtain legal services.”<sup>60</sup> Why should clinicians have a special responsibility? First, because—by and large—they have a practical ability to carry it out. And second, because they have a duty to their students to serve as role models.

In theory, *all* lawyers should “strive . . . to exemplify the legal profession’s ideals of public service,”<sup>61</sup> and “devote professional time and resources and use civic influence to ensure equal access to our system of justice . . . .”<sup>62</sup> But the Model Rules take a lenient approach in light of many lawyers’ countervailing goals of becoming prosperous members of society (or at least paying their employees and mortgages each month).<sup>63</sup> Thus, the obligation to expand representation is (1) unenforceable,<sup>64</sup> and (2) dischargeable through charitable contributions or by taking credit for the efforts of other firm members.<sup>65</sup> Many lawyers nonetheless devote a significant number of hours to *pro bono* cases.<sup>66</sup> But because clinicians’ personal incomes are not dependent

---

At TELC, we avoid turning down clients merely because we do not share their goals, as long as those goals are lawful and we believe that the proposed legal action is a reasonable way to advance those goals. See Babich, *supra* note 2, at 460-67. We will not, however, accept a case that we believe is unjust or seek to advance goals that we believe are irresponsible. See MODEL RULES OF PROF’L CONDUCT pmb. ¶ 7 (2009) (“[A] lawyer is also guided by personal conscience and the approbation of professional peers.”).

<sup>60</sup> ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1208 (1972)

<sup>61</sup> MODEL RULES OF PROF’L CONDUCT pmb. ¶ 7 (2009).

<sup>62</sup> *Id.* pmb. ¶ 6.

<sup>63</sup> See *In re Martinez*, 393 B.R. 27, 37 (Bankr. D. Nev. 2008) (explaining that economic realities mean that a “lawyer representing a client whose business contributes to a lawyer’s income necessarily faces a difficult question every day: Will the lawyer remain an independent professional or instead become a fancy butler serving the needs of a more powerful principal?”).

<sup>64</sup> MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. 12 (2009) (“The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.”).

<sup>65</sup> *Id.* R. 6.1 cmt. 9 (noting that when it is not “feasible . . . to engage in *pro bono* services” lawyers may discharge their responsibilities “by providing financial support to organizations providing free legal services . . . .” Additionally, “it may be more feasible to satisfy the *pro bono* responsibility collectively, as by a firm’s aggregate *pro bono* activities.”). See generally Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 374-75 (1993/94) (“[T]he legal culture in this country has understood *pro bono* work to be an act of personal charity, to be performed at the discretion of the individual attorney.”) (footnote omitted).

<sup>66</sup> ABA Standing Comm. on Pro Bono & Pub. Serv., *Supporting Justice II: A Report on the Pro Bono Work of America’s Lawyers* viii (2009), <http://www.abanet.org/legalservices/>

on attracting and pleasing paying clients, it is particularly practical for them to focus case-selection decisions on expanding access to justice. Indeed, it is natural for clinicians to take the cases that other lawyers do not want. Otherwise, clinicians would find themselves in the uncomfortable position of competing for business with their alumni.

All that said, while everyone with a lawful claim may be entitled to legal representation,<sup>67</sup> they are not—court appointments aside<sup>68</sup>—entitled to representation by any particular clinic.<sup>69</sup> As discussed in

---

probono/report2.pdf ("The great majority of lawyers provide pro bono service of some nature."). Based on the same data, others have concluded that the glass is half empty. See Deborah K. Hackerson, *Access To Justice Starts In The Library: The Importance Of Competent Research Skills And Free/Low-Cost Research Resources*, 62 ME. L. REV. 473, 478 (2010) ("A recent study from the ABA found that many lawyers did not participate in pro bono services and that the average hours spent on pro bono service was below the recommended fifty hours per year.").

<sup>67</sup> Because it is up to the legal profession to voluntarily fulfill people's entitlement to legal representation on most civil matters, that entitlement is largely theoretical. See, e.g., Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 327-28 (2010) (noting that more than "eighty percent of the legal need of the poor and the near poor—a cohort including at least ninety million Americans—is unmet" and that "these economically marginalized citizens are left outside the bounds of the effective use of our adjudicatory systems, state and federal") (footnote omitted); see also La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (Calogero, J. concurring) 2 (1999), <http://www.lasc.org/rules/supreme/xpfc.pdf> (noting that "the great majority of the poor may well go without free legal service in our society for a long time to come, as has been the case very likely throughout history").

Further, even people who are not poor may not be able to afford the legal fees it would take to bring an enforcement action against a major corporation or to effectively challenge issuance of a permit that might transform the quality of life in a community. Nonetheless, Congress created a strong federal policy favoring citizen participation in environmental permitting and enforcement. For example: "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator [of EPA] or any State under [the Clean Water Act] shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e); see also 42 U.S.C. § 6974(b)(1) (applying a similar mandate to the federal hazardous and solid waste programs); 42 U.S.C. § 7661a(b)(6) (requiring that state Clean Air Act permit programs provide "an opportunity for judicial review in State court of the final permit action by . . . any person who participated in the public comment process . . ."); 42 U.S.C. § 9617 (providing for public participation in government decisions about cleanup of hazardous substances).

Public participation without access to lawyers can be an exercise in futility. As the U.S. Court of Appeals for the Fourth Circuit has noted, "the comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him." *Virginia v. Browner*, 80 F.3d 869, 880 (4th Cir. 1996). The court quoted EPA's recognition that "[w]hen citizens are denied the opportunity to challenge executive decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised." *Id.* (quoting an EPA notice of proposed rulemaking published at 60 Fed. Reg. 14588, 14589 (March 17, 1995)).

<sup>68</sup> See *supra* note 47 (quoting MODEL RULES OF PROF'L CONDUCT R. 6.2 (2009)).

<sup>69</sup> *Supra* note 48 (discussing lawyers' freedom to select clients).

more detail below, I urge clinicians to make principled case-selection decisions that they are proud to share with students. But these arguments are appeals to clinicians' discretion. Just as the rules of professional conduct do not provide an excuse for shying away from controversial cases, they also do not force clinicians to go out on a limb by accepting risks of retaliation. Clinicians must make these decisions for themselves, guided by conscience and their visions of the lawyers and teachers they want to be.

#### IV. GETTING ALONG WITH UNIVERSITY ADMINISTRATORS

##### A. *Should administrators be informed in advance about potentially controversial representations?*

Understandably, university administrators hate to be taken by surprise. Thus, they may ask clinic directors to give them advance warning of significant activities that clinics undertake on behalf of clients, such as filing lawsuits or even filing significant motions within lawsuits. The request, however, is problematic since lawyers must "not reveal information relating to the representation of a client unless the client consents after consultation."<sup>70</sup> Lawyers who work in legal services organizations such as law school clinics "may disclose to a non-lawyer supervisor information relating to the representation [of a client]" only "if such disclosure will help to carry out the client's representation." Otherwise, "disclosure is permissible under Rule 1.6 only if the client has expressly consented to it after consultation."<sup>71</sup> The ABA Committee on Ethics and Professional Responsibility has noted, "[i]t is difficult to see how the preservation of confidences and secrets of a client can be held inviolate prior to filing an action when the proposed action is described to those outside of the legal services office."<sup>72</sup> So as reasonable as university administrators may think they are being by asking for a "heads up," the best answer to requests for advance warning of actions on behalf of clients is a carefully explained "no."

If information can be revealed once clients consent after consultation, administrators might ask, why not do that? It is difficult to imagine, however, why it would be in a client's best interest to consent. Advance warning to administrators gives those administrators an opportunity to attempt to talk the clinician out of helping the client. Even knowing that it would be illegal for a clinician to allow univer-

<sup>70</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009); *id.* cmt. 2 (noting that protection of client confidences is a "fundamental principle in the lawyer-client relationship . . .").

<sup>71</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 393 (1995).

<sup>72</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

sity administrators to direct their professional activities on behalf of clients, why would a client offer a representative of his or her lawyer's employer—who has no reason to have the client's best interests at heart—an opportunity to lobby the lawyer? Similarly, why would a client voluntarily run the risk that one or another administrator with advance knowledge of legal filings will act like a loose cannon, letting fear of retaliation drive some sort of independent "damage control" activity? While clinicians may have great trust in the integrity, wisdom, and discretion of their university administrators, there is no reason for clients to share that trust.

Nonetheless, most clinic clients would probably give their consent. Why? Because when lawyers provide free representation to clients who cannot afford alternative counsel, their clients are necessarily at a disadvantage in terms of power in the attorney-client relationship.<sup>73</sup> The clients will often have no realistic option to find replacement lawyers if the clinicians decide to focus their efforts on helping more cooperative clients.<sup>74</sup> Clinicians should not exploit their power in the attorney-client relationship to obtain a client consent that is not in the client's best interest.<sup>75</sup>

Selective disclosures of confidential information can risk waiver of the attorney-client privilege with respect to other information about the same subject. Depending on the applicable jurisdiction's rules, the waiver's scope may extend "to all communications relating to the same subject matter"<sup>76</sup> or, if Federal Rule of Evidence 502 ap-

<sup>73</sup> See, e.g., Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 341, 358 (1978) ("Public interest lawyers have the capacity (and sometimes the motivation) to exercise considerable influence over their client's choices and objectives" in part because "prospective public interest clients are in a take-it-or-leave-it position—they must either accept service as offered or go without."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992) (analyzing sexual relations with clients and noting: "The attorney-client relationship is not merely one that necessarily imposes fiduciary obligations but also one that is often inherently unequal" and "the client may not feel free to rebuff unwanted sexual advances because of fear that such a rejection will either reduce the lawyer's ardor for the client's cause or, worse yet, require finding a new lawyer . . .").

<sup>74</sup> People usually agree to be represented by law students as a last resort. See La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (Johnson, J., dissenting) 2 (1999) ("Those with the ability to do so, hire the best legal talent available."), <http://www.lasc.org/rules/supreme/xxbjj.PDF>. Therefore, when TELC turns down a case, it usually is not brought at all.

<sup>75</sup> In comments interpreting the Model Rules, the ABA has stressed the risk of lawyers "overreaching" in making requests of clients, noting that "the lawyer is well-positioned to exert undue influence." ABA Model Rules of Prof'l Conduct R 1.8(c) cmt. (2003); see also, Ann Southworth, *Lawyer-Client Decisionmaking In Civil Rights And Poverty Practice: An Empirical Study Of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1142 (1996) (arguing that "lawyers who work for poor clients generally should try to counteract powerful pressures to take decisions away from clients").

<sup>76</sup> *Hurwitz Mintz Finest Furniture v. United Fire & Cas. Co.*, 2008 WL 920408, at \*3



plies, to “undisclosed information that “ought in fairness . . . be considered together” with the disclosed information.<sup>77</sup> There “is no bright line test for determining what constitutes the subject matter of a waiver.”<sup>78</sup> Clinicians should be hesitant, therefore, to ask clients to consent to disclosures that do not benefit the client, even when the risk of a broad waiver is arguably minor.<sup>79</sup>

Can clinicians do anything to address administrators’ desire for information? Yes, but the approach offered below may be controversial. TELC routinely reports new representations once they become public by publishing a docket of filed lawsuits, administrative comments, citizen-suit notices of violations and similar documents that—in one form or another—have already been disclosed.<sup>80</sup> Disclosing ac-

---

(E.D. La. 2008) (citations and internal quotation marks omitted); *Genentech, Inc. v. U.S. Int’l. Trade Comm’n*, 122 F.3d 1409, 1416 (Fed. Cir. 1997) (“When the attorney-client privilege has been waived, whatever the subject matter of the waiver, the privilege is gone.”); see generally Laurie A. Weiss, *Protection of Attorney-Client Privilege and Work Product in the E-Discovery Era*, in *THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY* 163, 166 (Vincent S. Walkowiak ed., 4th ed. 2008) (“[I]n certain jurisdictions . . . selective waiver of a privileged document . . . may even effect a waiver of privilege with respect to the entire subject matter addressed by the document.”).

<sup>77</sup> FED. R. EVID. 502 (limiting “subject matter” waivers from disclosures in federal proceedings or to federal agencies); see generally Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 219 (2010) (“While some have asserted that litigants have much greater protection against privilege waiver with the enactment of FRE 502, substantial risks of waiver remain.”) (footnote omitted).

<sup>78</sup> *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349-50 (Fed. Cir. 2005); see also *In re Keeper of Records* (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 23-24 (1st Cir. 2003) (“It is well accepted that waivers by implication can sometimes extend beyond the matter actually revealed . . . . Such waivers are almost invariably premised on fairness concerns.”) (citations omitted).

<sup>79</sup> See *In re Keeper of Records* (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d at 24 (holding that “extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter”). TELC’s use of a litigation advisory board during the case approval process, *infra* note 140, is also not risk-free in this regard. But the litigation advisory board process offers a benefit to clients by providing TELC with access to the expertise of lawyers who we respect. Also, advisory board members have a duty of confidentiality. See *U.S. v. Deloitte LLP*, 610 F.3d 129, 140, 142 (D.C. Cir. 2010) (noting that “[v]oluntary disclosure does not necessarily waive work-product protection . . . because it does not necessarily undercut the adversary process” and holding that a company’s disclosure to an independent auditor did not waive such protection where the auditor had “an obligation to refrain from disclosing confidential client information”).

<sup>80</sup> The public nature of the information disclosed eliminates any significant “waiver problem” with respect to the attorney-client privilege. Nonetheless, this level of transparency remains potentially controversial, as discussed below.

TELC does not, however, take on the administrative burden of publishing information about each motion or brief filed during the course of its cases. People interested in such information can check court dockets, which are available to the public.

tivity after it is too late to try to stop it may, at first blush, seem inadequate. But it would be a bad idea for administrators to try to stop clinic representations anyway. Clinicians are bound by their professional duties, and often by binding law,<sup>81</sup> to ignore attempts to regulate their exercise of professional judgment.<sup>82</sup> Moreover, reasonably prompt—but after-the-fact—disclosures can go a long way toward satisfying administrators' desire for a "heads up." First, if clinicians inform administrators about new public activity shortly after the activity occurs, administrators are unlikely to be blindsided by constituents' complaints.<sup>83</sup> Second, receiving notice of publicly filed administrative comments, notices of violations, and similar documents keeps administrators generally informed about the clinic's development of attorney-client relationships. If those relationships implicate university interests or raise other issues that administrators want clinicians to be aware of, the disclosures give administrators an opportunity to provide clinicians with that information. At least in the context of environmental disputes, this opportunity *usually* occurs before the onset of major litigation. This is because environmental statutes generally require plaintiffs to exhaust administrative remedies or give advance notice to violators and regulators before filing a lawsuit.<sup>84</sup>

<sup>81</sup> See Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 85 (1999) ("Bad business conduct is usually punished only by civil liability, with only occasional criminal prosecution. By contrast, bad conduct by the lawyer subjects him or her to criminal prosecution and civil liability, as well as discipline by the profession and, perhaps, contempt of court.").

<sup>82</sup> See *supra* notes 39 (quoting MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2009)) and 57 (quoting, *inter alia*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (Aug. 10, 1974)). Administrators' communications with constituents, therefore, should consistently reflect the fact that—whatever their personal desires—administrators cannot provide immunity from claims by the clinic's clients.

<sup>83</sup> In general, however, I do not feel, that TELC can accommodate administrators' desires for a "heads up" before TELC informs opposition counsel. When I know who opposing counsel is—and assuming that TELC's relationship with opposition counsel is reasonably professional (and therefore collegial)—I believe it helps foster an environment that favors settlement (and is thus usually in our clients' interest) for defendants to hear the news of a lawsuit first from their own lawyers.

<sup>84</sup> Statutory provisions for appeal of environmental regulations or permits typically require that clients first exhaust administrative remedies by raising their concerns in administrative comments. See, e.g., *BCCA Appeal Group v. EPA*, 355 F.3d 817, 829 (5th Cir. 2004) ("[O]nly in exceptional circumstances should a court review for the first time on appeal a particular challenge to the EPA's approval of a state implementation plan that was not raised during the agency proceedings."); but see *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) ("[C]ourts have waived exhaustion if the agency has had an opportunity to consider the identical issues [presented to the court] but which were raised by other parties.") (internal quotation marks and citations omitted). Also, environmental "citizen suit" provisions usually require that clients provide advance notice of the violations at issue to the potential defendant and to government agencies. See, e.g., *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 33 (1989) ("[W]here a party suing under the citizen

The “usually” in the preceding paragraph is a possible source of heartburn for administrators. Although TELC generally files administrative comments or notices of violation on behalf of clients before taking on full-scale litigation, there are occasional exceptions. It would be quite a coincidence for such an exception to correspond with a representation that is somehow so toxic to university interests that the clinician—if fully informed—would have turned down the case. This is because, in my experience, ethically appropriate and lawful representations that are so threatening to university interests that clinicians should view them as toxic are extremely rare events.<sup>85</sup> Coincidences, however, sometimes occur, so it would be understandable if TELC’s system of disclosure of already public information made some administrators nervous.

In the final analysis, however, there is a satisfactory answer for university administrators’ reasonable concern that an unlikely but conceivable set of circumstances could cause a clinician to accept a representation that would inappropriately endanger the university’s vital interests. That is, if—once fully informed—a clinician decides that he or she has accepted a case with unanticipated toxic ramifications, the clinician has the option of seeking to withdraw from the case.<sup>86</sup>

I mentioned above that TELC’s approach to university administrators’ desire for a “heads up” may be controversial. This is because it is questionable whether a goal of “transparency” is appropriate for an organization that represents clients. The rule that lawyers must preserve their clients’ confidences applies “not only to matters communicated in confidence by the client but also to *all* information relating to the representation, whatever its source.”<sup>87</sup> The rules, therefore,

---

suit provisions of [the Resource Conservation and Recovery Act] fails to meet the notice and 60-day delay requirements of [42 U.S.C.] § 6972(b), the district court must dismiss the action as barred by the terms of the statute.”).

<sup>85</sup> A clinician who runs a domestic violence clinic provided an example of one possibility: a client whose opponent has a history of making credible threats of violence against the potential client’s lawyers. Under those circumstances, one can imagine a clinician appropriately turning down the case to avoid creating unreasonable safety risks for university students.

<sup>86</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.16(b) (2009) (noting that in general, lawyers may withdraw if “withdrawal can be accomplished without material adverse effect on the interests of the client” or, *inter alia*, “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;” or “other good cause for withdrawal exists”).

<sup>87</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 3 (2009); see also *id.* cmt. 4 (“This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.”); see also *In re Advisory Op. No. 544 of N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics*, 511 A.2d 609, 612 (N.J. 1986) (“Rule [1.6] expands the scope of protected

do not create a safe harbor for disclosure of information just because it has been previously disclosed. Thus, lawyers should not gossip about their clients, even if the information at issue is already public.<sup>88</sup> And one can imagine situations where a "low profile" is part of a client strategy that could be undone by a rigid policy of disclosing public documents to promote transparency or assuage administrators' concerns.<sup>89</sup> TELC's client-base, however, is rarely so secretive, perhaps because these clients' cases are generally "public" in character, *e.g.*, comprising permit or regulatory appeals or claims for injunctions that would have a community-wide impact. On balance, I am comfortable with the general understanding between TELC and its clients that the basic facts about lawsuits, comments, notices, and similar documents will not be treated as confidential once those documents are filed—unless disclosure would be contrary to the clients' interests.<sup>90</sup> It would be equally appropriate, however, for a clinician to take the opposite approach and reject "transparency" as a goal for a law school clinic.<sup>91</sup>

---

information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.").

<sup>88</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2000) ("Confidential client information consists of information relating to representation of a client, other than information that is generally known."); *id.* cmt. b ("The definition includes information that becomes known by others, so long as the information does not become generally known.").

<sup>89</sup> *Cf.* 511 A.2d at 613 ("[D]isclosure of the identity of clients of the Law Project would be tantamount to the revelation of the mental and financial status of the individuals, as well as the fact that he or she has a legal problem that required the services of an attorney.").

<sup>90</sup> *See* MODEL RULES OF PROF'L CONDUCT scope ¶ 14 (2009) ("The Rules of Professional Conduct are rules of reason."); *id.* R. 1.6 cmt. 5 ("Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.").

<sup>91</sup> TELC extends its focus on transparency to include making information about clinic activities as available as practical to members of the public, all of whom TELC views as potential constituents. TELC's web page, therefore, publishes the clinic's current and historical dockets, contains many of TELC's legal documents, and includes information about the outcomes of clients' cases. Whether this transparency helps or hurts TELC in disputes with clinic opponents is open to question. As all lawyers know, information can be a double-edged sword. So far, however, TELC's opponents have tended to base their arguments on made-up facts rather than to try to spin the information the clinic makes available. For example, the Louisiana Chemical Association's president published a letter claiming that "TELC takes credit on its website for preventing investments and jobs from coming to Louisiana." Dan S. Borné, Letter to the Editor, *La. Needs Rules to Curb Abuse by Law Clinics*, LAFAYETTE DAILY ADVERTISER, May 16, 2010, available in part at <http://www.lanewslink.com/archives.php?id=17432>. He made no effort to cite or quote information to back up his accusation, which was simply not true.

*B. Is it wrong for administrators to share their concerns with clinicians?*

Frank dialogue between administrators and clinicians about case selection carries the risk that clinicians will perceive criticism of their choices as a form of pressure. This risk is presumably greater for untenured faculty members. But this risk must be balanced against the risk of losing opportunities for communication and mutual understanding. In addition, trying to stifle colleagues' expressions of opinions goes against the grain of life in an academic setting, even when those colleagues are administrators.<sup>92</sup> My preference, therefore, is to view expressions of administrative concerns as opportunities to expand administrators' understanding of the basic principles that drive clinic operations. My hope is that these communications enhance the ability of administrators to respond effectively to concerns that their constituents express to them.<sup>93</sup>

Many university administrators are not lawyers and may not have a full understanding of the legal profession's role in the justice system. Even some administrators with a law degree may not share a practicing lawyer's understanding of professional duties. Indeed, for some members of the legal academy, the Rules of Professional Conduct may be little more than materials for a class that someone else teaches. By and large, however, these are intelligent, well-meaning people who—once they get past viewing all lawyers' explanations as doubletalk—are capable of understanding the nature of lawyers' professional obligations to (1) expand access to justice, and (2) represent their clients loyally, putting client interests above other considerations.<sup>94</sup> Unlike clinicians these administrators do not live with these obligations every day; they are likely to need reminding.

There is, nonetheless, a line beyond which administrators' expressions of concern cross into untoward pressure. Part of the communication process may be reaching a shared understanding of where that line is and, as necessary, reinforcing that understanding. Certainly, it is inappropriate for administrators to attempt to dictate how clinicians will exercise their professional judgment, whether in representing clients or in accepting or rejecting particular cases.<sup>95</sup> In my view, it is

<sup>92</sup> Cf. *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3rd Cir. 2008) (“[F]ree speech is of critical importance [on public university campuses] because it is the lifeblood of academic freedom.”).

<sup>93</sup> See Babich, *supra* note 2, at 467-72.

<sup>94</sup> See *supra* notes 3 (discussing lawyers' duty of loyalty) and 23 (discussing the profession's duty to expand access to the legal system).

<sup>95</sup> See *supra* notes 39 (quoting MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2009)) and 57 (quoting, *inter alia*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (Aug. 10, 1974)).

also crossing the line for administrators to request that clinicians take specific action—or refrain from taking specific action—on behalf of clients. When administrators have concerns about a clinic's cases, it is much more appropriate for them to share the information that gives rise to a concern and then trust the clinician to make an appropriate decision. Adding pressure—which ethical precepts tell clinicians to ignore—to already difficult decisions is unlikely to improve the outcome.

The occasional after-the-fact question about why a clinician accepted a case may be an opportunity to advance shared understandings. But repeated, detailed interrogation about case selection may tend to create a confrontational—rather than collaborative—atmosphere, especially since the lawyer's duty of confidentiality will often prevent clinicians from providing expansive answers.<sup>96</sup> If administrators are unable to convey their questions and concerns in a manner that is respectful of clinicians' professional independence and ethical duties, it may be appropriate for clinicians to seek to limit direct communication, for example by requesting that complaints, questions, and concerns be conveyed through the law school dean.

My suggestions remain the same whether the affected clinicians are tenured or untenured.<sup>97</sup> Untenured faculty may have good reasons to be particularly sensitive to criticism, but it is doubtful they would be better off if administrators' concerns went unexpressed and therefore unanswered. In the final analysis, clinicians are legal professionals and—whether they are tenured or not—it is part of the job for them to preserve loyalty to clients in the face of criticism.<sup>98</sup>

### C. What about state schools?

When politicians have direct control over a university's budget, administrators are likely to be particularly sensitive to the risks inher-

---

<sup>96</sup> See *supra* notes 70-72.

<sup>97</sup> Presumably clinicians are less likely to feel pressured once they have tenure. But because the tenure system makes untenured clinicians' job security dependent on faculty votes as well as approval from administrators, the system is also a source of potential pressure. See Kuehn & Joy, *supra* note 18 at 113 (arguing that "junior faculty," without tenure or presumptively renewable long-term contracts "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").

<sup>98</sup> See *supra* note 41 (citing sources suggesting that lawyers must find the resolution necessary to act consistently with their duties of loyalty and competence). I have often heard clinician's express generalized concerns about the effects of pressure to make tenure on people in the field. I have never heard them express doubts, however, about their own abilities to maintain their professional independence despite such pressure. Similarly, lawyers in firms who wish to make partner must maintain their ability to exercise independent professional judgment in the face of potential pressures related to their job security.



ent in tolerating clinicians' (and other academicians') academic freedom and professional independence.<sup>99</sup> And as Professor David B. Wilkins explains, challenges to lawyers' independence are already daunting:

Standing up to public pressure invariably is difficult. A doctor, for example, can render medical assistance to someone who has become a social outcast without becoming directly implicated in that person's antisocial views. The lawyer who actively advocates that same person's legal rights and interests is unlikely to be able to do so. At the same time, lawyers depend on the community's goodwill for their economic survival.<sup>100</sup>

Nonetheless, nothing in this article's analysis depends on whether the clinician's university is a private or state school.<sup>101</sup> The same principles of respect for attorney's independence, professional duties, and academic freedom apply. The difference is that the article's suggestions may be more difficult to carry out within the context of some public universities.<sup>102</sup>

<sup>99</sup> For example, a Wyoming State Senator reacted to a book by Professor Debra Donahue about the grazing of livestock on public land by proposing "a bill to close the University of Wyoming Law School as a means of firing its tenured law professor-author." Gordon Morris Bakken, Karen R. Merrill, *Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them*, 46 AM. J. LEGAL HIST. 110, 110 (2004); see also Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417, 432 (2002). In June 2001, Pennsylvania legislators amended the University of Pittsburgh's "appropriations bill to bar the clinic from using government money to fund the clinic." Elizabeth Amon, *School Law Clinics Spark Hostility*, Univ. of Pittsburgh Unit, *Opposing Logging, Draws the Ire of Pols, business*, NAT'L L.J., April 1, 2002, at A5.

State legislatures can be unpredictable. Cf. David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 197 (1998) (analyzing state laws that create causes of action against people who make "disparaging" remarks about the "safety of an agricultural food product."); Ed Anderson, *Bill Outlawing Baggy Pants Dropped In House, Opponents Claim Plan Is Too Broad*, NEW ORLEANS TIMES-PICAYUNE, May 13, 2010, available in part at <http://www.nola.com/news/t-p/capital/index.ssf?/base/news-8/127376523530700.xml&coll=1> (discussing a Louisiana House member's bill to ban "the practice of wearing pants too low," raising concerns that "police could also use the measure as a pretext to stop African-American males and hassle them") (internal quotation marks and attribution omitted) (2010 WLNR 9863056).

<sup>100</sup> Wilkins, *supra* note 28 at 1037 (footnote omitted).

<sup>101</sup> Clinicians at state universities may, however, be subject to statutory provisions that do not affect their colleagues at private universities. Compare *Sussex Commons Associates, LLC v. Rutgers*, No. A-1567-08T3, 2010 WL 4156755, at \*7 (N.J. Super. Ct. App. Div. Oct. 25, 2010) (holding that a law school clinic in a state university is subject to a state open records act) with *In re Exec. Com'n on Ethical Standards Re: Appearance of Rutgers Attorneys*, 561 A.2d 542, 549 (N.J. 1989) (holding "that a Rutgers University professor in a [law school] teaching clinic . . . is not to be regarded as a State employee for purposes of [a state] conflicts-of-interest law").

<sup>102</sup> See *infra* note 169 (noting that this article is not intended as a criticism of clinicians who take a different approach).

## V. HOW POLITICALLY CORRECT MUST A LAW SCHOOL CLINIC BE?

TELC's defense against political attacks has typically included the assertion that the clinic is an asset to Louisiana's legal community.<sup>103</sup> Our basis for this assertion lies in TELC's role in expanding access to the legal system and also in training loyal, diligent, and ethical young lawyers. It is not surprising, therefore, for some clinic opponents to throw TELC's vision of its own essential "goodness" back into clinicians' faces by examining TELC's conduct on a case-by-case basis. Has every case expanded access to justice, *e.g.*, has every client been indigent? When a TELC client loses a case, does that mean the case was frivolous? This section of the article discusses arguments that clinics fail to live up to their own standards for behaving as assets to the profession and role models for their students.

### A. *Is it wrong for law clinics to represent clients who can afford lawyers?*

The high point of the hearing on Senate Bill 549 was Tulane President Scott Cowen's unequivocal assertion of Tulane University's commitment to public service. He testified that if Tulane were to shut down its clinics to preserve state funding under Bill 549, "we [would] throw under the bus every indigent person in this state . . . and say we will not represent you because the money is more important. . . . [T]hat is what America is not about."<sup>104</sup> President Cowen gestured back to the crowd attending the hearing, which included residents from many of the communities that TELC has assisted through the years. Much of that assistance has occurred through TELC's work with environmental and community organizations committed to helping people protect their health, welfare, and the environment.

An argument that clinic opponents sometimes raise is that law school clinics should be barred from representing any clients—including community organizations—that are not "indigent."<sup>105</sup> The argu-

<sup>103</sup> See, *e.g.*, Adam Babich, *Illegal Permit? Who Are You Going to Call? Your Local Environmental Law Clinic!* 39 ENVTL. L. REP. (ENVTL. L. INST.) 11051, 11051 (Nov. 2009) (arguing that clinics "serve a vital function by expanding the public's participation in environmental decisionmaking").

<sup>104</sup> See Hearing, Louisiana Senate Commerce, Consumer Protection, and International Affairs Committee, LOUISIANA STATE SENATE (May 19, 2010) (providing a video of the hearing on Senate Bill 549), <http://senate.legis.state.la.us/video/2010/May/051910comp2.asx> (also available at [http://www.youtube.com/watch?v=osTF\\_XITNAE](http://www.youtube.com/watch?v=osTF_XITNAE)).

<sup>105</sup> How to define an "indigent" organization is open to question. The Louisiana Supreme Court's definition requires an examination of the assets of every member of the organization. La. Sup. Ct. R. XX § 5. The Fifth Circuit has rejected this approach when considering a client's eligibility for attorney fees under the Equal Access to Justice Act. *Tex. Food Indus. Ass'n v. U.S. Dep't of Agric.*, 81 F.3d 578, 579 (5th Cir. 1996) (considering

ment may be based in part on Louisiana's student practice rule, which limits student appearances in state forums to clients who meet the Louisiana Supreme Court's definition of indigence. The Louisiana Supreme Court, however, did not purport to regulate who law clinics can represent. Instead, the Court tailored its rule narrowly to the circumstances under which law students—who are not licensed to practice law—may appear before state courts and agencies as counsel on behalf of clients.<sup>106</sup> The Louisiana Supreme Court explained, “nothing in . . . Rule XX affects in any way the right of licensed attorneys to represent anyone—individual, association, corporation, or otherwise—in any matter in any court.”<sup>107</sup> Former Chief Justice Calogero stressed, “We specifically do not say that . . . clinics cannot work for non-indigent clients in any situation where it is legal and ethical [to do so].”<sup>108</sup>

The general rule is that licensed attorneys may represent whom they please.<sup>109</sup> That principle continues to apply when the law office at issue is working for non-commercial purposes, to advance the public interest. Thus, writing for the Supreme Court of New Hampshire

---

“the association's net worth and size,” not its members' individual assets). The Equal Access to Justice Act provides for awards to individuals “whose net worth did not exceed \$2,000,000 at the time the civil action was filed” and to organizations “the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed.” 28 U.S.C. § 2412(d)(2)(B). A section 501(c)(3) organization, however, may qualify for a fee award “regardless of the net worth of such organization.” 28 U.S.C. § 2412(d)(2)(B)(ii).

<sup>106</sup> *S. Christian Leadership Conference v. Sup. Ct. of La.*, 252 F.3d 781, 784 (5th Cir. 2001), *cert. denied* 534 U.S. 995 (2001) (explaining that Rule XX “operates only to set forth the limited circumstances under which unlicensed law students may engage in the practice of law in Louisiana; it has no other reach”).

<sup>107</sup> Respondent's Opposition to Petition for Writ of Certiorari, *S. Christian Leadership Conference v. Sup. Ct. of La.*, 534 U.S. 995 (2001) (No. 01-360), 2001 WL 34116823 at \*5, n.7 (2001).

Thus, TELC's licensed attorneys “make all appearances before state forums on behalf of [community] organizations. Student attorneys may still argue in court on these cases, however, as long as an individual who qualifies under Rule XX is also named as a plaintiff.” Adam Babich, *How the Tulane Environmental Law Clinic Survived the Shintech Controversy and Rule XX Revisions: Some Questions and Answers*, 32 ENVTL. L. REP. (ENVTL. L. INST.) 11476, 11477 (Dec. 2002) (footnote omitted).

<sup>108</sup> La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (Calogero, J. concurring) 3 (1999), <http://www.lasc.org/rules/supreme/xpfc.pdf>; see also Hugh M. Collins, Judicial Administrator, Louisiana Supreme Court, *High Court Explains Student-Lawyer Rule Change*, NEW ORLEANS TIMES-PICAYUNE, June 25, 1998, at B6 (Rule XX “only addresses appearances by law students as litigators” and “does not regulate the activities of law schools or licensed attorneys on the staffs of law school clinics.”).

<sup>109</sup> See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 11 (2009) (“An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957) (“It is . . . important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.”); see also *supra* note 48 (discussing lawyers' freedom to select clients).

before his appointment to the U.S. Supreme Court, Justice David Souter explained that a nonprofit organization's lawyers had a first-amendment right to advocate on behalf of the disabled "whether or not the clients are poor within the meaning of [state law]" because the state had no compelling justification "to prevent the [nonprofit] from providing legal services to the non-indigent."<sup>110</sup>

The ABA Model Rules encourage lawyers to expand access to the legal system by representing public-interest organizations without regard to the "indigence" of the organizations.<sup>111</sup> The Rules specify that "*Pro Bono Publico* service" includes representation of:

- "persons of limited means,"
- "charitable, religious, civil, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means," and
- "individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights," and
- "charitable, religious, civil, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate . . . ."<sup>112</sup>

The first two of these categories of *pro bono* service listed appear in paragraph "a" of Rule 6.1 and such service is typically referred to as "tier 1" *pro bono* service, *i.e.*, the most highly encouraged kind of *pro bono* service.<sup>113</sup> Under the model rules, however, "all *pro bono* is good,"<sup>114</sup> and the rules also encourage lawyers to spend additional *pro bono* hours on tier II matters.<sup>115</sup> In general, therefore, a clinic operates comfortably within a zone that the profession has designated as public service as long as it represents low-income individuals, govern-

<sup>110</sup> *In re N.H. Disabilities Rights Ctr., Inc.*, 541 A.2d 208, 215-16 (N.H. 1988); see also *Trister v. Univ. of Miss.*, 420 F.2d 499, 504 (5th Cir. 1969) ("The [state] University . . . may decide to forbid the practice of law to every member of its faculty. What [it] must not do is arbitrarily discriminate against professors in respect to the category of clients they may represent.").

<sup>111</sup> MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009). The question of ability to pay only comes up when the representation is designed to further organizational purposes rather than to assist people of limited means or protect civil rights, civil liberties, or public rights. When the purpose is to further organizational purposes, the test is not "indigence" but whether payment of standard fees would "significantly deplete" the organization's resources or be "otherwise inappropriate." *Id.* R. 6.1(b)(1).

<sup>112</sup> *Id.* R. 6.1 (emphasis added).

<sup>113</sup> Lawyers should spend "a substantial majority" of their *pro bono* hours on tier I activities. *Id.* R. 6.1(a); See generally, Deborah A. Schmedemann, *Pro Bono Publico as a Conscience Good*, 35 WM. MITCHELL L. REV. 977, 985 (2009).

<sup>114</sup> Bob Gillett, *The Bar and Pro Bono*, 85-MAY MICH. B.J. 33, 34 (2006).

<sup>115</sup> MODEL RULES OF PROF'L CONDUCT R. 6.1(b) (2009).

ment, or public-interest organizations.<sup>116</sup>

The most typical justification for the argument against clinic representation of public-interest organizations is that: (1) clinics have limited resources and, (2) therefore can best help expand access to the legal system if they concentrate all of those resources on representing people who demonstrably cannot afford a lawyer.<sup>117</sup> But at least in the context of cases involving public issues—including most environmental cases—the argument does not hold water. To most effectively meet its twin goals of (1) providing first-rate training to students, and (2) expanding access to the legal system, an environmental law clinic cannot stand alone in providing direct service to the poor. It “takes a village” to fight for environmental protection and, often, even that is not enough.<sup>118</sup>

When nonprofit organizations are available to assist community members in participating in environmental decisions, they bring several things to the table. The first is an enhanced ability to withstand social and political pressure. When an individual or even a small grass roots organization challenges wealthy and powerful interests, the pressures can be extreme. Here are some examples from TELC cases:

- *SLAPP suits*: On two occasions, chemical companies have filed lawsuits for slander against TELC clients for participating in public hearings about the companies’ permit applications.<sup>119</sup> Although such lawsuits are unlikely to succeed,<sup>120</sup> they can intimi-

<sup>116</sup> MODEL RULES OF PROF’L CONDUCT Rule 6.1 cmt. 4 (2009) says: “the award of statutory attorneys’ fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section.” But the comment encourages lawyers who receive such fees “to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.” Any attorney fees that TELC recovers go into the clinic’s special litigation expense account to further TELC’s activities.

<sup>117</sup> See La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (Lemmon, J., concurring in part and dissenting in part) 2 (1999), <http://www.lasc.org/rules/supreme/xxhtl.pdf>. (arguing that “increasing the threshold for indigency might result in loss of services for those most in need”).

<sup>118</sup> Cf. Carla Dorsey, Note, *It Takes a Village: Why Community Organizing Is More Effective than Litigation Alone at Ending Discriminatory Housing Code Enforcement*, 12 GEO. J. ON POVERTY L. & POL’Y 437, 458 (2005) (arguing that success in helping low-income residents fight gentrification “was a direct consequence of following a community-first strategy that involved organizing and lobbying as well as taking legal action”) (emphasis in original).

<sup>119</sup> See Petition, *Petroplex Int’l, LLC v. Calabro*, No. 33693 (23rd Jud. Dist., Jan. 13, 2010) (alleging “a campaign to impugn the good names of Petroplex International, LLC and A3M Vacuum Services, LLC”); Petition, *Safeland Storage LLC v. Monica*, No. 55495 (40th Jud. Dist. April 7, 2008) (seeking “defamatory damages” and damages from delay in construction).

<sup>120</sup> Louisiana has an anti-SLAPP (“Strategic Lawsuit Against Public Participation”) law that provides for a “special motion to strike” causes of action that are based on “furtherance of [a] person’s right of petition or free speech . . . in connection with a public issue . . .” LA. CODE CIV. PROC. art. 971 (2010).

date community members.

- *Bribes*: When TELC represented a small citizens group on a Clean Air Act citizen suit against an oil refinery in New Sarpy, Louisiana, the refining company distributed a leaflet offering to pay money to people who lived on the four streets closest to the refinery "once the lawsuits by Concerned Citizens of New Sarpy and its members have been dismissed."<sup>121</sup> The apparent intent was to divide the community, as some residents demanded that their neighbors do whatever was necessary to get those payments flowing.
- *Retaliation*: The lawyer for a Louisiana waste management company submitted a formal complaint to the academic employer of a community leader, arguing that the resident should be punished for "misrepresent[ing]" academic research at a public hearing about a solid waste permit. A Louisiana State University Committee of Inquiry found "no evidence" to warrant a full investigation and found that some of the allegations against the community leader were "intended to harass."<sup>122</sup>
- *Intimidation*: The owners of a proposed landfill served a formal demand for information on community groups, purporting to require disclosure of a host of irrelevant private details, including: the "Social Security number of each and every member" of the Plaintiff groups and, for each member, the "a) extent of your schooling, b) date and place of all marriages, c) full names of present spouse, if any, and any former spouses, d) dates and manners of dissolution of any prior marriages, [and] e) name, address, and date of birth of your children."<sup>123</sup>
- *Ridicule*: An oil refinery attacked the reputations of individual members of a neighborhood group in court filings, submitting an *engineer's* testimony that a member of the plaintiff group had become "obsessed" and "appears to be unhinged."<sup>124</sup> The district court judge characterized the refinery's approach as "kind of over the top"<sup>125</sup> and went on to find the refinery liable for repeatedly violating the Clean Air Act.<sup>126</sup>

<sup>121</sup> Orion Refining Corporation, Leaflet: Community Improvement Initiative (Aug. 1, 2002) (on file with author).

<sup>122</sup> Louisiana State University Committee of Inquiry, Research and Graduate Studies, Final Report 4 (April 17, 2003) (on file with author) (rejecting Gerald L. Walter, Jr., Position Paper (Jan. 17, 2003) (on file with author)).

<sup>123</sup> Defendant MRR St. Helena, L.L.C.'s Interrogatories and Requests for Production of Documents and Things 4-5, *Washington v. St. Helena Parish Police Jury*, No. 18370 (21st Jud. Dist., March 10, 2004) (commas added) (on file with author).

<sup>124</sup> Affidavit of Matthew S. Dobbins (Doc. 41-18) 3-5, *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663 (E.D. La. 2010) (No. 08-4986), 2009 WL 6666266.

<sup>125</sup> Transcript of Dec. 9, 2009 Hearing, *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663 (E.D. La. 2010) (No. 08-4986).

<sup>126</sup> *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663



Larger public interest groups can help insulate neighborhood organizations from such pressure. First, a defendant may be less likely to spend resources and risk credibility on intimidation tactics when larger groups are involved as plaintiffs. This is because such groups are less likely to be intimidated and more likely to have the resources to fight disreputable tactics. Also, when a supporting group is involved, local leaders may be able to deflect some pressure to the larger entity. Thus, in the example above that involved an oil refinery in New Sarpy: potential recipients of payments from the refinery might have been less likely to view neighbors involved in the lawsuit as blocking a windfall if those neighbors could have pointed to a decision by a larger, more insulated co-plaintiff to continue the litigation.

In addition, larger groups can contribute to the quality of the clinic's representation of lower-income residents and to clinic students' educational experiences. Sometimes these organizations can come up with budgets to hire expert witnesses or use their networks to identify experts. When these groups help fund or identify experts, they not only improve clients' chances of success, they provide student-attorneys with the valuable educational opportunity of working with expert witnesses. Also, some public-interest organizations employ their own staff attorneys, who can make constructive suggestions on pleadings. This additional layer of review can improve work product, provide student-attorneys with new perspectives, and—sometimes—provide students with valuable contacts for the future.<sup>127</sup> Larger groups can also contribute to keeping community members informed about proposed decisions affecting the environment and community members' rights to participate. For example, public-interest organizations are more likely to have systems for reading and evaluating public notices about projects that will affect a community's environmental quality. Community members often lose their rights to participate in environmental decisions by failing to spot legal notices and therefore missing 30- or 60-day comment periods. Members of public-interest organizations' staffs sometimes also contribute technical expertise and experience in working with government agencies. Clinicians appreci-

---

(E.D. La. 2010).

<sup>127</sup> Clients' staff attorneys can also be a source of tension, however, if they have difficulty accepting clinics' approach to assigning responsibility to student attorneys. Outside of clinics, lawyers are accustomed to treating student helpers as "law clerks" and generally limit their duties to research and preliminary drafting. Clinics, on the other hand, treat their students more like lawyers, encouraging them to take broad responsibility for developing and executing legal strategies. This potential gap in expectations is rarely a problem in the real world, however, if only because public-interest attorneys are often too over-extended to attempt to micro-manage the work of clinic students. At TELC, we are almost always grateful for whatever feedback these lawyers are able to provide.

ate opportunities to offer their students opportunities to work with sophisticated—as well as relatively unsophisticated—clients.

An essential part of running and maintaining a litigation clinic is building and maintaining a client base—that is, a source of student projects. Nonprofit organizations are an essential part of that base, at least in the context of an environmental practice. These organizations provide support, information, networking, expertise, and referrals.<sup>128</sup> Denying service to these organizations would be counterproductive to a clinic's goal to be perceived as a resource to its base. Plus, working with public interest organizations can enhance a clinic's (and law school's) national reputation and funding base, because it helps the clinic's work become better known within the nonprofit community and among charitable foundations. Overall, therefore, denying clinic representation to public-interest organizations out of a misguided attempt to show "pure" devotion to the poor would reduce the clinic's effectiveness in serving lower income community members and degrade the clinic's quality as an educational program.

*B. Should clinics shun all risk of ethical sanction?*

During the public debate about Senate Bill 549, clinic opponents accused TELC of filing frivolous lawsuits and other unethical conduct. Our best answer to that charge was to point to the enforcement mechanisms already available under the law to deal with frivolous filings and other unprofessional behavior.<sup>129</sup> But our most effective sound

<sup>128</sup> When TELC was facing the threat of Senate Bill 549, nonprofits, especially the Louisiana Environmental Action Network and Citizens for a Strong New Orleans East, were invaluable in organizing and implementing a response.

<sup>129</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."); FED. R. CIVIL P. 11(b) & (c) (providing a procedure for sanctions based on the rule that an attorney's signing, filing, submission, or advocacy of a pleading is a certification of his or her belief, after reasonable inquiry, that it (1) "is not being presented for any improper purpose"; (2) is "warranted by existing law or by a nonfrivolous argument for [change to existing law]"; (3) has evidentiary support for its "factual contentions . . . or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery"; (4) contains "denials of factual contentions [if any that] are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."); LA. CODE CIV. PROC. art. 863(B) & (D) (an attorney's signature is a certification that the pleading is "well grounded in fact; . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and . . . not interposed for any improper purpose . . ."). If a lawyer's certification violates art. 863, the court "shall impose upon the person who made the certification or the represented party,

bite may have been the—truthful—statement that no court had ever sanctioned the clinic. This is a dangerous standard to set, however, to the extent it implies that any sanction is proof that a clinic fails to meet professional standards. The truth is more nuanced; sometimes lawyers must balance their fear of sanction with their duties to zealously represent clients. An unduly cautious clinic—one committed to never risking sanction—would be a less effective advocate for its clients and a problematic role model for its students.<sup>130</sup>

For example, during argument before the Fifth Circuit on a case in which TELC's clients alleged violations of solid waste regulations, the question arose of whether the issue was moot, *i.e.*, whether it was "absolutely clear" that the violation could not reasonably be expected to recur.<sup>131</sup> After the hearing, the Louisiana Department of Environmental Quality generated a public document that showed the defendant was still in violation. TELC provided this information to the court under authority of Federal Rule of Appellate Procedure 28(j), which provides for citation of supplemental authority.<sup>132</sup> The Defendant responded with a request for sanctions, arguing, *inter alia*, that the letter "cites no newly issued authority and references alleged information outside the record."<sup>133</sup> Appropriately, the court denied the request for sanctions.<sup>134</sup> But although this outcome seemed likely, it was not pre-ordained. TELC's letter had indeed relied on information outside the record and one could legitimately argue about whether the information fell within the scope of Rule 28(j).<sup>135</sup> But it would hardly

---

or both, an appropriate sanction . . ."); LA. CODE CIV. PROC. art. 2164 ("The appellate court . . . may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.").

<sup>130</sup> See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 306-307 (1989) (arguing that fear of sanctions can chill public-interest litigation that is "premised on unique, relatively untested, or unpopular legal theories" and that some cases "may be based on limited factual information, because the relevant data are difficult to collect [or *inter alia*] are in the hands of the defendant . . .").

<sup>131</sup> See *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (reviewing the "mootness" standard).

<sup>132</sup> Appellant's Notice of Supplemental Authority, Oakville Cmty. Action Grp. and La. Envtl. Action Network v. Indus. Pipe, Inc., No. 05-30462 (5th Cir. Oct. 13, 2006).

<sup>133</sup> Appellee's Request for Sanctions, Oakville Cmty. Action Grp. & La. Envtl. Action Network v. Indus. Pipe, Inc., No. 05-30462 (5th Cir., Oct. 24, 2006).

<sup>134</sup> Order, Oakville Cmty. Action Grp. & La. Envtl. Action Network v. Indus. Pipe, Inc., No. 05-30462 (5th Cir., Dec. 12, 2006).

<sup>135</sup> See *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005) ("Rule 28(j) . . . permits parties to bring pertinent legal authority to the court's attention following briefing."). TELC argued:

The submitted information *illustrates* that the record before this Court does not make "it absolutely clear" that Industrial Pipe's violations would not recur. In the context of the mootness standard, any reasonably zealous counsel would alert the Court to such evidence that a violation had, in fact, recurred. Indeed, it would be

have qualified as zealous, or even competent, representation to fail to notify a court that a violation had recurred when the court was considering whether it was "absolutely clear" a violation would never recur. As one district court has noted, "[f]or the law to have any credibility or respect, it must be grounded in reality."<sup>136</sup>

Clinicians should hew to the highest standard of ethical behavior as defined by the rules of professional conduct applicable to the clinician's jurisdiction. Sometimes, however, loyal and competent representation consistent with those rules requires that clinicians run some risk of sanction.<sup>137</sup>

*C. What if a client's case turns out to be marginal?*

A goal of law school clinics is to bring reality into the curriculum. This is a worthy goal, but reality can be messy. How many lawyers get through their careers without litigating their share of "dog" cases—lawsuits that, in James McElhaney's words, threaten to start "scratching and biting . . . in front of the jury"?<sup>138</sup> Cases that look good when clinicians accept them may turn out to be marginal for any number of reasons. Clients may become wedded to unrealistic goals, witnesses may stop returning phone calls or fail to show up for depositions, whistleblowers may settle disputes with former employers and clam up, new precedent may scuttle legal arguments, the government may settle the case out from under the clinic's clients, or the defendant may even come into compliance.<sup>139</sup> A clinician may have made a bad call when accepting the case in the first place.<sup>140</sup>

Marginal cases are unpleasant enough in private practice, but can seem particularly problematic when seeking to run a "transparent" clinic—publishing a clinic's docket and case dispositions for all the

---

unfortunate for this Court to rule that it was "absolutely clear" that a violation would not recur without having received such information.

Appellant's Response to Appellee's Request for Sanctions, Oakville Cmty. Action Grp. and La. Envtl. Action Network v. Indus. Pipe, Inc., No. 05-30462 (5th Cir., Nov. 2, 2006) (emphasis added).

<sup>136</sup> Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Eng'rs, 455 F. Supp. 2d 532, 539 (E.D. La., 2006).

<sup>137</sup> The Fifth Circuit strictly construes 28 U.S.C. § 1927 "in order not to dampen the legitimate zeal of an attorney in representing his client." Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc., 38 F.3d 1414, 1416 (5th Cir. 1994) (emphasis added). Before courts should impose sanctions, therefore, "evidence of recklessness, bad faith, or improper motive" should be present. *Id.* at 1416-17 (citing Hogue v. Royse City, Tex., 939 F.2d 1249, 1256 (5th Cir. 1991)).

<sup>138</sup> JAMES W. McELHANEY, McELHANEY'S TRIAL NOTEBOOK 469 (ABA 3d ed. 1994).

<sup>139</sup> TELC has experienced all of these events.

<sup>140</sup> To help it avoid taking these cases, TELC works with a litigation advisory board. See Babich, *supra* note 2, at 465-67.

world to see.<sup>141</sup> Questions may come up: How, for example, could the settlement the clinic achieved in "Marginal Case A" justify the time and resources that went into the case? Why would the clinic file a high-profile case, like "Marginal Case B," and then dismiss it voluntarily? Explaining why a case went south to people outside the attorney-client loop would usually violate clinicians' duties of loyalty and confidentiality.<sup>142</sup> Also, such explanations would often be less than compelling since—from a Monday morning quarterback's perspective—the clinician probably should have anticipated and avoided whatever problems contributed to the outcome. It is best, therefore, to respond to questions from administrators or outsiders about marginal cases with some variation of: "We were pleased with that result," "Success is never guaranteed in litigation," or "I cannot go into details about any particular representation."

Clinicians should not apologize—at least not to anyone but themselves. If people never made mistakes, society would not need lawyers, and clinicians would all be out of a job. Surviving the occasional dog case is part and parcel of the practice of law. And look on the bright side: Marginal cases provide no shortage of "teaching moments" for the clinic's students.<sup>143</sup>

#### VI. SHOULD UNIVERSITIES LIMIT CLINICS TO AREAS OF THE LAW THAT ARE UNLIKELY TO ANNOY CONSTITUENTS?

Given the legal profession's core value of ensuring broad access to the justice system, the question of whether an educational institution should craft its curriculum to avoid offending society's movers and shakers is best answered with another question: How serious is the institution about teaching law?<sup>144</sup>

To offer a first-rate legal education, a law school's curriculum should include a variety of clinics, including at least one clinic that

<sup>141</sup> See TULANE ENVIRONMENTAL LAW CLINIC, *Docket*, <http://www.tulane.edu/~telc/docket.htm> (last visited Nov. 21, 2010).

<sup>142</sup> See *supra* notes 3 (discussing lawyers' duty of loyalty) and 70 (discussing lawyers' duty of confidentiality).

<sup>143</sup> One of the wonderful things about working in a law school clinic is that clinicians can usually re-conceptualize stressful aspects of practicing law as positive "teaching moments" that will help students internalize lessons which might otherwise seem abstract. See, e.g., Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45, 71-72 (Fall 2002) ("[I]nitial stages of feeling overwhelmed constitute a 'teaching moment' and a first opportunity to suggest to the students how they can begin to develop their own processes of . . . problem-solving.").

<sup>144</sup> See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 145 (2007) ("One way in which a law school can impart these values [providing access to justice and seeking justice] to students is by establishing and supporting in-house clinics that respond to the legal service needs of the communities in which they operate.").

involves administrative law issues, complex litigation, and highly regulated sectors of the economy. Such a clinic provides training for a type of practice that is typical in big firms, government, nonprofits, and "boutique" firms.<sup>145</sup> An environmental law clinic, for example, typically offers students experience on cases that turn on large numbers of documents (often including an administrative record), detailed regulatory schemes, expert opinions, and multiple parties. Like lawyers in other heavily complex or highly regulated areas (*e.g.*, securities, tax, energy, and anti-trust) an environmental lawyer's key work is often done in the library, during the document review process, and while putting together a legal strategy. Other types of clinics may place more emphasis on equally valuable skills, such as trial practice and counseling clients facing difficult issues in their personal lives. All of these options should be available to the modern law student.<sup>146</sup>

From the perspective of public service, clinics that grapple with administrative law and represent clients on issues of community-wide significance help meet an important need.<sup>147</sup> Because these cases tend to be complex, they are often expensive. Lawyers who specialize in highly regulated fields may be hesitant to take on *pro bono* cases because of the potential for positional conflicts<sup>148</sup> and so-called business

<sup>145</sup> See STUCKEY, *supra* note 144, at 139 (arguing that clinics should "teach students about . . . the types of practice settings in which they will be engaging").

<sup>146</sup> Cf. *In re Exec. Com'n on Ethical Standards Re: Appearance of Rutgers Attorneys*, 561 A.2d 542, 543 (N.J. 1989) ("Clinical training is one of the most significant developments in legal education."); Madeline June Kass, *Educating the Next Generation of Environmental Lawyers*, 25 NAT. RES. & ENV'T, Summer 2010, at 52, 54 (arguing that law school clinics serve "as an ideal means for meeting the Carnegie Report challenge"); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 121-22 (2007) (a/k/a "the Carnegie Report") (noting that: "Assuming responsibility for outcomes that affect clients with whom the student has established a relationship enables the learner to go beyond concepts, to actually become a professional in practice" and "If one were to search for a single term to describe the ability they [clinics] hone best, it is probably *legal judgment*." (emphasis in original)).

<sup>147</sup> Some have suggested that it is somehow inappropriate for law school clinics to represent clients on matters of state-wide or national significance. See James Varney, *Justice Calogero Seeking 3rd Term: Rough Campaign is Anticipated*, NEW ORLEANS TIMES-PICAYUNE, Aug. 7, 1998, at A2 (quoting former Louisiana Supreme Court Chief Justice Calogero as follows: "widespread advocacy campaigns by professors and students are beyond the legal parameters of helping indigent people"). But when the law creates opportunities for members of the public to participate in proceedings about socially important issues, why should access be limited to the wealthy? See DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 27 (2005) (noting that "a wide gap remains between the rights available in theory and those available in practice"). The legal system should provide a level playing field regardless of the social importance of the issues involved.

<sup>148</sup> See Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1400 (1998) (The term "positional conflict of interest" refers to "taking a representation at odds with other interests/positions one represents . . .").



conflicts.<sup>149</sup> It is unrealistic to expect public-interest legal service organizations to make up the difference.<sup>150</sup> Accordingly, clients with concerns about environmental issues are likely to go unrepresented if they cannot afford a lawyer.

The question, then, is stark: should universities sacrifice educational and public service goals and design their curriculums to tiptoe around issues that might annoy people with influence? Or should academic institutions maintain independence from their constituents' points of views? The answer is obvious.<sup>151</sup> It may not always be easy to buck financial supporters' preferences,<sup>152</sup> but universities prize their independence.<sup>153</sup>

<sup>149</sup> See Anderson, *supra* note 21, at 33 ("Attorneys in larger firms face significant pressure from clients not to undertake cases that go against their interests, even if unrelated to their representation by the firm. . . . As one large firm lawyer put it, 'We know what side our bread is buttered on, and we stay there.'"); Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 122 (2004) ("Firms also consider how politically controversial pro bono matters will play with their client constituency.").

<sup>150</sup> Moreover, legal services organizations that focus on highly-regulated fields often concentrate their efforts on "high impact" cases. Helping citizens participate in more pro-saic regulatory decisions that nonetheless affect the quality of clients' lives may be more up the alley of a law school clinic. This is because, for clinics, a steady stream of citizen concerns about day-to-day regulatory decisions is less a drain on resources than a reliable source of engaging and educational student projects. See Babich, *supra* note 103, at 11051-52.

<sup>151</sup> See DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 206 (2003) ("[T]he purely pragmatic university, intent upon increasing its financial resources by any lawful means, may gain a temporary advantage now and then, but it is an institution that is likely not to prosper in the long run.").

<sup>152</sup> For example, almost half a century ago, Tulane University tried to please constituents by fighting in court to prevent enrollment of African-Americans. In the longer-term, this decision became an embarrassment to members of the Tulane community. See *Guilory v. Admins. of Tulane Univ. of La.*, 212 F. Supp. 674 (E.D. La. 1962); see also Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 TUL. L. REV. 2207, 2233 n.95 (2004) (noting that Judge Ellis's decision "never made its way to the Fifth Circuit because of the intervening decision by the Tulane Board of Administrators to voluntarily integrate the university").

<sup>153</sup> See Richard W. Garnett, *Can There Really Be "Free Speech" In Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 59 (2008) (arguing that universities are "soaked in traditions of independence" and "play an important structural role in the landscape of civil society, clearing out the space necessary for discovery and dissent"); Risa L. Lieberwitz, *Faculty In The Corporate University: Professional Identity, Law And Collective Action*, 16 CORNELL J. L. & PUB. POL'Y 263, 274, 276 (2007) (noting that "[t]he justification of academic freedom, to enable faculty to engage in academic work that serves the public good, describes faculty interests as independent from private interests of capital" and "the core value of academic freedom, requires faculty independence in their research, teaching, and self-governance"); but see Graham Bowley, *The Academic-Industrial Complex*, N.Y. TIMES, Aug. 1, 2010, at BU1, available at <http://query.nytimes.com/gst/fullpage.html?res=9E01EFDA143DF932A3575BC0A9669D8B63&partner=rssnyt&emc=rss&pagewanted=all> ("Some analysts worry that academics are possibly imperiling or compromising the independence of their universities when they venture onto boards.").

## VII. HOW SHOULD CLINICS MANAGE CONTROVERSY?

### A. Education of law school constituents

I have argued before that the best approach to managing controversy is to show university constituents that a clinic's mission is essentially apple pie, that is: to (1) train effective and ethical lawyers by guiding students through actual client representation; (2) expand access to the legal system, especially for those who could not otherwise afford competent legal help on environmental issues; and (3) bolster the capacity of community members to participate effectively in decisions about environmental issues.<sup>154</sup> I still believe that, but will not repeat the details here.

### B. Consistent, collective opposition to attack

It is also important to respond with appropriate force when efforts to stir up controversy get out of control. An attempt at legislative control of law school clinics is more than an escalation of dialogue between differing viewpoints; instead, it is an assault on the independence of the bar and thus on the underpinnings of the U.S. legal system.<sup>155</sup> Retaliation against lawyers for representing unpopular viewpoints undermines the rule of law<sup>156</sup> and is an affront to the ex-

<sup>154</sup> Babich, *supra* note 2, at 467-72. The bottom line is that: Business people can understand that clinical education is a crucial part of maintaining a first-rate legal educational program. And one can show corporate representatives the rules of professional responsibility and ABA ethical opinions in black and white and they can understand that it would be wrong for the clinic to reject clients because of controversy. Granted, no one likes to be sued . . . . But once business people understand that threats and pressure are unproductive—and in fact could never be productive in the context of a university with integrity—they are more likely to accept clinical education as one facet of an educational system that, as a whole, merits their support.

*Id.* at 468.

<sup>155</sup> See David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 245 (2003) ("[F]air-minded individuals, regardless of their political orientation, should accept the principle of adversary argument, *audi alteram partem*. When politics impinges on the imperative to hear both sides, the adversary system threatens to dissolve into farce or fraud."); *Professional Responsibility: Report of the Joint Conference*, *supra* note 5, at 1216 ("Under our system of government the process of adjudication is surrounded by safeguards evolved from centuries of experience. . . . All of this goes for naught if the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him.").

<sup>156</sup> See *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907) (The "right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."); La. Const. ART. 1, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."); see also *A Good Kill*, *supra* note 7 ("By attempting to snuff [TELC's] existence, Adley and the LCA were, in effect, thumbing their noses at the law, judicial process and regulation—all

ample of Atticus Finch.<sup>157</sup> Americans from all sides of the political spectrum should condemn such behavior as dangerous and unacceptable. This is why lawyers known for conservative points of view joined with more liberal voices in condemning political attacks on government lawyers for having formerly represented Guantanamo detainees.<sup>158</sup> The lesson that everyone deserves a chance to vindicate his or her rights in the legal system is worth reinforcing.<sup>159</sup>

Clinicians and their allies should leave no doubt that legislative attempts to stifle or distort legal representation cross the line.<sup>160</sup> Tulane President Cowen hit exactly the right note in his testimony about Louisiana Senate Bill 549, providing not just an opposition, but a civics lesson:

This bill seeks to punish or severely limit the rights of individuals and organizations who try to enforce regulations and laws in favor of those who have the most to gain by restricting the rights of those that oppose them. . . . This bill creates a black eye, a serious black eye, for any industry that supports it. [It is] antithetical to everything that is the foundation of a civil society.<sup>161</sup>

### *C. Principled, common-sense case-selection*

Another approach to managing controversy, of course, is to allow it to influence clinic case-selection decisions. As I have already suggested, clinicians cannot completely rule out institutional concerns as a factor in selecting cases.<sup>162</sup> The questions, then, are when and how to go about considering the impact of proposed litigation on people with influence, especially politicians, donors, and potential donors.

A first principle is that whether a clinic will accept or reject particular cases must—as a matter of law—be up to clinicians.<sup>163</sup> Ethical

---

areas within the purview of the Legislature to change.”).

<sup>157</sup> See Steinzor & Kuehn, *supra* note 28.

<sup>158</sup> See John Schwartz, *Attacks on Detainee Lawyers Split Conservatives*, N.Y. TIMES, March 9, 2010, <http://www.nytimes.com/2010/03/10/us/politics/10lawyers.html> (“Many conservatives, including members of the Federalist Society” say the attack “violates the American legal principle that even unpopular defendants deserve a lawyer.”).

<sup>159</sup> See Luban, *supra* note 155, at 246 (Steps to combat limitations on access to justice “should be regarded as matters of fundamental procedural justice, not partisan politics.”); *Professional Responsibility: Report of the Joint Conference*, *supra* note 5, at 1162-1216 (Lawyers have “an affirmative duty to help shape the growth and development of public attitudes toward fair procedures and due process”).

<sup>160</sup> The response to Louisiana Senate Bill 549 was appropriate in this regard. See *supra* note 9.

<sup>161</sup> See *supra* note 104 (providing a link to a video of President Cowen’s testimony).

<sup>162</sup> *Supra* notes 56-69 and accompanying text.

<sup>163</sup> This principle does not, of course, deny administrators the ultimate power to shut down a clinic if they are willing to live with the resulting degradation of their university’s curriculum and reputation, as well as the damage to their own principles. See Kuehn, *supra*

considerations prevent clinicians from allowing university administrators, faculty committees, or university appointed boards to interfere with clinicians' "own independent professional judgment as to whether an action should be filed."<sup>164</sup> Further, just as university administrators should not try to command their professors to avoid research or scholarship that might offend supporters, they should also respect the academic freedom of their clinical faculty.<sup>165</sup> As noted above, however, clinicians should avoid needlessly cutting off lines of communication that might alert them to administrators' possibly legitimate concerns.<sup>166</sup>

Second, any consideration of university constituents' concerns must be undertaken with full awareness of how slippery a slope the analysis is. If a donor can achieve immunity from clinic-handled litigation by contributing millions of dollars to the university, how about a donor that contributes thousands of dollars? Hundreds? What about potential donors? Donors' relatives? Corporate affiliates?<sup>167</sup> If clinicians are willing to turn away injured clients who seek redress from donors, why not also turn away clients who oppose projects that donors care about? At some point, such an approach begins to sound like a protection racket—donate significant funds to the university and we will refrain from helping your opponents achieve access to the courts. Is that an approach clinicians would be willing to post on their web sites, *e.g.*, "those who contribute at least three million dollars per year need not worry about the clinic helping alleged victims of their alleged misbehavior"? Would clinicians want their students to find out about a policy of turning down public-interest cases "because the money is more important"? Of course not. As Tulane President Scott Cowen told the Louisiana Senate committee considering Bill 549: "That does [or at least should] not happen in America."<sup>168</sup>

Third, clinicians should consider whether clinic activities might affect donors, politicians, or other constituents only in unusual situa-

---

note 99, at 430 (describing a university's decision, "[a]fter a public outcry," to reverse a prior decision to separate a clinic from its law school).

<sup>164</sup> *Supra* note 57 (quoting, *inter alia*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (Aug. 10, 1974); see also Babich, *supra* note 2, at 466-67 (explaining how TELC's use of a legal advisory board complies with these ethical restrictions).

<sup>165</sup> See Lieberwitz, *supra* note 153, at 268-69 (The essence of academic freedom is "independence from the university administration and financial supporters of the university.").

<sup>166</sup> *Supra* notes 92-98 and accompanying text.

<sup>167</sup> See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995) (noting, *inter alia*, that a "lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter").

<sup>168</sup> *Supra* note 104 (providing a link to a video of President Cowen's testimony).

tions<sup>169</sup>—when a representation is likely to be genuinely toxic to the university.<sup>170</sup> If such situations do arise, clinicians should balance: (1) their concerns about consequences to the university, (2) the potential clients' need, and (3) the damage to the clinic's principles from turning down the case. How significant is the client's potential injury? Does the client have another realistic option for achieving access to the judicial system? Using common sense, does the decision have a reasonable ring to it or is it—at bottom—cowardly? Recognizing that such "difficult issues of professional discretion" arise in the legal profession, the Model Rules suggest that some "must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."<sup>171</sup>

To offer an analogy: When in private practice, I prepared a citizen-suit complaint for a community organization against an unpermitted hazardous-waste disposal company and its owner, an individual. Before I filed, a government official alerted me to his concern—based on his knowledge of the players—that a decision to include the owner in the lawsuit might result in my death. Like all lawyers, of course, I had sworn to follow a professional code that embodies a willingness to

---

<sup>169</sup> Why only in unusual situations? Why not *routinely* balance the potential that controversy might harm the university against the educational and public interest benefits of each potential case? Such a practice would permanently strand the clinician in the less-than-reputable world of the "business conflict," see *supra* note 21, and on the slippery slope described in the text accompanying notes 167-68, *supra*. Is a \$10,000 contribution to the university more valuable than a potential client's access to the legal system in Case A? How about in Case B? Is a permit appeal with only a reasonable chance of success worth upsetting local politicians? This is not the type of analysis that law schools should be teaching students. See *supra* note 23 and accompanying text (discussing the profession's higher aspirations). A genuinely toxic representation, however, is another matter. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (holding that even constitutional principles are not so rigidly interpreted as to create "a suicide pact").

Should we therefore condemn—as insufficiently courageous or politically incorrect—clinicians who avoid controversy that falls short of posing dire consequences to their universities? No. The decision is within each clinician's discretion. See *supra* note 48 (discussing lawyers' freedom to select clients). For example, a clinician might decide that a representation that risks his or her tenure or funding is toxic enough to merit rejecting a case. Considerations of self-preservation aside, that clinician may do his or her best service to students and the clinic's client base by continuing to direct the clinic and, perhaps, gradually creating an atmosphere within the university in which the lawyer's duty to expand access to the justice system is better respected. To be clear: only in the context of a dysfunctional institution would the clinicians' professional independence be constrained in such a manner. But the clinician's (or clinic's) martyrdom may not be the best approach to finding a solution.

<sup>170</sup> I do not offer a definition of "genuinely toxic" representation. This is a judgment call for each clinician. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring opinion) ("[P]erhaps I could never succeed in intelligibly [defining a key term]. But I know it when I see it . . ."). A possible example of a toxic representation appears in note 85, *supra*.

<sup>171</sup> MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 9 (2009).

accept sacrifices in the service of clients and the legal system. Common sense told me, however, that whatever the advantage my client might gain by naming the owner, it would not be worth the risk. I therefore discussed the issue with my client and we decided to sue only the company. This type of circumstance is rare—it happened to me once in more than twenty-five years of practice. It is also mildly embarrassing: Angelina Jolie would have handled it more impressively, at least in the movies. There was some minor damage to my self-image. Nonetheless, I continue to believe that I made a reasonable, common-sense decision and I would have no concern about sharing the decision-making process with my students. And I hope never to make another litigation decision for a similar reason.

Likewise, when an institution signs on to teach law and to offer the services of law school clinics, it buys into the legal profession's code. That institution must therefore accept the fact that sacrifice is part and parcel of public service, including providing legal services for *pro bono* clients. The fact that a particular representation—like a particular product of academic research—might risk lost donations or denial of political favors should be taken in stride. One can nonetheless imagine a situation in which the stakes are unreasonably high—just as they were in the example above, when I had information that a professional decision could put my life in danger. The question under those circumstances is: in light of the potential client's needs and options, the clinic's duties and principles, and common sense, would it be a responsible decision for the clinic to undertake the representation? If the answer is no, the clinician should turn down the case and work with his or her university to eliminate any expectation that the clinic will ever make another case-selection decision for similar reasons. There is no bright-line test. Different clinicians faced with similar circumstances may reach different conclusions. But as long as each makes a decision that is true to his or her conscience and best judgment in light of the considerations suggested above, each will be serving both the profession and their universities.<sup>172</sup>

#### *D. Transparency to clinic students*

The best test of a clinician's confidence in the probity of this decision-making process is in his or her willingness to share it, honestly,

<sup>172</sup> Cf. *Norwegian Evangelical Free Church v. Milhauser*, 252 N.Y. 186, 191, 169 N.E. 134, 135 (N.Y. 1929) (Cardozo, J.) ("There is in all such controversies a penumbra where rigid formulas must fail. No test more definite can then be found than the discretion of the [decisionmaker], to be carefully and guardedly exercised . . . in furtherance of justice.") (internal quotation marks and citation omitted).



with students.<sup>173</sup> Indeed, difficult judgment calls about controversial representations may be among a clinic's most valuable teaching moments. Granted, the decision's circumstances may be confidential, but clinicians ask students to keep clients' confidences all the time. These students will likely face their own professional and ethical dilemmas before long.<sup>174</sup> I can think of no better preparation for them than helping a clinician through such a difficult dilemma.<sup>175</sup>

#### CONCLUSION

I teach my clinic students to put their conclusions in their introductions, and to conclude with a brief statement of what they want the reader (usually a court) to do.<sup>176</sup> So here is the bottom line: universities and law clinics should live by their values. Let the chips fall where they may.

---

<sup>173</sup> See Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLINICAL L. REV. 357, 358 (2010) ("Reflection on the decision of whom to represent can be useful to teach about both the decision itself and about the attorney-client relationship more generally.").

<sup>174</sup> See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 9 (2009) ("In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."); James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 736 (1992) ("You do not have to be a philosopher, sociologist, or psychologist to know that being a lawyer in these troubled times is difficult.").

<sup>175</sup> Cf. Rodrigo Canales, B. Cade Massey, & Amy Wrzesniewski, *Promises Aren't Enough: Business Schools Need to Do a Better Job Teaching Students Values*, WALL ST. J., Aug. 23, 2010, at R4, available at [http://online.wsj.com/article/SB10001424052748703865704575133352776583796.html?mod=ITP\\_thejournalreport\\_1](http://online.wsj.com/article/SB10001424052748703865704575133352776583796.html?mod=ITP_thejournalreport_1) (arguing that although it is "inspire[ing]" that students who will soon be in positions of leadership vow to reject the temptations their predecessors could not . . . such oaths sound much like chastity vows" and that "[t]he problem . . . is not a lack of sincerity, but a failure to adequately prepare for the moment of truth.").

<sup>176</sup> See STEVEN D. STARK, *WRITING TO WIN: THE LEGAL WRITER* 5 (1999) ("In legal writing, we always lead with our conclusions.").