SECTION ON

NEWSLETTER

CLINICAL LEGAL EDUCATION

November, 1982

Reply to: Norman H. Stein
University of Arkansas at
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400 West Markham
Little Rock, Arkansas 72201
(501) 371- 2268

CHAIRPERSON'S MESSAGE
By
Elliott S. Milstein

Two issues have dominated my work as Section Chair during the past several months. These are, of course, faculty status and political interference. Both of these issues will be discussed as part of the Section's Annual Meeting Program and recent developments make clear that the faculty status question will be the major issue at the Annual Meeting because the House of Delegates will debate proposed ABA Accreditation Standard 405(e) at its first meeting in Cincinnati and because the ABA will hold a hearing on the proposal during the meeting as well.

Association President David Vernon has decided to devote his inaugral address to faculty status for clinicians and the Executive Committee of the Association decided that rather than adopting a position on this question it would throw the question open for debate by the House of Delegates. A similar method was used last year to debate the freedom of religion issue which was before the Association then. It is not contemplated that there will be a vote on a particular position by the House. However, there will be open discussion and speakers need not be delegates from their school. Presumably the debate will provide information to the Executive Committee which ultimately will take a position on the various proposals.

Because of the importance of the House of Delegate's debate, we have re-scheduled the Section's business meeting to permit clinicians to attend. The House of Delegates will meet from 5:00 to 7:00 on Thursday, January 6 and therefore our business meeting is scheduled for 8:00 to 9:30 on the same day. Furthermore, we will have a meeting for all clinicians interested in discussing the House of Delegates meeting on Wednesday, January 5 at 9:00 PM in Room Ivory B of the Stouffer Inn.

There will also be a hearing on Standard 405(e) conducted by the ABA Council on Legal Education and Admissions to the Bar at the Annual Meeting. The date and time of that hearing has yet to be announced. Another hearing will be held during the ABA's Mid-winter meeting and then action on the proposal should follow in late winter or spring.

There is general agreement among the people whom I have consulted that the Section should not attempt to adopt an official position on which particular improvement in the status of clinicians should be promulgated. There does seem to be general agreement that the ABA should require law schools to treat their clinicians more fairly but that each of the proposals involves risks for many of us and our programs. Our Special Committee on Faculty Status,
(cont'd on page 15)

This Newsletter is a forum for the exchange of points of view. Opinions expressed here are not necessarily those of the Section and do not necessarily represent the position of the Association of American Law Schools. AALS Executive Committee Reg. 12.4(c).

DETAILS OF SECTION'S ANNUAL MEETING PROGRAM, JANUARY 6, 1983

First Morning Session

Topic: "Big Cases v. Little Cases" - A Meaningful Distinction in Clinical Caseloads?

A panel discussion presenting different types of cases used successfully in clinical programs, and identifying and evaluating the characteristics of cases which enhance clinical legal education.

Moderator: Frank S. Bloch, Vanderbilt University

Speakers: Stephen J. Herzberg, University of Wisconsin
Michael L. Sheldon, University of Connecticut
Stephen Wizner, Yale University

Second Morning Session

Topic: Current Issues in Clinical Legal Education

Moderator: Susan J. Bryant, Hofstra University

Speakers: Elliott Milstein, American University
(ABA Standards on the status of clinicians)

Elizabeth M. Schneider, Rutgers-Newark
(Political interference in law school clinics)

Luncheon

Speaker: Clinton E. Bamberger, Jr., University of Maryland

First Afternoon Session

Topic: New Goals and Approaches for the Teaching of Lawyering Skills

Moderator: W. Lewis Burke, Jr., University of South Carolina

Speakers: Paul B. Bergman, UCLA
(The use of non-legal simulations in the teaching of trial advocacy)

Carrie J. Menkel-Meadow, UCLA
(Toward an alternative approach to negotiation)

Gary H. Palm, University of Chicago
(Teaching trial advocacy through the preparation of actual client cases)

Second Afternoon Session

Topic: Beyond the Teaching of Skills - Neglected Aspects of the Lawyering Process in Clinical Teaching

Moderator: Peter J. Hoffman, University of Nebraska

Speakers: Edwin H. Greenebaum, Indiana University at Bloomington
(Teaching interpersonal dynamics of professional relationships)

Kenney F. Hegland, University of Arizona
(Raising issues of role in skills courses)

R. Nils Olsen, Jr., State University of New York at Buffalo
(Teaching substantive analysis in the clinic as a lawyering skill)

Business Meeting

RESERVATIONS NECESSARY FOR SECTION LUNCHEON

The Section must guarantee in advance the number of people who will be at the Section's luncheon on January 6.

The price of each lunch is $13.00, including tax and gratuity. The lunch will consist of, inter alia, chicken.

To reserve a place at the luncheon, send the reservation form below with full remittance, payable to Stouffers Cincinnati Towers, to Kandis Scott, 3100 The Alameda, Santa Clara, California, 95050. All reservations must be received by Kandis by January 3.

CLINICAL SECTION LUNCHEON RESERVATION

Name: _____

School and Address: _____

_____

_____

Number of reservations @ $13.00 each: _____

Total amount enclosed: _____ (Made payable to Stouffers Cincinnati Towers)

Send to: Kandis Scott, 3100 The Alameda, Santa Clara, California 95050

SECTION'S OFFICERS NOMINATED

The Section's nominating committee (Jack Sammons, Mercer, Chair; Roger Haydock, William Mitchell; Gary Lowenthal, Arizona State; Robert Bloom, Boston College; and Evelyn Cannon, Maryland.) will place the following names in nomination during the Section's business meeting in Cincinnati on January 6th:

Chair-elect: Roy Stuckey, South Carolina

Executive Committee (3 year terms);
Bea Frank, N.Y.U.; and Jennifer Rochow, Boston College.

The Committee will also nominate John Capowski, Maryland, to serve the two years remaining in Roy Stuckey's term on the Executive Committee, if Roy is elected Chair-elect.

The executive committee seats are now held by Sue Bryant, Hofstra, and Gary Lowenthal, Arizona State, whose terms will expire; Rod Jones, Southwestern, and Lonnie Rose, Kansas, who have one year remaining in their terms; Roy Stuckey, South Carolina and Barbara Schwartz, Iowa, who have two years remaining. The Executive Committee will also include the Chair, Kandis Scott, Santa Clara; the immediate past Chair, Elliott Milstein, American; the Chair-elect; and the editor of the Newsletter, Norman H. Stein, Arkansas at Little Rock.

The section's bylaws do not allow nominations from the floor, but a member of the section may be nominated for an elected position on the executive committee by a petition signed by three other members and submitted to the section chair and the AALS Executive Director not less than 15 days before the annual meeting. (This year that date is December 22, 1982).

CHAIR-ELECT SOLICITS PERSONS INTERESTED IN SERVING ON SECTION COMMITTEES

Kandis Scott, who will assume the duties of Chair of the Section on Clinical Legal Education at the annual meeting, asks that members of the Section who are interested in serving on one of the section's committees contact her as soon as possible. The section's standing committees are (1) Nominating; (2) Annual Meeting Program; (3) National and Regional Training Programs; and (4) Awards. In addition, the section has three special committees: Teaching Materials; Political Interference; and Faculty Status.

PROPOSED AMENDMENTS TO BYLAWS OF THE SECTION ON CLINICAL LEGAL EDUCATION PURSUANT TO ARTICLE VIII

Norman H. Stein, Arkansas at Little Rock, proposes the following amendments to the section's bylaws.

Article III. Officers and Committees

Section 2. Executive Committee.

(e) Annually the chairperson shall appoint the six elected, non-officer members of the executive committee to chair or co-chair the standing committees and any special committees, insofar as practicable. The executive committee shall determine. . . .

Article V. Duties of Officers

Section 1. Chairperson

. . . .of the section for the prior year. The chairperson shall appoint members of standing and special committees and may appoint chairpersons for those committees from among the elected, non-officer members of the executive committee. The membership of such committees shall reflect. . . .

The object of the proposed amendments is to promote substantial involvement of the members of the Executive Committee in the section's activities and in the issues which confront the Section on a continuing basis. Most of the work is now done by the appointed chairs of the section's committees, with elected executive committee members usually acting solely upon their own initiative.

AALS HOUSE OF REPRESENTATIVES TO ADDRESS ABA PROPOSED ACCREDITATION STANDARD 405(e)

On November 19-20, 1982, the AALS Executive Committee met and decided that ABA proposed accreditation standard 405(e), on the status of clinical teachers, would be a major agenda item before the AALS House of Representatives at the annual meeting. President-elect David H. Vernon, University of Iowa, will speak to the issue and invite debate.

MEMBERSHIP LIST

The following list includes all members of the Section, according to AALS records as of November 1, 1982. Previous members of the Section who have not yet paid their dues were sent a memo advising them of the need to pay their dues to receive the Newsletter. In-

quiries about the list or membership in the Section ($15.00) should be directed to Jane M. La Barbara, AALS Associate Director, Suite 370, One Dupont Circle, N.W., Washington, D.C. 20036. (202) 296-8851.

Gary L. Anderson - Tennessee
Claudia Angelos - N.Y.U.
Clinton Bamberger - Maryland
John Barkai - Hawaii
Katherine T. Bartlett - Duke University
Joseph T. Baum - Albany
Stephen F. Befort - Minnesota
Frank S. Bloch - Vanderbilt
Robert M. Bloom - Boston College
John E. Bonine - Oregon
John E. Bowman - Boston University
Frank A. Bress - N.Y.U.
John Brittain - Connecticut
Susan Bryant - Hofstra
Eilliot S. Burg - Vermont
William Burnahm - Wayne State
Mark Burnstein - Southwestern
Janet M. Calvo - N.Y.U.
Lee Campbell - Southern California
Evelyn O. Cannon - Maryland
John J. Capowski - Maryland
Robert S. Catz - Cleveland State
Leonard L. Cavise - Illinois Institute of Tech.
Robert Condlin - Maryland
James T. Countiss - Hawaii
Vance L. Cowden - South Carolina
Robert L. Doyle - Mississippi
James M. Doyle - Georgetown
Steve Emens - Alabama
Michael Sidley Evans - San Diego
Marc Feldman - Rutgers, Camden
Guillermo Figueroada - Puerto Rico
Mary-Lynne Fisher - Loyola, Los Angeles
Susan Fotte - University of California at Berkeley
Beatrice S. Frank - N.Y.U.
Paula Galowitz - New York University
Prof. Charles B. Garabedia - Suffolk Univ. of MaryIand
Donald G. Gifford - Toledo
Carlos A. R. Bonzalez - Inter-American University
William W. Greenhalgh - Georgetown
Lawrence M. Grosberg - Columbia
Philip K. Hamilton - New England
Thomas Hammer - Marquette
Henry L. Hecht - San Francisco, Calif.
Mark J. Heyrman - Chicago
Warren P. Hill - Washburn
Peter T. Hoffman - Nebraska
Jonathan M. Hyman - Rutgers, Newark
Rodney R. Jones - Southwestern
Ken Kreiling - Vermont
Susan Leviton - Maryland
John Levy - Wm. & Mary
Carol Liebman - Boston College
Kenneth G. Mason - DePaul
Robin A. Masson - Cornell
Elliott S. Milstein - American
Wallace J. Mlyniec - Georgetown
James J. McGovern - South Carolina
Richard Neumann - Hofstra
James R. Nielsen - Hastings
Richard L. North - Maryland
R. Nils Olsen, Jr. - Buffalo
Gary H. Palm - Chicago
Douglas L. Parker - Georgetown
Steven Pepe - Michigan
Riachrd P. Perna - Dayton
Don Peters - Florida
Rex R. Perschbacher - Cal. at Davis
Thomas M. Place - Dickinson
Theresa J. Player - San Diego
Alfred A. Porro, Jr. - Baltimore
Daniel L. Power - Drake
Daniel A. Pozner - Cornell
W. Marshall Prettyman - Seton Hall
Louis Reveson - Rutgers, Newark
Suzanne Reilly - Pennsylvania
Ceil M. Reinglass - DePaul
Karl M. Rice - Mercer
Dean Rivkin - Tennessee
Henry Rose - Loyola, Chicago
Laurence Rose - Kansas
David Rossman - Boston University
Howard M. Rubin - DePaul
Jeanette Rucci - San Franciso
Nicole Q. Russler - Tennessee
Carol Ryan - Arizona State
Richard L. Rykoff - Santa Clara
Jack L. Sammons - Mercer
Andrew Schepard - Columbia
Phillip G. Schrag - Georgetown
Kandis Scott - Santa Clara
Kathryn Sedo - Minnesota
Andrew J. Shookhoff - Vanderbilt
Arnold I. Siegel - Loyola, L.A.
Stephen M. Simon - Minnesota
Robert H. Smith - Boston College
Simon Smith - Monash Univ. of Australia
Mark Speigel - Boston College
Julia Spring - Columbia
Walter W. Steele, Jr. - SMU
Norman H. Stein - Arkansas at Little Rock

Mark Stickgold - Golden Gate
Leslie Stllknecht - Mercer
Barry Strom - Cornell
Graham B. Strong - Virginia
Roy Stuckey - South Carolina
Harry Subin - N.Y.U.
Francis C. Sullivan - L.S.U.
Kathleen A. Sullivan - Cornell
Paul Tremblay - Boston College
John T. Valauri - Chase College
Lawrence B. Weeks - Arizona State
Leah Wortham - Catholic Univ. - D.C.
Michael Wolfson - Los Angeles, Calif.

TITLE IX UPDATE

The continuing resolution for the Department of Education includes $960,000 for Title IX, which is the same amount appropriated for the current fiscal year. It is possible that the amount will be doubled during the upcoming lame duck session of Congress. Despite this good news, there remains the possibility that the matter will be deferred or rescinded. Therefore, there is no information available with regard to grants or the application process.

UPDATE ON STATUS OF CLINICAL TEACHERS AT GEORGETOWN

The Georgetown Law School faculty recently completed the work it began last May to upgrade the status of clinicians who are not on the tenure track. (See, Newsletter, June, 1982.) In this final action, the faculty addressed the financial issues, which it had deferred last spring. It voted to authorize the Dean to set salaries, fringe benefits, and other prerequisites on the same basis as those of other faculty members.

As the existing clinicians enter the new system (through the procedures established last May), this decision will result in a salary increase of approximately 20%. In addition, the clinicians will be eligible, on the same basis, as other faculty members, for summer teaching stripends, summer writing grants, paid sabbaticals, and the use of student research assistants paid by the Law Center.

STACY CAPLOW RESIGNS AS CHAIR OF THE COMMITTEE ON FACULTY STATUS

Stacy Caplow, Brooklyn has resigned as chair of the Committee on Faculty Status. She has taken a leave of absence from Brooklyn Law School to join the Office of the District Attorney for Kings County, New York. Elliott Milstein has appointed Jim Doyle, Georgetown, and Karen Tokarz, Washington at St. Louis, as co-chairs of the Committee for the remainder of this year.

SEVENTH ANNUAL TRAINING CONFERENCE TO BE HELD IN NEW ORLEANS FROM APRIL 21-23, 1983

Susan Bryant, Hofstra, Chair of the AALS Planning Committee for the National Teachers Training Conference, has announced the schedule for the 1983 weekend conference. The primary focus of the conference will be on case planning, it being the consensus of the Committee that this area of clinical teaching had not received adequate time or attention at previous training conferences.

Thursday, April 21, 1983 - Evening Session

Topic: The Interrelationship of Critical Legal Scholarship to Clinical Education

Speaker: Duncan Kennedy, Harvard

Friday, April 22, 1983 - Teaching Case Planning in the Classroom

Morning Session

Topic: The Initial Approach to Case Planning: What to do After the Client Leaves

Speaker: Mark Spiegel, Boston College

(Each presentation will be followed by comments by experienced clinical teachers. Thereafter, the conferees will be divided into small groups for further discussion.)

Afternoon Session

Topic: Case Planning and Preparation for Trial

Speaker: David Binder, UCLA

Saturday, April 23, 1983 - Teaching Case Planning by Supervision

Morning Session

Topic: Teaching Case Planning with Team Supervision

Speakers: Phil Schrag and David Koplow, Georgetown

Afternoon Session

Topic: Case Planning at the Intermediate Stage: The Ability to Maintain a Flexible Theory of the Case During Fact Development.

Speaker: Gary Palm, Chicago

STEVE HARTWELL REPORTS ON WESTERN REGIONAL CONFERENCE

On October 22-24, 1982, the University of San Diego Law School Clinic hosted a weekend clinical consortium meeting for 40 clinical teachers from California, Oregon, Hawaii and Arizona. The conference featured the following presentations:

James Nielsen, Hastings, discussed the teaching of pleadings, using a mult-media process;

Rick Barron and Terry Player, University of San Diego, demonstrated the teaching of evidence through a videotaped simulated trial, in which the students are called upon to make evidentiary objections;

Mary-Lynne Fisher and Arnold Siegel, Loyola, analyzed the competitive and collaborative models of negotiation;

John Barkai and Jim Countiss, Hawaii, presented a demonstration of active listening skills;

Mark C. Stickgold, Golden Gate, discussed his study of field placement;

Lynn Lopucki described a computer assisted strategy game between creditor and debtor; and

Kandis Scott reported on current issues affecting clinical legal education.

DON PETERS, FLORIDA, DESCRIBES HIS FULBRIGHT-HAYES FELLOWSHIP IN MALAYSIA

"Taking The Show On The Road"

> "[I like] the way in which various alternatives were presented to us, followed by discussions, with a final choice to be ours alone. It felt great to be given the chance to think constructively instead of being spoon fed."
>
> "[What] I appreciate the most is the opportunity for 'self-discovery' through the exercises and through watching others perform."

Clinical legal education opened to good reviews in Kuala Lumpur last year as shown by these comments taken from student evaluations of the first clinical course offered by the Law Faculty at the University of Malaysia. Entitled Professional Practice, this course was developed by Associate Professor Visu Sinnadurai and lecturer Philip Koh Tong Ngee. A senior Fulbright-Hayes Award permitted me to join them and another Malaysian lecturer, Nik Ramlah Nik Mahmood, on the teaching team for this class which was Southeast Asia's first devoted

to the interpersonal processes that comprise lawyering.

The Professional Practice course was planned before my arrival and it was patterned after similar courses offered at Monash University in Melbourne, Australia, and the University of Kent at Canterbury, England. Introducing students to office and trial skills and providing practical substantive information not covered in the traditional curriculum were the primary objectives of the course. Law is a first degree in Malaysia and 21 students in their fourth or final year enrolled for the new venture. Class met twice a week during the ten week first two terms of Malaysia's academic year. Our students then wrote papers on practical topics during the shorter third term. The course was graded with sixty percent of the mark allocated to the first two terms and forty percent assigned to the final paper.

My role was to develop and introduce the law office and trial skills classes. We chose a performance-feedback approach using short simulations. It was the first time that any of the students, or the Malaysian practitioneers who helped us, had used this method of teaching and learning. Everyone adapted to it enthusiastically and the student evaluations also indicated that everyone agreed that the method was a useful learning experience.

Feedback was usually provided immediately after the performances with the teaching team and the class sharing the process. Over eighty percent of our students rated the public critiques an excellent way to learn lawyering skills and thought that the performance-feedback method will help them learn how to teach themselves when they start practicing. Although the Law Faculty lacked videotape equipment, cooperation from the Education Faculty across the street enabled us to tape a few performances. Our students responded very positively to the opportunities to see themselves acting as lawyers.

Interviewing, negotiation, counseling, direct examination [examination in chief] and cross examination were the topics covered in this phase of the course. The similarities between Malaysia's legal system, which is derived primarily from British common law as supplemented by statute, and our substantive law simplified the task of developing simulations. Our direct examination assignment, for example, involved presenting testimony from Mr. Nathan Tinjar who claimed that Victor Kandasami negligently failed to clean moss off the cocunut tree from which he fell while trying to tap a coconut to extract its toddy, the substance from which a popular drink is made.

A highlight of my experience was meeting and working with several able Malaysian lawyers who helped us teach the course. The Malaysian Bar does not follow a rigid separation between law office and courtroom practitioners and we used local lawyers in each sphere. They led the substantive units on family law, conveyancing, motor vehicle litigation and criminal trials and usually provided comprehensive introductory lectures, challenging simulations, and specific feedback on student performances.

Malaysia's linguistic diversity, which includes Malays who speak only Bahasa Malaysia, Chinese who speak varying dialects, and Indians who speak Tamil, requires that much lawyering has to be conducted through an interpreter. This point struck me early and forcibly. After my initial lecture which offered a theoretical model of interviewing that stressed rapport-building and active listening, the first student question was "how much of this is relevant when you are listening through an interpreter?" Although several practitioners addressed this question anecdotally, we never developed satisfactory learning units to deal with issues of selecting and training interpreters for law office work and handling them effectively in trial practice.

Field work opportunities for our students in Professional Practice were limited to two or three days working at the Legal Aid Bureau in Kuala Lumpur during the first term break. The work included drafting pleadings and preparing letters for staff attorneys. Malaysia does not have a student practice rule and no organized effort is underway to introduce one. The goal is to create a clinic in which the students can interview clients and do case preparations for members of the Malaysia Bar Council who will volunteer their time to handle the matters in Court. The Bar Council, however, is responding very slowly to this project.

A rewarding aspect of my experience was meeting lawyers and legal educators working in legal aid and clinical legal education in other countries in the region. Interest in both legal aid and clinical legal education and the linkages between them is growing in most of these countries. Clinical programs in one form or another are now underway at law schools in Thailand, Indonesia, the Phillippines, Taiwan, and Nepal. My descriptions of how my experience in Malaysia suggested that our notions about effective lawyering might be relevant in different legal systems were favorably received at schools in all of these countries.

My Fulbright-Hayes Award came through the traditional route of applying for a project described in the annual list published by the Council for International Exchange of Scholars. The initiative for a project comes from the host country and clinical legal Fulbrights have been rare. The 1983-84 pamphlet, for example, includes eleven law grants and none hint that they might be the least bit clinical. More may be forthcoming because my presentations to Deans and other officials always included the suggestion that Fulbrights can be used effectively to start, develop, and enhance their clinical programs. The Council for the International Exchange of Scholars is located at 11 DuPont Circle, N.E., Washington, D.C., 20036, and copies of their pamphlet are available upon request.

Getting back more than you give is usually one of the rewards of clinical teaching. It certainly was my experience in Malaysia. Working with a lively, challenging group of students; sharing

professional ideas and approaches with international colleagues; testing and refining my ideas about effective lawyering and how to teach and learn it in a very different setting; and getting a brief glimpse of three very different, very rich cultures interacting in a unique environment were all immensely rewarding aspects of my experience. That summary, however, barely scratches the surface of what is was like. No matter how long the show plays in Malaysia, this actor enjoyed taking it on the road.

UNIVERSITY OF OREGON ENVIRONMENTAL LAW CLINIC AGAIN UNDER ATTACK

John Bonine and Michael Axline, Oregon, report that the law school's Environmental Law Clinic is once again under attack for representing clients in litigation. The Environmental Law Clinic has brought an action on behalf of a number of plaintiffs against the United States Forest Service regarding timbering in a national forest. A timber industry association has moved to invervene in the litigation, alleging that the action has been brought "as a class project" and that the plaintiffs have a "mere academic interest" in the case, such that the law school is the real party in interest and should be subject to wide-ranging discovery.

Dean Derrick A. Bell, Jr., responding to this challenge, stated that "the clinic is an integral part of our curriculum at the law school; and a successful effort to remove the clinic would, in my opinion, have grave consequences for the future of all clinical legal education." He has asked for the support of the AALS and its Section on Clinical Legal Education. Elliott Milstein is presently undertaking efforts to organize such support, as more fully reported in his Chairperson's Message.

Professor Axline's response to the motion to intervene included the following, which may be of use to other clinical programs finding themselves in a similar situation:

> "Personal references to counsel in a case manifestly have nothing to do with the merits of the case. They are condemned by our rules and should never be indulged in." Smerke v. Office Equipment Co., 158 S.W.2d 302, 303 (Tex. Comm. App. 1941, opinion adopted by Supreme Court)(improper to refer to fact that opposing counsel was from another city and represented a corporation). Cf. Estis Trucking Co., Inc. v. Hammond, 387 So.2d 768 (Ala. 1980)(improper to imply that defendants' attorney tried only expensive lawsuits); New York Central R. R. Co. v. Johnson, 279 U.S. 310 (1929)(attack on opposing counsel's conduct of a case reversible error). Making

disparaging or irrelevant comments about opposing counsel can interfere with the parties' right to a fair trial. Cf. Wayne County Board of Road Commissioners v. GLS Leago, 394 Mich. 126 (1975); Cook v. Cox, 478 S.W.2d 678 (Mo. 1972); but cf. Willis v. Fried, 629 P.2d 1255 (Okla. 1981)(not reversible unless prejudicial).

If the behavior rises to the level that a clinic wishes to consider bringing ethical charges, relevant provisions of the Code of Professional Responsibility may be found in DR 7-105(C)(1), (2), (4), (5), and (6). See footnote 81 thereto. See also EC 7-37 ("A lawyer should not make unfair or derogatory personal reference to opposing counsel"), EC 7-38, and Old Canon 17 ("indecent to allude to the personal history or the personal peculiarities and idiosynchrasies of counsel on the other side").

ARTISTS & ENTERTAINERS TO BE SERVED BY NEW LAW PROGRAM AT SOUTHWESTERN

Dean Leigh Taylor has announced the beginning of a new "Arts and Entertainment Law Program" at Southwestern University School of Law which will match advanced law students with artists, entertainers, and community groups in need of legal assistance on specific types of legal problems. The Southwestern Clinical Law Center will offer specialized services covering subjects such as contract negotiations and drafting, copyright and trademark protection and non-profit incorporation. Law students, working under the direct supervision of faculty member/attorneys Steven Rood and Robert Lind will advise and counsel clients, negotiate, draft opinion letters and review contracts. Students are permitted to represent clients under special rules established by the Supreme Court of California. Fees for services will be set on a sliding scale, depending upon the type of service requested and the financial status of the prospective client.

GEORGETOWN LAW ANNOUNCES PRETTYMAN FELLOWSHIPS

Founded in 1960, the Prettyman Fellowships combine classroom study at Georgetown Law Center with actual representation of indigent clients in both the federal and local courts of the District of Columbia. The Fellowships carry a substantial stipend and will be awarded to four or five outstanding law graduates. Fellows engaged in the two-year Prettyman Program also participate, during their second year of study, in supervising upperclass law students enrolled in Georgetown's Criminal Justice and Juvenile Justice Clinics. Within its central emphasis on trial advocacy, the Prettyman Fellowship Program thus includes not only traditional legal studies and courtroom experience, but training as a clinical instructor as well. Upon successful completion of the program and submission of a major paper, fellows are awarded the degree of Master of Laws.

All candiates who hold an undergraduate degree from an approved college or university and who have been or will have been awarded a Juris Doctor degree from an approved law school before June 1983 are invited to apply to the Prettyman Program prior to December 31, 1982. All fellows are required to take the District of Columbia Bar Examination. Further information may be obtained by writing: LEGAL INTERNSHIP PROGRAM, Georgetown University Law Center Clinical Programs Center, 605 -G- Street, N.W., Third Floor, Washington, D.C. 20001.

TRANSITIONS

Rick North, Maryland, will be on leave for Spring semester, 1983, and will be visiting with the Clinical Law Program at the University of Warwick, Coventry, England.

JOBS AVAILABLE

The University of Nebraska at Lincoln seeks a clinical faculty member to direct an in-house civil clinical program, teach a seminar on lawyering skills, and supervise student-lawyers. Distinguished academic record and practice experience desirable. Initial appointment will be one year with extensions probable. Salary commensurate with experience. Admission to the Nebraska Bar usually can be accomplished by motion if applicant is member of another bar. Send resume by November 1 to: Professor Martin Gardner, Faculty Appointments Committee, College of Law, University of Nebraska-Lincoln, Lincoln, Nebraska 68583-0902. Affirmative Action/Equal Opportunity Employer.

The University of Maryland School of Law is seeking applicants for a full-time tenure track clinical position. Candidates should have substantial practice and clinical teaching experience in addition to an interest in scholarship. The appointment is to begin in the Fall of 1983.

The law school clinical program has seven full-time and three part-time faculty members working in it. In addition to the ten faculty members who supervise students in the handling of client cases, there are several faculty members who teach simulated skills courses.

Candidates should send a resume to Professor E. Clinton Bamberger, Director, Clinical Law Program, University of Maryland School of Law, 500 West Baltimore Street, Baltimore, Maryland 21201.

(CHAIRPERSON'S MESSAGE cont'd)

co-chaired by Karen Tokarz and Jim Doyle, is currently trying to assess the impact of the proposal on various clinical programs and we hope to have that information by the time of the Annual Meeting. It is clear, however, that many clinicians have heretofore been unsuccessful in obtaining tenure.

The Committee on Clinical Education of the AALS has strongly endorsed 405(e) which would require that full-time clinical teachers (who are not paid from grant funds) be either on the tenure track of a separate tenure track or have an employment relationship which is substantially equivalent (long term contracts and parity of other benefits). Joe Harbaugh, among others, argues that nothing short of full tenure-track is acceptable or in the long-term interests of legal education and therefore 405(e) should be rejected and the interpretation of Standard 405(d) which asserts that clinical teachers must be given the opportunity for tenure should be reaffirmed. Other clinicians have argued for a separate tenure track (405(e) without the "substantially equivalent" language).

The main argument against changing the accreditation standards seems to be that the ABA has no business dictating the internal policy of law schools. At most, it is argued, the ABA should make 405(e) aspirational rather than mandatory. If this position prevails the debate over faculty status will return to the local level (where, in most law schools, it has remained stalled for so long).

In any event, our battle for full membership in the law school community has been moved to center-stage at the Annual Meeting and the outcome seems likely enormously to affect the future of clinical education throughout the country. Can you really afford not to be there to participate in this?

The other issue, that of interference with the case selection process and the litigation of clinical programs by outsiders, has been the subject of a report by our Special Committee on Political Interference. That committee, chaired by Liz Schneider, responded to a request to draft a proposed standard to protect the independence of professional judgment of clinical program lawyers. Their report, which documents some of the problems which programs have had in the past and discusses those problems in the context of the Code of Professional Responsibility and the First Amendment, has been submitted to Dean Rivkin who will use them to assist the ABA Clinical Committee to draft a standard. Earlier drafts of the report were circulated to the Section's Executive Committee as well as to other interested individuals and their comments are reflected in the current Tentative Final Draft. That Draft is attached as an appendix to this newsletter and will be the subject of a discussion during the Section's program in Cincinnati. I am grateful to Liz and the Committee, particularly Jim Stark, for drafting such a first-rate document.

Another function which we hoped that this Special Committee would serve would be to design a method to permit us to respond collectively when a clinical program was under political attack. One clinical program is in the midst of litigation which raises the issue, "Does the fact that a law school clinic through faculty, staff and law students is counsel for a party make the university the real party in interest in the litigation (and therefore subject to discovery)?" That school asked for our help and I am happy to report that it appears as if we will be able to provide it. We were able to find a major Washington law firm to help on a pro-bono basis and I am optimistic that the AALS Executive Committee will agree to file a brief Amicus Curiae with the trial court because of the importance of this issue to clinical education. Because the decision making process is not yet complete as I write this I am

being purposely vague about all of this but I hope to be able to report on it in full at the Annual Meeting. If things go as I expect we will not only have succeeded in getting the AALS to assert itself to protect a member school but we also will have begun a process which can be replicated should similar issued arise elsewhere.

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Title IX, the federal grant program for clinical education has been saved once again from the extinction that the Administration sought. Thanks largely to Congressman Neal Smith of Iowa the current Continuing Resolution for the Department of Education contains $960,000 for the grants. That is the same amount as in the current year which is obviously not enough but usefull nevertheless. I am informed that grant booklets will go out in late February with a deadline of late March.

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This is my last newsletter as Chair of the Section. It has been a tremendous honor to have served and it will be a great relief to turn the job over to Kandis Scott. I want to thank those of you who have worked on behalf of the Section this year. I think that we have built a very effective voice for clinical education during the past four years and I am proud to be a part of this group. I hope that you will be as supportive of Kandis as you have been of me and I wish her success during her term.

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MEETING TIMES OF IMPORTANCE TO CLINICIANS AT THE AALS ANNUAL MEETING

Wednesday, January 5
9 PM Informal Meeting to Discuss House of Delegates Debate on Clinical Faculty Status. Ivory B, Stouffer Inn

Thursday, January 6

8:30 to 5:00	Section Annual Meeting Program and Luncheon
5:00 to 7:00	House of Delegates Debate
8:00 to 9:30	Section Business Meeting and Election of Officers

TIME: 10:00 to 11:30 a.m., Friday, January 7 in Room 29 of Cincinnati Convention Center
ABA Hearing on 405(e), Faculty Status Standard for Clinical Teachers

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TENTATIVE FINAL DRAFT

Political Interference in Law School Clinical Programs

Report of the AALS Section on
Clinical Legal Education,
Committee on Political Interference

November 1982

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Constitutional Litigation Clinic
Rutgers Law School
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Chair

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Over the last several years, instances have been reported around the country of efforts by State legislators and others to interfere with law school clinical programs or other litigation enterprises. In response, the AALS Section on Clinical Legal Education convened a special committee to investigate political interference with law school clinical programs and to make recommendations. This report of the Committee on Political Interference documents the problem of political interference, details educational, ethical and legal proscriptions against such interference, sets forth the need for an ABA Standard, and proposes a Standard.

A. THE PROBLEM OF POLITICAL INTERFERENCE

Political interference in law school clinical programs has occurred in the past[1] and appears to be on the rise again, particularly in State law schools.[2] Through legislative efforts, litigation and private pressure, state legislators and private groups are attempting to restrict clinics from public interest representation in such areas as civil rights, civil liberties, environmental law and prisoners' rights. These attacks have been directed at clinic litigation efforts perceived as threatening the financial or political interests of the state or private groups.

Legislators have attempted to restrict the types of cases which law school litigation programs at the universities of Iowa, Colorado and Idaho have handled. Iowa's "in-house" Prisoner Assistance Clinic, Complex Civil Litigation Clinic and Legal Services externship program were threatened with termination by a bill introduced in the 1981 legislative session by six members of the Iowa House of Representatives in retaliation for the clinic's successful handling of several large-scale prison conditions suits against the State penitentiary. The bill would have prohibited the expenditure of any state funds for the representation of clients in litigation against any governmental body, and specifically the representation of inmates, by persons associated with the law school's clinical program. The bill was passed in a House Committee, then defeated in a spending prohibition attached to the university's appropriation bill.

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1. For example, in 1969 a joint committee of the American Association of University Professors (AAUP) and Association of American Law Schools (AALS) investigated claims of political interference with a law school-legal services program at the University of Mississippi. In 1970, this Committee published a report which concluded that political pressure by members of the State bar, State legislators and the governor's office caused the University of Mississippi's Law School to separate itself from the clinic, and to illegally terminate the contracts of two professors who wished to remain connected with the clinic. "The University of Mississippi," AAUP Bulletin (Spring 1970) at 74-86.

2. The Committee could not document all instances of political interference which have been reported. This report highlights situations at the University of Iowa, University of Colorado, University of Connecticut, University of Tennessee and University of Oregon Law Schools which were able to be substantiated. Clinical programs at the University of Idaho and Arkansas Law Schools have also reportedly been attacked.

A similar bill introduced twice in the Colorado State legislature was directed against a seminar on constitutional litigation at the University of Colorado Law School taught by Professor Jonathan Chase, in which students worked on civil rights cases.[3] This bill attempted to prohibit "law professors at the University of Colorado from assisting in litigation against a governmental unit or political subdivision." In 1981 it passed both houses of the legislature but was vetoed by the governor. In 1982 it passed the House of Representatives but did not get out of Committee in the Senate. Similarly, the Idaho House of Representatives passed a bill by a vote of 55-11 this spring that would have prohibited any public institution from offering "a class, legal clinic or other educational opportunity in which students participated in any lawsuit against the State or its political subdivisions." Fortunately, this bill was also defeated in Senate Committee.[4]

The University of Tennessee Law School's clinic has not been so fortunate. Motions to dismiss attorney fees applications in two clinic civil rights cases filed by the State Attorney General, on the ground that clinic attorneys were state employees, led the university board of trustees to convene a special committee to study the clinic. This inquiry has led to an unwritten "agreement" that the clinic would not initiate any "significant" suits against the state, and the separation of the clinic from the legal services program with which it was previously joined.

Attacks on a University of Oregon Law School clinic, the Pacific Northwest Resources Center, have been repeatedly mounted by private groups through the courts and Board of Higher Education. In one incident the clinic, funded at that time by the National Wildlife Federation, brought a lawsuit to halt timber-cutting practices in Idaho, which angered members of the timber industry. This group was able to depose two clinical instructors, the dean of the law school, two former clinic students and university officials to develop information on the finances and decision-making processes of the clinic.[5] In addition, they have pressured university officials and the Board of Higher Education to restrict the clinic's legal work and threatened the withholding of funds from the University pending administrative review.

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3. Conversation with Jonathan Chase, now Dean of Vermont Law School, July 7, 1982. This bill was so clearly directed at him that it was known as the "Skip Chase" bill. The bill was a response to a lawsuit which he filed challenging a Nativity scene.

4. A bill to curb clinic representation at the University of Arkansas has also been reported. In addition, at the University of Connecticut, a high ranking state official recently threatened to introduce legislation to limit the activities of the Law School's Criminal Clinic. This program, which has been involved in several capital cases, last year successfully challenged a provision of Connecticut's death penalty statute.

5. See Appendix A, "Seeing the Forest for the Trees," Willamette Week, December 29, 1980-January 5, 1981.

These documented attacks against law school faculty members, administrators, and programs are not isolated instances. Individually and collectively, they constitute a significant chill on the educational independence of American law schools. As one clinical teacher put it to us, "there is no question that we worry constantly that our willingness to represent unpopular clients and our success in suing governmental bodies will cost us our chances to provide high quality clinical training to our students."[6] At a time when both the ABA and the public at large are concerned with improving opportunities for skills training in American law schools, this state of affairs is a matter of substantial concern.

B. PROSCRIPTIONS AGAINST POLITICAL INTERFERENCE

After careful examination of the problem of political interference, the Committee believes that there are four reasons why outside interference with the operations of law school clinical programs is unwarranted and perhaps unlawful. First, outside attacks on law school educational programs threaten the institutional independence of law schools. Second, such attacks undermine the academic freedom of individual clinicians in their capacity as teachers. Third, externally imposed restrictions on law school clinics conflict with the ethical obligation of clinicians, as attorneys, to exercise independent judgment on behalf of their clients and to take controversial cases. Fourth, interference with clinical curricula impinges upon protected First Amendment rights of associational and academic freedom and raises serious constitutional problems. Each of these issues is examined in turn.

Institutional Self-Governance

External attacks on law school clinics, whether brought by legislators, judges, other state officials or private interest groups constitute a serious challenge to the independence and institutional integrity of American law schools. The choice of subject matter emphasis in clinical programs is an important educational decision. It is common for law school faculties to review proposed subject matter guidelines for clinics, just as they review course coverage and catalog descriptions for substantive courses in their curricula. To the extent that outside individuals or groups interfere with this process, they are challenging perhaps the most critical academic function of law school faculties.

Law teachers have sometimes criticized efforts by outside agencies to regulate course requirements in law schools. In recent

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6. Memo from Barbara Schwartz to Elizabeth Schneider, re: Legislative Interference with Clinical Programs at the University of Iowa (June 25, 1982).

years, for example, the Indiana Supreme Court and the South Carolina Supreme Court adopted rules mandating extensive curricular requirements for students who wish to take bar examinations in those states, a development assailed by many law teachers.[7] In addition, the Clare Committee, the Devitt Committee, the Cramton Task Force and most recently the ABA Section of Legal Education and Admissions to the Bar have been criticized for their efforts to suggest or mandate skills training in American law schools.[8]

Efforts to require increased law school offerings in skills areas may raise difficult questions concerning the resource capacity and proper function of American law schools. Nevertheless, even critics would agree that these efforts are motivated by a positive desire to improve the diversity of law school curricula. Stated another way, the impetus for these efforts is clearly educational in nature - to enhance the professional preparation of law students in the practice of law.

By contrast, outside attacks on law school clinics are negative in their motivation and restrictive in their impact. The impetus for these attacks is political and ideological rather than educational. Such efforts can result in limitations on clinics which threaten the ability of law schools to provide first-rate skills training. Where successful, such attacks may also impair, however subtly, the ability of law schools to inculcate in students traditional values of zealous advocacy and professional independence. Outside political attacks on clinical programs thus pose dangers to the institutional independence of law schools different in kind from other forms of regulation - and very disturbing in their potential effects.

In 1966, the AAUP published a Statement on Government of Colleges and Universities.[9] This policy states that "when an educational goal has been established, it becomes the responsibility primarily of the faculty to determine appropriate curriculum and procedures of student instruction." Statement at 44. It states further that when "external requirements influence course content and manner of instruction or research they impair the educational effectiveness of the institution." Id. Section V contains the following language:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, faculty status, and those aspects of student life which relate to the educational process. On these matters the power

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7. See, e.g., Nahstoll, "Current Dilemmas in Law School Accreditation," 32 J. Leg. Ed. 236, 241 (1982).

8. Id. at 241-42.

9. A copy of this statement is attached to the Report as Appendix B.

> of review and final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances and for reasons communicated to the faculty. Id. at 43.

Outside political interference with law school clinical programs violates this policy statement and threatens the autonomy of law school faculties in designing high quality skills training programs for their students.

Academic Freedom

In addition to undermining the institutional autonomy of law schools, political interference with clinical programs threatens the academic freedom of individual clinical teachers. At the present time, AALS by-laws and ABA standards both incorporate AAUP principles of academic freedom and tenure.[10] Under AAUP guidelines, a teacher is entitled to "full freedom in research and in the publication of the results" and "to freedom in the classroom in discussing his subject, but he [sic] should be careful not to introduce into his teaching controversial matter which has no relation to his subject."

Neither the AALS nor the ABA presently have specific guidelines regarding academic freedom for clinical faculty. But it is important to emphasize that clinicians are -- first and foremost -- teachers. The selection of individual cases to handle and the methods of handling those cases, like the selection of casebooks and teaching approaches, lie at the very heart of the educational function of clinical programs. So long as these decisions reasonably serve that educational function, they must be accorded the traditional protections of academic freedom, and vigorously protected from outside political interference. Indeed, the litigation decisions of clinical teachers are in need of especially vigilant protection because, to a greater extent than the decisions of classroom teachers, they are made in a public forum.

The Code of Professional Responsibility

Outside interference with clinical programs poses especially sensitive problems because clinical faculty act in a dual capacity, as teachers and attorneys. Thus, in addition to raising academic freedom issues, political attacks on clinicians may violate funda-

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10. AALS by-laws, §6-8(d) states: "A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors."

The ABA Standards and Rules of Procedures for Approval of Law Schools contain verbatim the text of the 1940 AAUP statement of principles on academic freedom and tenure in Annex 1 to its rules.

mental ethical principles contained in the ABA Code of Professional Responsibility. Of particular concern are outside attacks that interfere generally with the clinicians' exercise of independent judgment and, particularly, the decision to undertake controversial cases.

It is clear under the Code that outside individuals or groups may not interfere with a clinical teacher's legal decisions concerning the handling of clinic cases - decisions such as choice of parties, forums and legal remedies. Canon 5 of the Code of Professional Responsibility states the fundamental principle that "[a] lawyer should exercise independent professional judgment on behalf of a client." Since "[n]either his personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client," EC 5-1, a lawyer must "disregard the desires of others that might impair his free judgment." EC 5-21. A lawyer must resist employer pressures against independent judgment, EC 5-23. He "shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B) (emphasis added). Accordingly, "a lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves." EC 5-24. The board must scrupulously guard against unreasonable interference with the handling of specific cases or the representation of specific clients by staff attorneys. ABA Formal Opinion No. 324 (August 9, 1970), ABA Formal Opinion No. 334 (August 10, 1974).

It also seems clear that outside individuals and groups may not exert pressure on clinics to avoid taking politically controversial cases or cases against specified government entities. Canon 2 of the Code of Professional Responsibility stresses that every lawyer should aid in making legal services fully available. EC 2-26 requires each lawyer to accept his share of the burden of rendering legal services in those matters unattractive to the bar in general. A lawyer cannot justify refusal to handle cases on the ground of his "personal preference to avoid adversary alignment against judges, other lawyers, public officials or influential members of the community," EC 2-28, and cannot decline to handle legal matters which are "repugnant" because of "the subject matter of the proceeding [or] the identity or position of a person involved in the case." EC 2-29. ABA Informal Opinion No. 1208 (February 9, 1972). "[J]ust as an individual attorney should not decline representation of an unpopular client or cause, an attorney member of a legal aid society's board of directors is under a similar obligation not to reject certain types of clients or particular kinds of cases merely because of their controversial nature, anticipated adverse community reaction or because of a desire to avoid alignment against public officials, governmental agencies or influential members of the community." ABA Formal Opinion No. 324.

These principles govern law school clinical programs. Interference with clinic case selection procedures, particularly to restrict representation of controversial clients and causes, has been held to violate ethical precepts of the Code. ABA Informal Opinion No. 1208.

In Informal Opinion No. 1208, the ABA Ethics Committee considered the ethical implications of law school guidelines which would bar clinics from suits against the State, as well as guidelines which would require prior approval for such suits from a clinic governing board[11] on a case-by-case basis. The opinion concluded that the imposition of either restrictions was ethically impermissible:

> ... [L]awyer members of a governing body of a legal aid clinic should seek to avoid establishing guidelines (even though they state broad policies; see Formal Opinion No. 324) that prohibit acceptance of cases aligning the legal aid clinic against public officials, governmental agencies or influential members of the community; see Formal Opinion No. 324. Acceptance of such controversial clients is in line with the highest aspirations of the bar to make legal services available to all. 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.[12]
> Informal Opinion No. 1208 at 3 (emphasis supplied)

Thus Opinion No. 1208 clearly establishes that political interference in clinic case selection conflicts with fundamental ethical proscriptions and that law schools should resist such efforts when they arise.

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11. Informal Opinion No. 1208 assumed that "[t]he governing body of the law school clinic is a hierarchy consisting of the law school faculty and its committees and its dean, the university administration and the university board of trustees. Some of the individuals in this hierarchy are lawyers and some are not." Informal Opinion No. 1208 at 1.

The Guidelines for Clinical Legal Education note that "[t]he functioning of a [clinic] advisory group raises problems, however, particularly in the area of interfering with the attorney-client relationship. ABA Formal Opinions No. 324 and No. 334 indicate that an advisory board is significantly limited in its role once a case has been accepted." Guidelines on Clinical Legal Education, Report of the Association of American Law Schools-American Bar Association Committee on Guidelines for Clinical Legal Education (1980) at 90.

12. However, the Opinion suggests that lawyer-members of the boa would only be subject to a disciplinary sanction for establishment of and participation in a prior approval, case-by-case clinic case selection process, although across-the-board restrictions on suing the state are "counter to the ethical precepts urged upon lawyers in the Code of Professional Responsibility." Informal Opinion No. 1208 at 3

Constitutional Considerations

Law school clinical programs should be accorded a high measure of constitutional protection because of the dual sources of First Amendment activity involved in clinical education. Outside interference with clinical curricula restricts law teachers' and law schools' right of "academic freedom" and clients', teachers' and students' rights of association for the purpose of litigation. While any form of interference burdens the exercise of these rights, state legislation which conditions funding of State law school clinics on the non-exercise of these rights raises particularly serious constitutional problems. These bills impermissibly dictate the subject matter and content of law school curriculum by effectively prohibiting State law school clinics from engaging in the very type of public interest litigation which has been the educational mainstay of most clinical programs.

The crucial educational function served by law school clinical programs protects clinic decisions concerning case selection and choice of defendants from State interference. These are educational decisions which determine the content and subject matter of clinical curriculum and are at the heart of "academic freedom." The Supreme Court has recognized an "academic freedom" interest deriving from the rights of expression and association guaranteed by the First and Fourteenth Amendments for individual teachers, Sweezy v. New Hampshire, 354 U.S. 234 (1957), Keyishian v. Board of Regents, 385 U.S. 589 (1967). An institutional right to protection against "governmental intervention in the intellectual life of a university" has also been recognized by some justices. Keyishian, 354 U.S. at 262 (Frankfurter, J., concurring), Regents of the University of California v. Bakke, 438 U.S. 265, 311-316 (1978)(Powell, J.). See generally, Note, "Academic Freedom and Federal Regulation of University Hiring," 92 Harv. L. Rev. 879 (1979). The Court has consistently reaffirmed that "the First Amendment ... does not tolerate laws which cast a pall of orthodoxy over the classroom" Board of Education, Island Trees v. Pico, 102 S. Ct. 2799, 2807 (1982) citing Keyishian, 385 U.S. at 603, for "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." Sweezy, 354 U.S. at 250. Restricting clinic litigation to cases which do not challenge State action unconstitutionally "impose[s] [a] strait jacket" on law school curricular choices and casts a prohibited "pall of orthodoxy" over the law school.

Law school clinical programs generally involve representation of individuals or groups exercising rights to association through litigation. Clinic teachers and student interns are also exercising these rights through participation in litigation. An unbroken line of Supreme Court decisions from NAACP v. Button, 371 U.S. 415 (1963) to In re Primus, 436 U.S. 412 (1978) establishes that activities related to association for the purpose of litigation are protected against State action by the First and Fourteenth Amendments and that State restrictions on the exercise of

associational rights must be justified by proof of actual harm to a compelling State interest. In re Primus, 436 U.S. at 433-38. Indeed, the Supreme Court has recognized that "[a]ssociation for the purpose of litigation may be the most effective form of political expression," NAACP v. Button, 371 U.S. at 431, and thus has affirmatively sought to protect public interest litigation. The right to sue the State is implicit in this protection of First Amendment associational rights expressed through litigation. Just as the freedom to criticize the government is essential to meaningful exercise of free speech rights, freedom to sue the State is essential to a meaningful exercise of associational rights.

Because of the importance of these First Amendment rights at stake, laws which restrict suits against the State brought by clinical programs have serious constitutional defects. First, the attempt to restrict First Amendment activity through the threat of withdrawal of state funds rather than outright prohibition appears to violate the Supreme Court's command that the State cannot condition receipt of state funds on the waiver of constitutional rights. Second, differential treatment of State law school clinic programs based on the subject matter of their curricula raises serious equal protection problems.

The Supreme Court has repeatedly held that the state cannot condition receipt of funds on a waiver of First Amendment rights. Sherbert v. Verner, 374 U.S. 563 (1963) (state may not condition receipt of unemployment benefits on person's willingness to accept Saturday employment that violates her beliefs); Pickering v. Board of Education, 391 U.S. 563 (1968) (board of education may not dismiss teacher on the grounds that teacher wrote letter critical of board); Shelton v. Tucker, 364 U.S. 479 (1960) (school may not condition teacher's re-employment on teacher's signing of affidavit that lists all organizations to which teacher belongs or contributes). The Supreme Court has explained why this is impermissible:

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.... For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not demand directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Since the state cannot directly dictate the subject matter of law school curriculum or prohibit public interest litigation challenging state action it cannot "produc[e] that result" through

the threat of denial of funds to State law schools.[13]

Secondly, differential treatment of State law school clinics on the basis of whether they sue the State raises serious issues of equal protection as "informed by" the First Amendment. See Carey v. Brown, 447 U.S. 455, 460-61, 466-71 (1980) (state statute allowing the picketing of a workplace but not of a residence is invalid); Taxpayers with Representation v. Regan, 676 F.2d 715 (D.C. Cir.) cert. granted, 51 U.S.L.W. 3221 (October 5, 1982) (lobbying restrictions on non-veterans tax-exempt organizations, not applied to veterans' organizations, are invalid); see also Emerson, "The Affirmative Side of the First Amendment," 15 Ga. L. Rev. 795, 802-03 (1981); Karst, "Equality as a Central Principle in the First Amendment," 43 U. Chi. L. Rev. 20 (1963). Since fundamental rights are involved, the state must show more than a "rational basis" for its differential subsidization. Taxpayers, 676 F.2d at 728. Discriminatory governmental subsidization of first amendment activities is only constitutionally valid where the discrimination "serves a substantial governmental interest and [where] the statute is narrowly tailored to serve that end." Buckley v. Valeo, 424 U.S. 1, 95-96 (1976); Taxpayers, 676 F.2d at 731, 750.

Under this standard such legislative restrictions on law school clinics cannot pass constitutional muster. State refusal to fund law school clinics' public interest litigation serves no legitimate governmental interest but is instead "aimed at the suppression of [the] dangerous ideas" advanced by clinical teaching and practice of public interest litigation. Speiser, 357 U.S. at 519.

First, laws which seek to restrict clinic litigation, such as those proposed in Iowa, Idaho and Colorado would not meet the "substantial governmental interest" test. In Island Trees v. Pico, 102 S. Ct. 2799 (1982) the Supreme Court held that a school board's exercise of discretion concerning a library's contents is unconstitutional if it is "intended ... to deny ... access to ideas with which [they] disagree ..." 102 S. Ct. at 2810. In each of these states it is clear that the legislation is designed to stifle the exercise of First Amendment activity and to deny students "access to [First Amendment protected litigation and educational experiences] with which [the State] disagrees." Island Trees v. Pico, 102 S. Ct. at 2810.

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13. The legislation discussed herein is not controlled by Harris v. McRae, 448 U.S. 297 (1980) (government is not required to fund medically necessary abortions) because of the preferred status of first amendment rights, the greater role accorded to state neutrality in the First Amendment context, and the "penal" and "retaliatory" history of the legislation in the States in which it has been proposed. Cf. McRae, 448 U.S. at 317 n.19.

Second, the only interest which the State can assert to support this differential treatment is an interest in immunizing itself from suit. This interest is wholly illegitimate and violates basic public policy in favor of enforcement of civil rights. Cf. Shadis v. Beal, 685 F.2d 824 (3d Cir. 1982), cert. denied, sub nom. O'Bannon v. Shadis, 51 U.S.L.W. 3331 (November 2, 1982) (contract provision between State of Pennsylvania and legal services which bars the award of attorney fees in civil rights action to State-funded legal services offices violates public policy in favor of enforcement in civil rights actions as expressed in 42 U.S.C. §1988). Indeed, in Shadis the Third Circuit emphasized the illegitimacy of Pennsylvania's even less direct effort at stifling the prosecution of public interest suits.

> What the Commonwealth has attempted to do here is to buy immunity from CLS lawyers. In return for a steady, partial subsidy, the Commonwealth has demanded that CLA not seek attorney's fees in cases brought against the Commonwealth.... The obvious effect of this, if the agreement is enforced, is to cause CLS not to bring actions against the Commonwealth. In end result, an important member of the plaintiffs civil rights bar would be removed from the scene and the vigorous enforcement of the laws would be materially quelled.
> Shadis v. Beal, 685 F.2d at 831 citing Shadis v. Beal, 520 F. Supp. 858, 864 (ED PA. 1981)

For these reasons, State legislation restricting clinic litigation has serious constitutional infirmities. This underscores the need for the ABA to take affirmative action, through the use of the accreditation process, to protect the exercise of these rights by state law school clinics.

Need for an ABA Standard

Law school clinical programs can only discharge their legal and educational obligations free from political interference. Clinical teachers around the country are deeply concerned by the message of this recent spate of attacks - vigorous representation of controversial clients and willingness to sue the state may result in the termination of clinical programs. Law schools must be affirmatively encouraged to protect and ensure clinic independence from outside interference. Accordingly, the law school's responsibility to do so should be explicitly tied to the accreditation process.

It is not surprising that interference in clinic programs is increasing at the same time that budgetary pressures, particularly on state law schools, have intensified. However, the present economic situation underscores the need for the ABA to vigorously respond to protect clinical education. See generally Guidelines on Clinical Legal Education, Report of the Association of American Law Schools - American Bar Association Committee on Guidelines for Clinical Legal Education (1980). Law school administrators are now even more likely to feel substantial pressure from legislators and private groups who control the university's financial purse-strings. Implementation of a Standard is an important means of supporting resistance to those pressures. *

* The authors gratefully acknowledge the invaluable assistance of Thomas Kowalczyk, student in the Constitutional Litigation Clinic at Rutgers Law School-Newark, in the preparation of this report.

ATTACHMENT A

Proposed Standard:

Interference in Law School Clinic or Litigation-Related Programs

Law schools should ensure that clinical or other litigation-related programs are free from political interference. Litigation enterprises within law schools are educational programs; decisions concerning subject matter emphasis, case selection and handling are both educational and legal decisions. Ethical precepts governing legal practice, [and] basic tenets of academic freedom and principles of institutional self-governance require that these decisions be made by clinic teachers and law schools free from unwarranted interference by outside agencies.

In the interest of principles of academic freedom and to safeguard the independence of the lawyer-client relationship, choice of individual cases and methods of handling those cases (including such issues as choice of parties, forum and remedies) must be left to the discretion of teachers in charge of the clinic or litigation related program, provided such choices serve the educational objectives of the enterprise. Law schools must affirmatively protect the independence of both the case selection and the case handling process.

Law schools should seek to avoid establishing guidelines that prohibit acceptance of controversial clients or cases or that prohibit acceptance of cases aligning the clinical program against public officials, government agencies or influential members of the community. Acceptance of such cases is in line with the highest aspirations of the bar to make legal services available to all.