Chapter 13

THE DELIVERY OF LEGAL SERVICES: SOME ETHICAL CONSIDERATIONS IN THE USE OF LAW STUDENTS

by Robert C. Wolf*

The themes of quality versus quantity and education versus service are competing values that any law school must confront when establishing a clinical law office.¹ Most recently these themes were raised at Catholic University Law School when some members of the Black Law Students Association (BALSA) suggested that the unleashing of a large number of predominantly white, middle-class law students in a black, inner-city neighborhood to make their mistakes in learning how to be lawyers would make the residents of the neighborhood, the potential clients of the black bar, increasingly mistrustful of lawyers. In essence, BALSA’s complaint was that a law office staffed by students would be inefficient, would provide its clients with less than professional service, and would make mistakes at the expense of the clients—poor black clients—with the result that the students may graduate better equipped to deal with their white middle-class clients while the low-income community would be left further scarred and unwilling to seek legal help again. What follows is a discussion of the way one clinical office has tried to cope with these problems in an effort to avoid the result feared by BALSA.

The Columbus Community Legal Services (CCLS) is the neighborhood law office of the Catholic University

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School of Law. It is located in a low-income, black community about a five-minute drive from the law school. The office is staffed by two full-time attorneys, both Assistant Professors at the Law School; an administrative secretary, a secretary, a clerk-typist, and the law students participating in either the full clinical semester (13 credit hours) or a three-hour course.² The office handles the full spectrum of civil and juvenile cases, but no criminal cases, and has an active caseload of over two hundred cases. There are presently nine full-semester second- and third-year students and eighteen three-hour students working in the office for credit.³ The client group consists of those who walk in from the street, referrals from community organizations, and community groups.

By locating its clinic in a neighborhood away from the school, the law school acknowledged its obligation to service as well as to education, and committed itself to an involvement in the community. A neighborhood office such as CCLS is designed, by definition, to attract individuals from the community—the walk-in client—and the more successful the office is at making itself known, the greater will be the demand for its services. The latter is not always a desirable result.⁴

The community in which a neighborhood office is located has the right to demand that every lawyer practicing in its midst will give it quality advice and representation. This means that lawyers will be available; that the advice being dispensed is accurate and from people qualified to do so; and that problems will be treated in a professional and expeditious manner.

Meeting the expectations of the community is not an easy task. There is the initial problem of placing second- and third-year, predominantly white, middle-class law students in a low-income, black community. This is exemplified on
the very elemental level by the discussion we invariably have at the commencement of each semester. The students appear their first day at the office dressed in patched jeans, sweatshirts, slacks and faded tee shirts, and are asked to consider the impact of their appearance on the community in which we are operating in light of what they believe the client's perception of the lawyer is. Some of the issues the discussion invariably touches are: the impact of dress on the ability to communicate with the client and obtain the necessary information to properly represent the client; the right of white middle-class people to impose their middle-class hangups about lawyers on the black community; and the ability of our office to continue to operate in the community and attract clients. We have not yet resolved the problem by imposing a dress code, although my inclination is that forcing the student to dress as he or she would for court has a positive impact on the attorney-client relationship as well as upon the student's mental attitude toward lawyering.

Meeting the expectations of the community is a special problem where the students do not have the substantive background to deal with the problems of the clients. The inference of BALSA's charge is that it is improper, even unethical, to allow students to interview clients unless the students are thoroughly grounded in the substantive law. To be sure, in order to do an effective interview, the students must have some idea of what they want from the client—some idea of the substantive defenses available and the elements necessary to prove those defenses in order to gather the proper information. The more substantive knowledge they have, the better equipped they will be to deal with the information being given by the client. (This does not necessarily mean, however, that they will do a better interview.)
Educationally, the opportunity to learn law through the specific problems presented by the client, rather than from the traditional casebook method, is one of the great advantages of the clinical approach, and to require students to have taken all of the substantive courses before they can interview a client would be counterproductive.\(^5\) The client has the right to demand, however, that the student doing the interview is being adequately supervised. Critical, then, to the success of a clinical program such as CCLS is adequate supervision.\(^6\)

In order to provide adequate supervision for the students we require each student to fill in once a week a progress sheet on each open case he or she is handling. The progress sheet forces the students not only to give the current status of the case, but also to think of the client’s problems in legal terms—to assess alternatives—providing both a regular spot-check on each case as well as the progress of the student. The attorneys’ time, then, can more efficiently be used dealing with the problems raised by the weekly progress sheet than by sitting down on a weekly basis and reviewing each case with the student. Similarly, all mail, before it is sent out (as well as every pleading before it is filed) and all mail that comes into the office is reviewed by the attorneys before it is given to the students. In this way problems are spotted and discussed.

Do all of these safeguards provide an absolute guarantee that the client will not be misrepresented? The answer must be “no,” for there is no way to protect absolutely against misrepresentation unless the attorneys sit in on every interview and are present every time the student takes any action on the case. Even though one admonishes the student that he must advise the client at the outset that he is a law student working under the supervision of an attorney and is not a full-fledged attorney, there is no way to guarantee that the student will always
tell the client this fact. And, even if the student does inform the client that he or she is a "legal intern" and not a lawyer, the distinction soon gets wiped out in the client's mind—if it ever really was clear—and as far as the client is concerned, he or she is dealing with a lawyer.\footnote{Similarly, while the same unauthorized practice considerations apply to student dealings with the opposition,\footnote{be it opposing counsel, landlord, or creditor, there is no way to guarantee that the students will not neglect to inform the opposing side that they are students. Tactically it is more useful, certainly, in a negotiation to let the other side believe that you are an attorney, albeit a violation of the canons. We can, and do, require that no settlement can be finalized on behalf of a client without the approval of one of the attorneys in the office. This at least protects the client's interests. The students' interests, however, pose additional problems. The threat of unauthorized practice charges being filed against students is not so remote a possibility. During this past semester the Committee on Unauthorized Practice of the District of Columbia Court of Appeals has challenged the right of at least one student working in a neighborhood legal services office in town to interview clients and in any way represent the client. During one lengthy case, in which our office was involved this past semester, opposing counsel raised the suggestion that two of our students had attempted to suborn testimony. In addition, he threatened to bring charges before the grievance committee that our office was engaged in unauthorized practice and was stirring up litigation by advising tenants in a housing development, whose owner he represented, of their rights. While these charges and threats were, I believe, totally without foundation, the impact on the students of the threats was significant. Certainly these threatened charges raised, quite vividly, an additional, basic consideration of a program such as CCLS}}
—that is, the obligation to protect, at all costs, the future of the student. It would hardly be a worthwhile exercise to permit a student to learn how to be a lawyer through involvement in the clinical experience if the result were to bar the student forever from the practice of law. Thus, equal in consideration to providing the client with quality legal representation, is the requirement that every precaution be observed to protect the student's future ability to function as a lawyer.

One of the demands placed upon a law office located in the community is the requirement that it take a larger quantity of cases than might otherwise be educationally desirable. This is so for several reasons. As already mentioned, the very reason for setting the office in the neighborhood is to become involved in the community and to encourage clients to come in from the streets. As a result, the office cannot as carefully screen the cases as it would like, confining it to a large extent to the problems the clients walk in with. In many instances this results in an abundance of routine, similar cases. For example, if we would allow it, the clinic could handle nothing but domestic relations problems and still have a monstrous caseload. While the function of providing a domestic relations service may be great, the educational value to the student and service value to the total community are minimal.

Another reason why CCLS cannot be as selective as it might otherwise wish is that when one cuts off intake it tends not only to stem the immediate flow of clients but it also gets clients out of the habit of coming to the office with problems. If clients are unable to rely upon our services, many will stop consulting lawyers. If one of the objectives of placing the office in the community is to foster an enlightened community, the turning on and then shutting off of intake seems to be counterproductive. The
realities of the situation, however, require that to some degree we control caseload.

It has been persuasively argued that it is a violation of the canons of ethics for an attorney to handle more clients than he or she can adequately represent. This is even more a concern with students. At the very minimum, therefore, the office cannot take in more clients than the students can give quality representation to.

The ability of the student to deliver quality representation is to a large extent tied into the availability of the attorneys. Thus, if there are a number of cases in the office requiring the attorneys to appear in court, either to personally try the case or to supervise a third-year law student, the total number of cases the office can handle must be reduced. Similarly, the more court appearances required of the attorneys, the less time there is available to prepare for the classroom sessions.

Given the requirement that the neighborhood law office control caseload, can the choice of cases be made solely on an educational basis for the students? As previously suggested, I believe not. An office set up to serve the community must accept some duplication of cases, must handle routine cases, and must meet many of the demands placed upon it by the community. While, educationally, the student may derive more from handling a wide spectrum of cases, integrating substantive knowledge with the lawyering skills as they are adapted from one fact pattern to another, from one area of legal research to another, an individual client in the community will not be satisfied when his or her case is refused because the office has handled too many landlord and tenant cases that month. The direction we are heading in at CCLS suggests a greater involvement in affirmative litigation that addresses itself to the systemic problems affecting the community around our
office, with a continuing involvement in routine cases that will develop the lawyering skills being taught in the classroom. Thus, divorces, for example, will probably be reduced to a level where no student has more than one or two, or else will eventually be completely rejected at intake. Affirmative test-case litigation, an area the office is already involved in, may be increased.

Even given a reasonable restraint on caseload, the probability is that at the end of the semester the students will be left with a number of open, active cases. The question comes to mind whether the student, once assigned to a case, should be required to carry it through to completion or whether it should be assigned to another student taking the course the next semester. For the present we have opted for reassigning cases. Although this decision was based upon unsatisfactory efforts to have students continue on their cases even though no longer taking the course for credit, there are distinct disadvantages to reassigning cases. The impact upon the client of changing students from semester to semester and the failure to have a sustained contact with one person may have as negative an impact upon the community and the client as anything the neighborhood office can do. In some of the office files there are three or four form letters informing the client that the law student working on the case is leaving the office and that the case is being reassigned to another. If anything gives the client the sense of being used for an experiment, transferring the client from student to student does. Not only does it interfere with the development of an attorney-client relationship, but it also raises serious questions in the client’s mind about the privacy of his or her file.¹²

One way of dealing with this problem may be to require the student to spread the thirteen hours of credit over two semesters and, at some point in the second semester, require the student to terminate intake and work solely on
closing his or her active cases. One suggested product of this approach is that it would maximize the impact of the students on the rest of the law school because the students would still be involved in regular courses, sharing their observations, perceptions, and approaches from the perspective of their clinical experiences.

Certainly the student’s value to the clinic would be expanded if the credits were spread over two semesters, for with everything compacted into one semester the student does not really begin to develop the lawyering skills and a sense of confidence until well into the semester. On the other hand, there is the value of having the undivided attention of the student for an entire semester, knowing that demands can be placed on him without concern that there will have to be a choice between attending a class or serving the client. A practical consideration militating against dividing the credits over two semesters is that we would have to double the number of students per semester taking the course in order to keep the cost per student at the same level. Thus, for the immediate future at least, it seems advantageous to have the student take all of the credits in one semester.

One of the interesting conclusions of some of the students completing the first full semester was that the impact of the four-month slice of lawyering, rather than making them more confident in their future roles, had raised serious questions in their minds about their ability and desire ever to become practicing attorneys. In part, this sense may be due to their failure to see the completion of many of their cases. All many seemed to do was get bogged down in the same kinds of dilemmas with each case, never seeing the fruition of their efforts. Whether this impression will linger with perspective and the opportunity to compare themselves to their peers remains to be seen.
On the other hand, this sense may be the result of the very nature of a clinical law office's practice. By requirement of the bar, the majority of the cases handled by clinical law offices must be those involving indigents with non-fee generating problems—cases which the private bar does not want either because the case is not economically profitable or because it is too oppressive. If anything perpetuates the sense by the poor that they are receiving less than quality legal services, it is this requirement that third-year law students can only represent indigent clients, and then, in civil matters, only where there is no affirmative claim in excess of $750.00. The suggestion is very clear that law students will be allowed to make their mistakes on the poor—the the group least able to object. Clearly, the bar and the courts would not have authorized third-year law students to practice unless convinced that those represented would receive quality representation. Anything less would be in violation of the Canons of Professional Responsibility. But why then limit the practice of third-year law students so narrowly? If, in fact, part of the clinical objective is to permit law students to develop the skills of a lawyer under the supervision of practicing attorneys, why then should that experience not also be expanded to include, under the supervision of an experienced attorney, estate work or corporate planning or employment discrimination suits? Certainly the quality of lawyering might improve.

From the strictly service aspect there is a legitimate argument to be made that there are not enough attorneys to provide sufficient legal assistance for the poor and, therefore, every available resource must be exhausted in order to assure that the poor are represented. But if the poor are to receive the same quality of representation as the non-poor then their representatives must be free to raise all of the defenses and affirmative claims available without
regard to the amount of the counterclaim or the affirmative suit.

Footnotes

1 The term "clinical law office" is used to refer to any law office supported totally or in part by the law school, where students perform lawyering functions under the supervision of practicing attorneys. The office can be located in the law school proper or in a low-income neighborhood, or the students can be placed in an existing neighborhood legal service office.

2 The fall of 1972 was the first full clinical semester at the law school. The office has operated since the fall of 1970, however, with students receiving three-semester credits for their work. The office was funded initially by the Council on Legal Education for Professional Responsibility (CLEPR) for the 1970-71 school year. In 1971-72 the office was funded entirely by the law school, and in 1972-73 it is supported jointly by the law school and CLEPR.

3 The third-year practice rule in the District of Columbia permits third-year students to represent clients in non-federal courts under the following conditions:

   Superior Court of the District of Columbia
   Criminal Rule 44 I (f)
   (f) LEGAL ASSISTANCE BY LAW STUDENTS
   
   I. Practice.
   
   (a) Any law student admitted to the limited practice of law, pursuant to Rule 46A of the general rules of the District of Columbia Court of Appeals, and certified and registered as therein required, may engage in the limited practice of law in the Superior Court of the District of Columbia in connection with any case arising in the Landlord and Tenant Branch and Small Claims Branch of the Civil Division of this Court, and in defense of any case arising otherwise in the Civil Division (provided, however, that a law student must not serve as counsel in connection with any claim which seeks affirmative relief of a monetary value in excess of $750), any family or juvenile proceeding (not involving a felony), and any criminal case or matter (not involving a felony), on behalf of any indigent person who has consented in writing to that appearance, provided that a "supervising lawyer," as hereinafter defined, has approved such action and also entered his appearance.

   (b) Any eligible law student may also appear in any criminal case or matter on behalf of the United States or the District of Columbia with the written approval of the United States Attorney or Corporation Counsel, or their authorized representatives, and the "supervising attorney."
(c) In each case, the written consent and approval referred to above shall be filed in the record of the case.

(d) The law student must be enrolled in a clinical program. A clinical program, for which such practice by an eligible law student is enrolled, is a law school program for credit of at least three semester hours held under the direction of a full-time faculty member of such law school, or an adjunct professor for a consortium of law schools, whose primary duty is the conduct of such program in which a law student obtains practical experience in the operation of the District of Columbia legal system by participating in cases and matters pending before the Courts or administrative tribunals.

II. REQUIREMENTS AND LIMITATIONS.

To be eligible to make an appearance pursuant to this Rule, the law student must:

(a) Be registered and certified by the Admissions Committee of the District of Columbia Court of Appeals as eligible to engage in the limited practice of law as authorized by the District of Columbia Court of Appeals General Rule 46A.

(b) Certify in writing that he had read and is familiar with the rules of this Court.

(c) Not enter his appearance in any criminal jury matter until he has participated in two non-jury trials and one jury trial (as an observer only), and has been certified by a Judge of this Court as having done so. Such certification shall be made to the Clerk of the Court. No student shall enter his appearance in more than three criminal jury cases at one time.

(d) Be registered with the Clerk of the Court and pay the appropriate fee.

(e) File with this Court a certificate showing that he has been registered and certified by the Admissions Committee of the District of Columbia Court of Appeals.

The admission of the law student for the limited practice of law pursuant to this Rule may be terminated by the Chief Judge, or his authorized representative, at any time. Notice of termination shall be filed with the Clerk of the Court, and a copy thereof sent to the Admissions Committee of the District of Columbia Court of Appeals.

We try to raise through substantive lectures at the beginning of the semester the highlights of the areas of law most often applicable to our clients' problems as well as provide manuals and bibliographies for the students to refer to whenever possible.

One of the primary blocks to adequate supervision is the need of law schools to justify the expense of an operation such as CCLS on an economic basis. Thus, the cost per student for the clinical office is generally compared to the cost per student for large lecture classes, with the result that the student-teacher ratio in many schools gets expanded beyond a reasonable level. Fortunately at Catholic University Law School this concern, while recognized, has not yet impinged on our program and the student-teacher ratio has remained relatively low. How long this can continue is unclear.

Canons 3 and 6, Code of Professional Responsibility, American Bar Association.

Ibid.

Silver, supra note 4 at 233-235; Note, Neighborhood Law Offices: The New Wave in Legal Services for the Poor, 80 Harv. L. Rev. 805,812 (1967). There is the further consideration of where one refers a client with a pressing problem once you deny him or her service.


Caseload is controlled, to some extent, by requiring clients who walk in from the street to make an appointment and return, unless there is an emergency or the client is unable to come back. In this way the caseload can be controlled and the students can plan their days. One student each day is on call to handle emergency problems.


Supra, note 6.

Supra, note 3.

Canons 3 and 6, Code of Professional Responsibility, American Bar Association.