

**AALS CONFERENCE ON CLINICAL LEGAL EDUCATION
WORKSHOP FOR THE FUTURE: ETHICS, PROFESSIONALISM,
REFORM**

**Clinics as Model Ethical Law Offices: Clinic Design, Procedures and
Supervision**

The following is a summary of the discussion from the session “Clinics as Model Ethical Law Offices: Clinic Design, Procedures and Supervision.” The issues listed under point B were identified by participants as approaches that they have adopted, but do not reflect a group consensus of what should be implemented generally. The hypothetical that was used to frame the discussion is also attached at the end of the summary.

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- A. Ethical Issues identified in the hypothetical
1. Confidentiality breaches
 - a. Student discussions in property class that did not further the representation and included disparaging remarks
 - b. Clinic and administration
 2. Competency
 3. Conflict of interest
 - a. Between clinics
 - b. Students and potential employers
 - c. Direct client
 4. Unauthorized practice by student
 5. Failure to supervise
 6. Communication with clients
 7. Retaliation/extortion by City Attorney
 8. Administration’s interference with case

9. Solicitation of clients (depending upon state rules)
 10. City Court structure (judicial ethics)
 11. Diligence
 12. Vigorous advocacy
 13. Loyalty
- B. Clinic structure/design, practices and procedures to address ethical issues
1. Confidentiality
 - a. Student instruction on ethical responsibility
 - i. Written policy regarding confidentiality and discussions of client matters
 - ii. discuss policy with students
 - iii. require student signature on policy (read and will adhere to practice)
 - b. Education of Dean/Administration re: relationship with clinic and access to confidential information
 - c. Education/training with non-lawyer collaborators (social workers) who have different set of ethical obligations/reporting requirements
 - i. Make team member and, thus, bound by legal ethics rules
 - d. Consent from client to discuss matter with “larger” group.
 - i. Standard retainer agreement provision that obtains client consent
 - ii. Determine what constitutes the “larger” group that will have access to information
 - e. Discussions with stand-up faculty re: addressing client discussions in class and mitigating breaches of confidentiality in non-clinic classes
 - i. Be mindful of potential value in having clinic experiences brought into non-clinic classes to enrich others and provide exposure to clinic work versus potential breaches of confidentiality
 - f. Structure of clinic: different models
 - i. Clinic as separate corporation with Board of Directors

1. other faculty brought into cases as consultants
 2. obtain client consent to discuss matter with consultants
 - ii. Solo practitioners
 1. clinics have separate offices and entrances; no sharing of files, information or staff
2. Vigorous Representation: student without conflict but ambivalent about client's rights
 - a. Student instruction: "suck up" and use as opportunity to teach about role in representing causes one doesn't support and as exposure to real life practice
 - b. Evaluate harm to client
 - i. Do clients deserve "competent" representation or "excellent" representation
 - ii. Judgment as to when student violates Rules of Professional Responsibility and/or Rule 11
 - c. Policy that provides option to say "No" to representing a client (different considerations depending upon point in the case development – at point of accepting case v. after accepting case)
3. Conflicts Checks
 - a. Student instruction
 - i. potential conflicts based on past, current and future employment
 1. future employment: continuum of interviewing at firms/agencies to employment offer to accepting employment
 - ii. Specific cases based on agency/employer
 - iii. Spouse and sibling employment
 - iv. Boards and organizations
 - b. Implement policy and procedure to check student-attorney conflicts
 - i. Weekly e-mail to students to update information
 - ii. Determine which clinics must participate – all clinics or specific ones based on structure of "law firm"
 - c. Implement policy and procedures to address inter-clinic conflicts
 - i. Address through design of physical space
 - ii. Address based on ABA and state opinions that govern law firms

- iii. Decide whether to “separate off” certain clinics or resolve conflicts under the rules.
 - d. Ethics Opinions: seeking opinion from internal or outside counsel
- 4. Unauthorized practice/competence
 - a. Student instruction
 - i. Clarify whether student practice rules authorize students to accept cases on behalf of the clinic without obtaining approval of supervising attorney

THE CASE OF CHRISTOPHER JENCK

Please take a few minutes to read the narrative below and to consider the questions that follow.

Meghan Smith and Clark Jackson are second-year law students enrolled in the Civil Justice Clinic at the William Jefferson Clinton School of Law. The clinic provides free legal services to a wide range of poor people in the City of Clinton, including the homeless, battered women, poor tenants, and victims of predatory lending.

Meghan and Clark have been assigned to represent Christopher Jenck, a homeless man who has been charged by the City of Clinton with urinating in public and aggressive begging, in violation of local city ordinances. The charges against Mr. Jenck, both misdemeanors, are to be heard by a newly created specialty court called the Downtown Community Court. Meghan and Clark interview Mr. Jenck, who much to their dismay, admits that he committed the conduct for which he has been charged. However, Mr. Jenck states that he is determined to fight the charges. He believes he is a victim of the City's efforts to sweep the homeless out of downtown Clinton. Instead of providing drop-in day centers (with public restrooms) and meaningful social services for the homeless, the City has redoubled its police presence in the downtown area to target and arrest the homeless.

Meghan and Clark perform some legal research into the origin of the Downtown Community Court, and learn that the court is privately funded and controlled by the Downtown Clinton Partnership, an association of downtown business owners and developers. (Among the Partnership's members is the law firm of Peter & Rossi, for whom Meghan worked as an associate last summer.) The Downtown Community Court is designed exclusively to hear so-called "quality of life" ordinance violations originating in downtown Clinton. Violators are arrested and held in jail pending trial. (In most other cases, ordinance violators are given a summons to appear in court, but are not arrested or held pending trial.) Those who plead guilty are routinely fined and required to perform community service, which often consists of cleaning up the streets, sidewalks, and alleyways adjacent to downtown businesses.

It turns out that the Downtown Partnership gave the City \$250,000 to create the court. The Partnership's money pays for a judge, court clerk, city attorney, marshal, and probation and parole officer (but not a public defender). In addition to its financial contribution, the Downtown Partnership has volunteered its administrative staff to manage the court. In return, the City has set aside 45 jail beds and agreed to provide a monthly accounting of all "quality of life" offenses prosecuted in the downtown area.

Meghan and Clark discuss the case with their clinical professor and supervising attorney, Jerry Frank, and together they agree to challenge the constitutionality of the Downtown Community Court. Their argument is that the court violates fundamental notions of due process under the state and federal constitutions. They draft and file a motion to dismiss challenging the subject matter jurisdiction of the court. The motion is a serious piece of work, requiring in-depth legal research and detailed constitutional analysis. Frankly, it's more than Meghan and Clark can handle alone. As a result, Jerry takes an active role in drafting the motion and the accompanying memorandum of law.

The court schedules a hearing on the motion to dismiss for two weeks hence. (The court also releases Mr. Jenck on his own recognizance, pending trial).

Meanwhile, at Jerry's suggestion, Meghan and Clark decide to go to the Downtown Homeless Shelter to see if they can find other homeless individuals with cases pending before the Downtown Community Court. When they arrive at the shelter, Clark makes a general announcement, stating that he and Meghan are there to talk with – and represent – any homeless people who have cases in the Community Court. Several individuals come forward: two have cases pending in the Community Court; another wants to bring a police brutality action against the City of Clinton Police Department for an officer's mistreatment of him during an arrest for aggressive begging; and three others want help with their claims for Social Security Disability Insurance Benefits. Clark, unsure of his role, decides on behalf of the clinic that he will accept all six cases. He tells the man with the police brutality claim that, based on what Clark has learned so far in criminal procedure and constitutional law, he thinks the man has a solid case for money damages and injunctive relief.

Two days before the hearing on the motion to dismiss, Jerry receives a call from the Dean of the law school requesting a meeting urgently. Jerry rushes to the Dean's office. The Dean hands Jerry a letter he received by fax from the City Attorney's office that morning. In the letter, the City Attorney expresses her profound disappointment that the law school is challenging the constitutionality of the Downtown Community Court. The City Attorney explains that the court was the product of two years of consultations with local businesses and a nationwide investigation into municipal best practices concerning homelessness. The City Attorney states that in light of the law school's position, she will no longer serve as an adjunct professor in the school's trial practice program, and further the City Attorney's office will not consider employment applications from law students working on the Community Court matter. The City Attorney sent a carbon copy of her letter to the Chancellor of the University, who has already called the Dean of the School of Law to request a meeting. The Dean asks Jerry to submit a detailed memorandum describing the law school's representation of Mr. Jenck and tells Jerry to take no further action in court until the Dean has had a chance to meet with the Chancellor.

Frustrated, Jerry returns to the clinic and knocks on the door of his colleague, Jane Clark, a fellow clinical professor and supervising attorney. He describes the situation to Jane, expecting her to lend a sympathetic ear. However, to Jerry's surprise, Jane shares the concerns of the City Attorney and questions the merits of the Civil Justice Clinic's challenge to the Downtown Community Court. Jane teaches a separate clinic, called the Mental Health Clinic. In this clinic, students do not represent individual clients, but instead engage in legislative advocacy, community organizing, and negotiations with state and local agencies to promote advances in the law and the provision of greater services to people with mental disabilities. Recently, Jane's clinic was instrumental in helping a nearby town, the City of Gore, obtain a grant from the federal government to create a specialty criminal court whose docket will be comprised exclusively of cases involving individuals with mental illness. Moreover, several weeks ago, the Mental Health Clinic entered discussions with the City of Clinton to assist it in developing a mental health court like the one in Gore.

Jane says that in this day and age of reduced funding for the poor, and in particular the homeless, advocates must take advantage of any and all available resources. Jane is shocked that the Civil Justice Clinic would challenge a program like the Downtown Community Court that is receiving \$250,000 from private businesses. A contribution of that magnitude, she says, is simply unprecedented, and if any of the money is being used to fund services for the homeless, it's a net gain. The Mental Health Clinic pursued private funding for the mental health court in Gore (albeit unsuccessfully), and intended to do the same in its work for Clinton. Jane wonders how and why the Civil Justice Clinic took Mr. Jenck's case without consulting with her, since her clinic and Jerry's share office space and since they treat the two clinics as part of a single law firm.

With these issues lingering in the background, Jerry, Meghan, and Clark begin preparing for the hearing on their motion to dismiss. Jerry is still not sure how he will handle the Dean and the Chancellor, but he knows he cannot delay preparations with the students until that issue is settled.

Meghan is slated to argue the motion, but her commitment to the case is waning. Meghan lives downtown and has often been troubled by what she calls the "lewd behavior" of various homeless individuals who live in her neighborhood. One night last semester, when she was returning home from law school, Meghan found a man passed out on the front stoop of her apartment. The man appeared to be intoxicated and homeless. Meghan called the police, who arrested the man and, as far as Meghan knows, took him to jail to await a hearing before the Downtown Community Court.

Yesterday, Meghan talked somewhat disparagingly about the case in her property class. Although she did not mention names, she revealed that she was working on a "case in the clinic" on behalf of a homeless man who was "guilty" of urinating in public and aggressive begging. She said she had mixed feelings about the case and that, intellectually, she was more inclined to agree with those in favor of "controlling chronic misconduct in city spaces" than those in favor of "homeless rights." Jerry learns of Meghan's comments from another student in the clinic.

Jerry wonders if he should pull Meghan from the case and assign the argument to Clark. He remembers, though, that Clark wants to keep a low profile because he is seeking a summer internship with the City's Land Management Office and is worried that public involvement in the Community Court case may hurt his chances of getting the internship. Moreover, Clark recently told Jerry that he feels overwhelmed by the volume of work he has to do in the clinic and the diversity of the substantive issues involved. He just can't stay on top of things.

As Jerry, Meghan, and Clark sit in Jerry's office to prepare for the hearing, the clinic receptionist rings Jerry's line and tells him that Mr. Jenck is on the phone. The receptionist says Mr. Jenck is frustrated because he has called several times and left messages for the students, but has not received a return call. Meghan explains to Jerry that she did not receive the messages. She says it is possible that other students in the clinic took the calls and forgot to put messages in her box. Clark admits that he has received at least two messages from Mr. Jenck. Clark says that he used to return every one of Mr. Jenck's calls, but Mr. Jenck just keeps going over the same material and Clark does not have time for that anymore. Jerry asks the receptionist to patch Mr. Jenck's call through and puts the call on speakerphone. Mr. Jenck asks Jerry and the students for an update on the case.

Questions

1. What, in your view, is the most serious ethical issue raised by this scenario?

2. Are there any conflicts between the clinics, and if so, how could they have been avoided?

3. Do the students' outside work experiences or aspirations present ethical problems for the clinic?

4. Is the clinic bound by Clark's promises of representation to the individuals he and Meghan met at the Downtown Homeless Shelter?

5. Has Meghan breached Mr. Jenck's confidentiality by discussing his case in her property class? Would it matter if another student in the class were working in the City Attorney's office? On this case?

6. Can Jerry discuss the particulars of Mr. Jenck's case with the Dean? Should he? If the Dean and Chancellor do not approve the litigation, must Jerry withdraw?

7. Whose case is this? Jerry's? Meghan's? Clark's? Some combination?

8. Should Meghan be pulled from the case? Clark? Should Jerry argue the motion himself?

9. What can be done to instill in the students the need to (and best methods for) maintaining communication with their clients?