

## ENGAGING OUTSIDE COUNSEL IN TRANSACTIONAL LAW CLINICS

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*This article examines the plurality of objectives and methods by which transactional law clinics collaborate with outside attorneys to competently represent their organizational clients on a wide range of legal issues. Some transactional law clinics rely on outside counsel as informal legal advisors or consultants; others collaborate with outside counsel for the development of community projects or referral of legal work; many transactional law clinics engage outside counsel as “local counsel” when assisting a client in other jurisdictions or internationally; still others engage outside counsel more formally to assist in the supervision of student work on client cases. For some, the idea of a clinic working with outside counsel poses a credible threat to clinical pedagogy, clinical faculty status, and the permanent integration of clinics into the law school curriculum. To others, collaborating with outside counsel is a part of everyday client representation, and may be necessary for ethical and professional responsibility reasons. While discussing the import of these concerns, this article identifies the benefits of collaborating with outside attorneys for law school clinical programs and proposes a framework for deciding whether and how to collaborate with outside attorneys. This article further recommends proactive steps that a clinical law professor can take to facilitate the clinical law professor’s objectives if she decides to engage outside counsel. While this article examines collaboration with outside counsel primarily through the lens of transactional law based clinical programs, our discussion provides helpful guidance to law school clinical programs generally.*

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## INTRODUCTION

Law school clinics engage attorneys outside the clinic setting to meet pedagogical, service-driven, professional, and financial objectives. This article examines the plurality of objectives and methods by which transactional law clinics collaborate with outside attorneys. Some transactional law clinics rely on outside counsel as informal legal advisors or consultants; others collaborate with outside counsel for the development of community projects or referral of legal work; many transactional law clinics engage outside attorneys as “local counsel” when assisting a client in other jurisdictions or internationally; still others engage outside counsel more formally to assist in the supervision of student work on client cases. While isolated instances of clinic collaboration with outside counsel have frequently been cited, these multiple objectives and methods have yet to be examined in a systematic manner.<sup>1</sup> In this article we undertake the task.

Clinics collaborate with corporate law firms, solo practitioners, staff attorneys and managing directors from public interest organizations, government lawyers, community lawyers, and public interest law firms. In our first years of starting new transactional law clinics at our respective law schools, we each received inquiries from attorneys interested in working with our clinics that included:

*A general counsel from an international nonprofit organization requested to work with clinic students to develop legal white papers and legal case studies for the nonprofit’s grantees; the general counsel also agreed to refer the nonprofit’s grantees to the clinic for representation on transactional law matters.*

*The pro bono counsel of a corporate law firm suggested that the clinic partner with the law firm’s associates to host drop-in legal advice clinics for small businesses and entrepreneurs.*

*Law school alumni proposed to be guest lecturers in the clinic seminars.*

*Law school alumni offered to informally advise clinic students on legal matters for clinic clients, acting as sounding boards for students’*

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<sup>1</sup> Collaboration with outside attorneys was one of the central topics discussed during the Transactional Law and Skills Section Meeting at the Association of American Law Schools 2013 Conference on Clinical Legal Education. The Section members discussed motivations and manner of collaboration with outside attorneys as well as advantages and disadvantages; some Section members, including the authors, were tasked with studying the issue further. See AALS CLINICAL SEC. NEWSL. (AM. ASSOC. OF L. SCH., D.C.) 43 (Fall 2013) (on file with authors).

*transaction planning and management; still others have offered to supervise students and directly engage with clinic clients.*

To some clinical law professors, the idea of a clinic working with outside attorneys poses a credible threat to clinical pedagogy, clinical faculty status, and the permanent integration of clinics into the law school curriculum.<sup>2</sup> To other clinical law professors, collaborating with outside counsel is a part of everyday clinical work and may be necessary to satisfy ethical and professional responsibilities. This article acknowledges that the appropriateness of collaboration with outside attorneys will vary between different clinics, depending on various factors including the unique characteristics of the clinic and its work, the nature of the intended collaboration, and the collaborating partner. To assist clinicians in this evaluation we avoid absolute assertions and instead provide a range of recommendations and considerations for the clinician to consider in structuring a collaborative relationship with outside attorneys. Some clinical law programs choose to integrate outside attorneys in their work and some do not; such a choice is made at each individual institution, whether with thoughtful input by clinical faculty members or by administrative fiat. With a keen understanding of clinical pedagogy<sup>3</sup> and the history of clinical legal education, in this article we discuss the objectives and methods of collaboration with outside attorneys in an effort to inform a clinical law professor's decision-making process on the issue.

While collaborations with outside attorneys may arise organically with cursory thought given to their purpose, organization, and structure, we recommend that clinical law professors use the same methodical and thoughtful approach to collaboration with outside attorneys as they do with respect to other curricular components of their clinics. The variety of collaborative possibilities raises questions for both seasoned and new clinicians in determining whether and how to effectively implement relationships with outside attorneys.

This article focuses on transactional law clinics in particular. The organizational clients of transactional law clinics typically encounter a broad set of legal issues, both routine and complex, and, as such,

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<sup>2</sup> Persistent perspectives that clinics are expendable programs within in the law school curriculum remain. See Victor Fleischer, *The Unseen Costs of Cutting Law School Faculty*, N.Y. TIMES DEALBOOK (July 9, 2013, 3:46 PM), <http://dealbook.nytimes.com/2013/07/09/the-unseen-costs-of-cutting-law-school-faculty/> (arguing that clinics should be closed to meet budgetary constraints rather than firing non-clinical faculty).

<sup>3</sup> See Wallace J. Mlyniec, *Where To Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLIN. L. REV. 505, 505 (2012) (noting that clinical pedagogy is a distinct teaching methodology and describing its differences from both doctrinal teaching and legal practice).

transactional law clinics may be more likely to engage outside attorneys to help meet clients' needs. Additionally, the legal knowledge and skills that a transactional law clinic's scope of work requires matches the particular skill sets corporate lawyers wish to develop and use in their *pro bono* legal work. Such *pro bono* work is not abundantly available through legal aid organizations, which typically represent individuals in litigation and advocacy matters rather than organizations on business law or transactional matters.<sup>4</sup> Nevertheless, while this article reflects on collaboration in transactional law school clinics, collaboration with outside attorneys can occur in any clinic regardless of practice area. As such, this article will be helpful to clinicians who engage outside counsel across a range of disciplines.

The article begins in Part I by setting forth the client service, pedagogical, personal, professional, and financial objectives that motivate clinicians to engage outside attorneys. Part II then identifies the methods for engaging outside attorneys, focusing primarily on integrating the outside attorney through a community project or in the role of a consultant, referral source, or supervisor within the clinic. In Part III, we discuss common challenges and potential concerns regarding collaboration with outside attorneys that clinicians should consider before moving forward with collaboration. Part IV provides our recommendations for implementing collaborative relationships with outside attorneys that may mitigate identified disadvantages and concerns. Specifically, we recommend a risk management approach (apropos of transactional lawyers) and advise clinicians to establish well-defined goals, roles, and responsibilities for any collaboration between the clinic and an outside attorney. To assist with this objective, we recommend that a clinic enter into a written agreement, in the form of a letter agreement or Memorandum of Understanding ("MOU") with any outside attorney who participates in clinic operations. An example MOU is attached in the Appendix to this article as a tool to facilitate our recommendation. We also make recommendations for maintaining student autonomy and responsibility when collaborating with outside attorneys. Finally, in Part V, we conclude with a context-specific, systematic framework that clinicians can use to decide whether to engage outside attorneys. A decision-tree is also attached in the Appendix; it presents the objectives, methods, and concerns discussed in this article but allows the clinical law professor to consider

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<sup>4</sup> James L. Baillie, *Fulfilling the Promise of Business Law Pro Bono*, 28 WM. MITCHELL L. REV. 1543 (2002) (noting that *pro bono* work is often litigation-oriented, describing challenges to finding *pro bono* opportunities for business lawyers who want to use their transactional skill sets to benefit others, and describing the long-term contributions of business law *pro bono* work to community economic development).

collaboration in light of her own clinical setting and goals.

## I. WHY ENGAGE OUTSIDE ATTORNEYS?

Clinical law professors collaborate with attorneys outside of the law school clinic for reasons related to (1) client service, (2) pedagogy, (3) professional objectives, (4) institutional objectives, and (5) financial objectives. None of these reasons are mutually exclusive.

### A. *Client Service Objectives*

An acute reason for engaging outside counsel—particularly for transactional law clinics—is competent and comprehensive client representation. First, the typical client of a transactional law clinic is an entity and not an individual. Transactional law clinic clients are non-profit organizations, small businesses, microenterprises, social enterprises, and innovative startups. Our clients face a complex and broad array of business issues that require expertise in numerous areas of the law, but often do not have access to legal counsel. Our clients may not qualify for *pro bono* legal services from legal aid organizations, which often serve individuals and not small businesses or organizations. Additionally, lawyers in our clients' areas of need—such as employment law or securities law—are often unaffordable.<sup>5</sup>

As clinicians, our motivations to engage outside attorneys in clinic work extend beyond our desire to facilitate the direct representation of clients, but also encompass our desire to positively impact the availability of legal services in the community. We engage outside attorneys to enhance our clinics' ability to address the varied challenges our organizational clients face.

#### 1. *Serving the Breadth of Legal Issues Faced by Organizational Clients*

Transactional law clinics are relatively recent additions to clinical programs.<sup>6</sup> The earliest transactional law clinics—which focused heavily on community economic development—date to the 1970s, but

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<sup>5</sup> See Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1 (2009) (providing a discussion on the widening gap in access to justice for both low- and moderate-income clients and highlighting the need to increase both free *pro bono* and low-cost "low-bono" legal services to serve both of these income groups).

<sup>6</sup> See Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLIN. L. REV. 195 (1997) (providing a discussion of the emergence and role of small business clinics); Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLIN. L. REV. 1 (2000) (providing an overview of the evolution of clinical legal education generally).

there has been a recent rapid increase in the number of transactional law clinics around the country.<sup>7</sup> The nature of a transactional law clinic's practice can vary greatly between clinics depending on the particular clinic's focus and client-base. Transactional law clinics might engage in community lawyering, community economic development, nonprofit governance, small business development, entrepreneurship, or social entrepreneurship.<sup>8</sup> A defining feature of transactional law clinics is the representation of entities or groups of individuals, typically nonprofit organizations and small businesses or other for-profit entities such as cooperatives and limited liability companies. Because they are entities, our clients face a broad set of legal issues.<sup>9</sup> Although our clients typically operate on a much smaller scale than large corporate clients,<sup>10</sup> transactional law clinics encounter a scope of substantive law that encompasses many different subject-matter areas, each distinctly unique and colored by the complex nuances born of the realities of legal practice within that sub-specialty of law.<sup>11</sup>

In addition to the varied laws and regulations affecting organizational clients of transactional law clinics, market forces have played a role in the breadth, depth, and complexity of legal services necessary

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<sup>7</sup> Jones, *supra* note 6.

<sup>8</sup> Praveen Kosuri, "Impact" in *3D—Maximizing Impact through Transactional Clinics*, 18 CLIN. L. REV. 1 (2011) (describing and categorizing the types of legal work undertaken by transactional law clinics).

<sup>9</sup> Transactional clinics have nonprofit and for-profit organizational clients that face a broad scope of legal issues including those related to: corporate structuring and financing; tax exemption; intellectual property rights; commercial real estate ownership and leasing; corporate and nonprofit compliance with federal, state, and local laws and regulations; business licensing; tort liability for volunteers and other constituents; employee and independent contractor relations; vendor and supplier relations; and fiscal sponsorship arrangements. Additionally, some organizational clients operate across state or international borders, beyond the jurisdiction in which a clinical law professor is authorized to practice.

<sup>10</sup> Some transactional law clinics, like the Corporate Lab at the University of Chicago Law School and the Transactional Lab at the University of Michigan Law School, represent large corporate clients, CORPORATE LAB, THE UNIVERSITY OF CHICAGO LAW SCHOOL, <http://www.law.uchicago.edu/corporatelab> (last visited Jan. 31, 2014); THE TRANSACTIONAL LAB, UNIVERSITY OF MICHIGAN LAW SCHOOL, <https://www.law.umich.edu/clinical/transactionallab/Pages/default.aspx> (last visited Jan. 31, 2014).

<sup>11</sup> Indeed, in looking as an example to private practice—where tailored legal assistance to businesses and other organizational clients for transactional clients is common—one finds that the broad scope of substantive law addressed in practice is frequently subdivided and covered by many different practice groups in the private practice setting. A single corporate client of a law firm is likely to be served by the law firm's corporate department, finance department, and intellectual property department, and possibly in numerous firm offices spanning different geographical locations. This highlights the breadth of substantive law addressed within the transactional law setting for a single client. Although a hallmark of transactional practice is its focus on non-litigation work, further complexity in a representation may arise with the anticipation of possible litigation—in which case a private practice would commonly consult its business litigation department or else bring in outside litigation assistance.

to fully serve the legal needs of such organizational clients. In the face of increased economic challenges many nonprofit organizations have been forced to re-evaluate their operations and consider creative approaches to increasing their revenue streams, which in many cases result in more complex legal situations.<sup>12</sup> Recent corporate and nonprofit abuse scandals have subjected both for-profit and nonprofit clients of transactional law clinics to increased regulation, thus further complicating the legal environment within which these organizations must operate and adding to the knowledge base clinics must possess to offer competent legal assistance.<sup>13</sup>

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<sup>12</sup> During the 2008 economic recession, donations to nonprofit organizations plummeted, compelling nonprofits to become more entrepreneurial in their quest for operating capital. See ROBERT REICH & CHRISTOPHER WIMER, STAN. CTR. ON POVERTY & INEQ., CHARITABLE GIVING AND THE GREAT RECESSION (2012) available at [http://www.stanford.edu/group/recessiontrends/cgi-bin/web/sites/all/themes/barron/pdf/CharitableGiving\\_fact\\_sheet.pdf](http://www.stanford.edu/group/recessiontrends/cgi-bin/web/sites/all/themes/barron/pdf/CharitableGiving_fact_sheet.pdf) (finding that charitable giving decreased by 7% in 2008 because of the Great Recession). Many have sought market-based, revenue-generating activities that require greater attention to governance and tax compliance. Nonprofits have also proactively sought such market-based, revenue-generating activities because social enterprise—i.e., the use of market-based mechanisms by a for-profit or nonprofit organization to alleviate or solve social and environmental problems—has become more popular. Opting into social enterprise opportunities opens access to individual donors and foundations that are attracted to the promise and popularity surrounding social enterprise, but also opens the doors to so-called social investors willing to invest venture capital at low or zero rates of return. For a discussion of the legal issues faced by social enterprise clients in a transactional law clinic, see Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLIN. L. REV. 215 (2013).

Engaging in such revenue-generating activities poses additional legal issues for the nonprofit client, the least of which is navigating regulation by the Internal Revenue Service of unrelated income business tax at the risk of tax-exempt status revocation. For an explanation of this issue see Robert A. Wexler, Adler & Colvin, *Legal Framework for Earned Income*, Presentation at the Social Enterprise Alliance Annual Conference (April 17-19, 2007), available at [http://www.adlercolvin.com/pdf/revenue\\_generating\\_activities/AC\\_Web\\_Resource-Legal\\_Framework\\_for\\_Earned\\_Income\\_\(00160444\).PDF](http://www.adlercolvin.com/pdf/revenue_generating_activities/AC_Web_Resource-Legal_Framework_for_Earned_Income_(00160444).PDF). For example, in an attempt to tap into funds available to social enterprises, a nonprofit client may seek assistance in creating a joint venture with a for-profit organization. Advising the client on the corporate structuring of the joint venture necessarily entails application of federal tax law, contract law, limited liability company, partnership, and corporate law, as well as advice on nonprofit and corporate governance, potential business risks and liabilities, and asset contributions and distributions. If the client's plan includes co-branding the joint venture, as most do, intellectual property rights must also be considered.

<sup>13</sup> Nonprofits have also recently faced additional regulation in the wake of corporate and nonprofit scandals. In 2002, nonprofits became subject to federal regulations aimed at the corporate sector. The Sarbanes-Oxley Act of 2002 enacted criminal sections for retaliating against whistleblowers or destroying records in the course of a government investigation; these criminal provisions apply to nonprofit organizations. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 802, 1102, 1107, 116 Stat. 745, 800, 807, 810 (codified as amended at 18 U.S.C.A. §§ 1512-1513, 1519-1520 (West, WestlawNext through P.L. 113-52 approved 11-21-13)). Nonprofits have responded by developing practices that protect whistleblowers and procedures to retain corporate records. States have also increased their regulation of nonprofit activity. In 2004, California enacted the California Nonprofit Integrity Act requiring, among other things, that California nonprofits with gross revenues of \$2

Many transactional law clinicians often serve as the de facto general counsel of organizational clients or adopt a holistic approach that recognizes clients' issues as necessarily interdependent rather than discrete.<sup>14</sup> For all of these reasons, transactional law clinicians often find it necessary to collaborate with outside attorneys to serve organizational clients' varied legal needs.

## 2. *Leveraging Legal Resources for the Client Community*

Expanding the availability of legal services to our client base also motivates collaboration with outside attorneys. Many transactional law clinics have an explicit commitment to support the economic development of a community or the philanthropic activities of the non-profit sector. For example, the mission of the Social Enterprise and Nonprofit Law Clinic at Georgetown University Law Center includes facilitating the growth of the social enterprise sector in Washington, D.C. as a means of community and economic development. The mission of the Community Development Clinic at the University of Massachusetts School of Law – Dartmouth is to support community development throughout the local southeastern Massachusetts region. Law school clinics can leverage their own reputation and relationships to accomplish this mission. A clinic can identify and connect the client community with private attorneys, thereby expanding the depth and scope of legal services available.

Outside attorneys may be more willing to take on a client *pro bono* than they otherwise would if they know that a clinic is willing to assist with preliminary, foundational legal matters that would not be time effective for the outside attorney to address. Additionally, outside attorneys may be more willing to accept the *pro bono* client referral from a clinic if the clinic has vetted the client. Some outside

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million or more establish an audit committee and prepare annual audited financial statements. California Nonprofit Integrity Act of 2004, ch. 919, § 7(e), 2004 Cal. Stat. 7158, 7161-62 (codified at CAL. GOV'T CODE § 12586 (West, WestlawNext through all 2013 Reg. Sess. laws, all 2013-2014 1st Ex. Sess. laws, and Res. c. 123 (S.C.A.3))). New York State is also in the process of revising its nonprofit corporation act to create greater transparency and oversight. Non-Profit Revitalization Act of 2013, A8072, 2013-2014 Leg., Reg. Sess. (N.Y. 2013). In Oregon, legislation was approved recently that mandates that an Oregon charitable organization devote at least thirty percent of its functional expenses to program services (rather than administrative expenses) or face disqualification from receiving state income tax and corporate excise tax deductions on its charitable contributions. OR. REV. STAT. § 128.760 (2013). For-profit small businesses or social enterprises also face their own complex regulatory structures, including tax, securities, and intellectual property laws. With equity crowd-funding recently permitted by the Jumpstart Our Business Startups Act, JOBS Act, Pub. L. No. 112-106, Title III, 126 Stat. 306, 315-23 (2012), clinic clients that previously did not seek outside investment may soon need securities law advice.

<sup>14</sup> Clinicians adopting this approach often attempt to assist a client with the full disordered and unstructured assortment of the client's legal issues.

attorneys are also more willing to accept *pro bono* clients from law school clinics based on the reputational advantage a clinic confers.<sup>15</sup> In sum, a clinic can leverage its resources and relationships to increase the availability of legal services to its client community.

### *B. Pedagogical Objectives*

Pedagogical objectives may also motivate a clinician to engage outside attorneys in a clinic's work. Capitalizing on the additional specialized expertise that an outside attorney brings to the clinic may allow the clinic to expand the breadth or complexity of cases handled. This expansion could allow clinic students the opportunity to engage in a more comprehensive general transactional practice setting than would otherwise be possible.

Transactional law clinics teach students core transactional practice skills including: interviewing, contract drafting, legal research, legal analysis, transaction planning and management, application of substantive law to client-specific problems, client counseling, client communication and business writing, and oral and visual presentation skills. Similar to other clinics' curricula, students are also taught problem-solving, reflective lawyering, and professionalism. Many may also choose to explicitly incorporate discussion of issues related to values, morality, social and economic justice, or policy into their pedagogical objectives for student learning.

These varied skills can be taught through routine transactional legal services like incorporation, tax-exempt filings, reviewing and preparing governance documents, or drafting a contract such as volunteer or confidentiality agreements. These relatively simple and discrete forms of legal work are often the "bread and butter" of transactional law clinics because the student can see them through from start to finish. This discrete practice approach enhances the clinician's ability to increase the non-directive nature of their student case supervision—a lauded principle in clinical legal education—that in turn allows the student to maximize personal ownership and responsibility over her cases.<sup>16</sup>

However, some may believe that this balancing act deprives the

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<sup>15</sup> The outside attorney may value connection with a law school program for various reasons. Some of these reasons may include: an alumni values "giving back" to her alma mater; a small firm partner values the public relations benefit that comes from a highly visible collaborative representation with the clinic; or a large law firm partner values the training the client representation provides to new associates.

<sup>16</sup> See Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLIN. L. REV. 333, 352 (2009) (contrasting the merits of service and impact clinics and arguing for a middle ground that retains student responsibility while achieving impact).

student of substantial learning opportunities. Some skills cannot be learned through discrete, manageable legal work that lacks time pressure.<sup>17</sup> By engaging in “live,” time-sensitive transactions or slightly more complex legal services, students may be challenged to learn and practice additional substantive law and skills such as negotiation. And yet “live,” time-sensitive transactions come with uncertainty (whether uncertainty in timing or uncertainty in complexity); such uncertainty is often mitigated by clinicians through the assistance of outside attorneys who can take over client representation after the student-lawyer finishes her academic semester or represent the client on legal matters—like corporate tax—not typically handled by a transactional law clinic. Similarly, students are able to view multiple styles and methods of lawyering by collaborating with outside attorneys. Through such interactions, students can learn when, how, and whether to adjust their own professional styles. Increasing the number of issues and experiences injected into the clinical experience may create a more contextualized learning environment for students that nurtures the exploration of pedagogical objectives related to values and professional identity.

Nonetheless, the tradeoffs between student autonomy and primary responsibility for a case versus opportunities for exposure to varied practice and professional considerations is one that some clinical law professors may not be willing to make in light of countervailing concerns over maintaining the integrity of traditional clinical pedagogical principles.<sup>18</sup> We further examine the tension between student autonomy and student involvement in “live,” time-sensitive, and complex legal projects in Part III of this article, and offer suggestions to mitigate this tension in Part IV.

### C. *Institutional Objectives*

#### A law school and university’s institutional objectives of building

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<sup>17</sup> For example, a nonprofit client might ask the student-lawyer to draft a form volunteer agreement that the nonprofit can have each of its volunteers sign. The student-lawyer drafts the volunteer agreement but the student-lawyer never engages in any negotiation of the volunteer agreement with an opposing party (here, the volunteer) or opposing counsel (which a volunteer does not have). To learn negotiation skills, the student-lawyer in the transactional law clinic must have a “live,” time-sensitive deal to work on, such as a merger of nonprofit organizations, a commercial lease, or a joint venture arrangement.

<sup>18</sup> Laurie Hauber has identified strategies to maintain student autonomy and find valuable learning opportunities for clinic students involved in complex legal projects. Laurie Hauber, *Complex Projects in a Transactional Law Clinic*, 18 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 247 (2009) (highlighting the potential challenges arising from engaging in complex projects in a transactional law clinic and offering strategies for combating these challenges to maintain pedagogical value and provide a meaningful experience for law students).

community support for law school programs, encouraging alumni involvement with the law school, and supporting student career development can also motivate clinicians to seek collaboration with outside attorneys.

### *1. Community Support*

Many transactional law clinics collaborate with outside attorneys at legal aid offices, nonprofit organizations, law firms, and other clinics as a means of introducing a new clinic to the legal community or gaining and maintaining legitimacy and relevance in the local legal community. Historically, clinicians have been hired from legal services organizations or government agencies. These clinicians were already working in the communities in which the new clinic hoped to engage. As such, the newly hired clinician integrated her established legal services practice into the law school.<sup>19</sup> In more recent years, clinical hiring has expanded beyond hiring local lawyers to run clinics. Gains in institutional status and security of position for clinical law professors have largely been accompanied with increased expectations for scholarship, service to the university, and similar duties commonly expected of doctrinal law professors. Accordingly, new clinical law professors are increasingly expected to hold scholarly and academic credentials similar or equivalent to doctrinal law professors, which has contributed to a hiring process similar to doctrinal hiring. Clinical candidates are sought nationally. New clinical law professors often do not have backgrounds as practicing attorneys in their local clinic communities. New clinicians may relocate from a different legal jurisdiction or possess fewer years of practice experience compared to previous clinicians. Many new clinicians are hired directly from clinical teaching fellowships rather than local networks of attorney practitioners, or they may participate in the national teaching job market like their non-clinical faculty counterparts and accept a teaching position at a law school far from their previous community ties.<sup>20</sup>

As new clinicians launch clinics in communities in which they have no prior experience or ties, they often seek outside attorneys in order to establish new ties. Collaborating with outside attorneys helps new clinicians (or experienced clinicians transferring to a new geographical area) build networks within and gain support from the local

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<sup>19</sup> Jones, *supra* note 6, at 203.

<sup>20</sup> For example, both authors were clinical teaching fellows prior to starting their own clinics in jurisdictions where they had never previously practiced. Amanda M. Spratley was a clinical teaching fellow at The George Washington University Law School and now seeks to contribute to community economic development in Dartmouth, Massachusetts; Alicia E. Plerhoples was a clinical teaching fellow at Stanford Law School and works to assist small business and nonprofit communities in D.C.

public interest and legal communities. Such collaboration may also assist the clinic (and possibly the law school) in maintaining relevance in the particular communities in which it is situated, and avoid claims of elitism or detachment from their communities.

## 2. *Alumni Involvement & Career Development*

Clinical collaboration with outside attorneys can be a means to involving alumni in the law school. Often, a clinic is one of the most rewarding courses in which a law student enrolls. Alumni may recall and appreciate clinical law professors' devotion to their professional development. Alumni may recall the professional and personal satisfaction they received from assisting an indigent client, small business, or nonprofit organization. Engaging alumni in clinic operations may be one tool to encourage alumni to become involved with their alma mater. Such participation may lead to increased *pro bono* hours on the part of the alumni, significant giving to the law school, and/or employment opportunities for clinic students by alumni.<sup>21</sup>

### D. *Professional Objectives*

Motivations for collaborating with outside attorneys may also root in extracting additional personal and professional satisfaction from our clinic work. Law professors appreciate the autonomy that comes with teaching and research. However, law teaching can be an insular endeavor. While clinical law professors may interact daily with their students, we often do not have peers to interact with on a daily basis on our client work. Many law school clinics adhere to a model of one clinical law professor directing her own law clinic, perhaps without the support of a teaching fellow or paralegal. Professors including Susan Bryant and Janet Weinstein have highlighted the benefits of incorporating collaborative learning in the law school classroom,<sup>22</sup> yet benefits of collaboration may also extend to the clinical law professor's own experience and growth. The clinical law professor may find more professional satisfaction in her work given the reduction of

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<sup>21</sup> Although neither of us has yet implemented a robust plan to actively engage alumni clinic participants into our current clinic activities, we are both exploring potential opportunities for such collaboration. We feel that there is an opportunity to create a meaningful experience for both graduated clinic participants and current students who crave interaction with practicing attorneys.

<sup>22</sup> Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459, 468 (1993) (discussing the beneficial impacts of collaboration in legal practice and the merits of developing collaborative skills); Janet Weinstein, Linda Morton, Howard Taras, & Vivian Reznik, *Teaching Teamwork to Law Students*, 63 J. LEGAL EDUC. 36 (2013) (discussing the benefits of and providing strategies for successful teamwork between law students in the law school classroom).

stress and professional motivation that results from collaboration with peers in the practicing legal community.<sup>23</sup> Engagement with attorneys beyond the law school may also imbue the clinical law professor with a sense of worth to the legal community in which the clinic operates, as her work is validated by peer attorneys working in the same practice area.

### *E. Financial Objectives*

Finally, law schools and clinical law professors also consider collaboration with outside attorneys for financial reasons related to fundraising and cost-saving measures.

#### *1. Fundraising*

Clinical collaboration with outside attorneys may be a means of attracting financial contributions to the law school from the corporate law community. Transactional law clinics—particularly those that highlight small business development, entrepreneurship, or intellectual property—are responsive to the private bar’s call for increased transactional law and skills training. Corporate lawyers from law firms in particular are interested in partnering with transactional law clinics: (i) as a source of reputational goodwill and public relations; (ii) as a source of meaningful transactional *pro bono* work for their partners and associates because transactional *pro bono* work is difficult to secure; (iii) as a source of visibility and access to law school students; and (iv) as a source of client referrals, particularly where such transactional law clinics are working with startups and other potentially high-growth small businesses. Where a corporate lawyer sees and understands the value derived from partnering with a transactional law clinic, she may be more likely to provide the clinic or law school with financial support, or encourage her law firm to do so.

#### *2. Cost-Saving*

Recent criticism of law school curriculums has focused on the perceived failure to teach law students lawyering methods and skills that they need for post-graduation practice.<sup>24</sup> Advocates for curricular

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<sup>23</sup> Bryant, *supra* note 22, at 470-71 (“Encouraging legal service lawyers to co-counsel cases and to develop other cooperative projects may create opportunities for them to share their ideas as well as their burdens. Such collaborative arrangements may provide the social support they need to mitigate some of the stress associated with the one lawyer-one client model.”).

<sup>24</sup> For a discussion of the pressures that law schools face to redesign their curriculum to include more experiential education, see Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J. L. & Soc. JUST. 247 (2012). For a history of the development of law school curricula and its rejection of skills-based and experiential education since the 1880s,

reform promote courses that place the student in the role of lawyer to bridge the learning gap between theory and practice.<sup>25</sup> Sample proposals include, but are not limited to: (i) expansion of existing clinical and experiential programs;<sup>26</sup> (ii) structuring the third year of law school as an entirely experiential year during which students enroll in a combination of simulation, externship, practicum courses, and clinics to prepare for post-graduation practice;<sup>27</sup> and (iii) creating “low bono” legal offices staffed by recent graduates.<sup>28</sup>

Nevertheless, the cost of experiential education continues to be controversial. The 2008 economic recession and concomitant crisis in legal education have exerted increased pressure on both law schools and clinics to do more with less.<sup>29</sup> Law school tuition has soared in

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*see* Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008). In comparing law schools to other professional schools such as medicine, nursing, and engineering, the Carnegie Report found that “a law degree requires no experience beyond honing legal analysis in the classroom and taking tests. In most schools, this leaves direct preparation for practice entirely up to student initiative. Too often, the complex business of learning to practice is largely deferred until after entry into licensed professional status.” WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 88 (Carnegie Foundation for the Advancement of Teaching 2007); *see* ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 16-17, 19 (Clinical Legal Education Association 2007) (arguing that law schools are reluctant to commit to prepare students for practice); Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLIN. L. REV. 57, 58 (2009) (“Law schools teach students to think like lawyers but not to act like them.”).

<sup>25</sup> *See* Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279 (2012) (highlighting the important role of clinical legal education in the restructuring of legal education and related cost challenges).

<sup>26</sup> *Infra* note 34 (new ABA proposal to increase the minimum number of experiential coursework credits required for law school graduation); *see also* Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595 (2008) (arguing that adding more doctrinal courses taught in the Langdellian method will do little to reform legal education and advocating that every law student should have a clinical experience).

<sup>27</sup> Peter Latman, *N.Y.U. Law Plans Overhaul of Students' Third Year*, N.Y. TIMES DEALBOOK (Oct. 16, 2012, 6:58 PM), <http://dealbook.nytimes.com/2012/10/16/n-y-u-law-plans-overhaul-of-students-third-year/> (noting NYU Law School's change to its curriculum in response to this criticism). Washington and Lee University School of Law has recently introduced an entirely experiential third year curriculum. WASHINGTON & LEE UNIV. SCH. OF LAW, *Washington and Lee's New Third Year Reform*, <http://law.wlu.edu/thirdyear/> (last visited Dec. 13, 2013).

<sup>28</sup> Ethan Bronner, *To Place Graduates, Law Schools Are Opening Firms*, N.Y. TIMES, Mar. 7, 2013, available at <http://www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html>. Law school incubators are responsive to three converging goals: (1) to fill the access to justice gap, (ii) to employ recent graduates, and (iii) to teach recent graduates how to practice law.

<sup>29</sup> For a comprehensive critique of law school tuition, *see* BRIAN Z. TAMANAH, *FAILING LAW SCHOOLS* (2012). *But see* Philip G. Schrag, *Failing Law Schools – Brian Tamanaha's Misguided Missile*, 26 GEO. J. LEGAL ETHICS 387 (2013) (book review) (critiquing Tamanaha's belief that law school is no longer affordable to students and warning of stratification of attorneys into elite and non-elite classes if some—but not all—law schools

recent years while post-graduate employment and law school enrollment have dropped.<sup>30</sup> Law schools seek to decrease costs either as a moral imperative to remain affordable to low-income and middle-class students, or as a response to low enrollment numbers that cannot support tuition and program cost increases. Some argue that experiential education, and clinics in particular, are an expensive instruction method. Detractors of clinical legal education point to the low faculty-student ratio as the primary factor driving clinic costs.<sup>31</sup> Others have disputed this argument, comparing faculty-student ratios in clinics with non-clinical seminars, which are often quite low as well, and pointing out the attendant benefits of participating in a clinic.<sup>32</sup> Some also argue that costs should not be the primary factor by which curriculum decisions are made.<sup>33</sup>

Notwithstanding potential cost concerns, the demand for increased experiential learning opportunities for law students is on the

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move to two-year curricula).

<sup>30</sup> Karen Sloan, *Tuition Is Still Growing; Despite Lagging Law School Applications, It Vastly Exceeds Inflation*, NAT'L L.J. (Aug. 20, 2012), at 1 (noting the increase in average tuition and fees at private and public law schools and describing the decline in law school applications); David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1 (stating that law schools have market power to raise tuition despite poor market conditions); Sam Favate, *Law School Costs Keep Rising Despite Decreased Demand*, WALL ST. J. BLOG (Aug. 23, 2012, 12:25 PM), <http://blogs.wsj.com/law/2012/08/23/law-school-costs-keep-rising-despite-decreased-demand/> (describing the juxtaposition between the decrease in law school enrollment and increase in average tuition).

<sup>31</sup> See, e.g., Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177, 192 (2012) ("Since instructor-participant ratios must be very low, and clinics require significant administrative support, they cost a lot of money. Yet, in response to regular complaints from the legal profession that law school is too 'theoretical,' law schools continue to expand their clinical programs, without much in the way of evidence regarding whether the costs they incur are justified by the results they produce in regard to producing 'practice-ready' graduates."). Compare Chemerinsky, *supra* note 26, at 595 (arguing that although clinical legal education is expensive, "[t]he most important change that is needed in law school is to ensure that every student has a clinical experience or the equivalent.").

<sup>32</sup> DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 15 (2002) ("[C]linic is a fairly expensive and labor-intensive form of legal education. However, these costs incurred and these faculty resources are committed because there are many things that students can only learn in a clinical environment . . . that the costs and resource allocations are easily justified."); Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J. L. & SOC. JUST. 309 (2012); Mary Lynch, *Plummeting Admissions Numbers Decrease Cost of Clinical Courses Relative to Other Courses*, BEST PRACTICES FOR LEGAL EDUCATION BLOG (Feb. 22, 2013), <http://bestpracticeslegaled.albanylawblogs.org/2013/02/22/plummeting-admissions-numbers-decrease-cost-of-clinical-courses-relative-to-other-courses/>.

<sup>33</sup> See, e.g., Jeff Pokorak, Comment to *Clinical Legal Education and the Future of the Academy* (July 11, 2013, 11:44:16 AM), <http://prawnsblawg.blogs.com/prawnsblawg/2013/07/clinical-legal-education-and-the-law-school-crisis.html#more> ("[C]ost-alone analysis should never be determinative, but rather justifying the student education value is the key to this discussion. And experiential learning (although perhaps more costly) is very high value for students, enrollment recruiters, advancement people, school grant writers, and so on.").

rise. The American Bar Association is in the process of revising accreditation standards to require increased experiential coursework (i.e., clinics, externships, or simulation courses) in law school curricula. The ABA Council of the Section of Legal Education and Admissions to the Bar approved for public comment a proposal to change Standard 303(a)(3) to require that law students complete a minimum of 15 credits of experiential coursework prior to graduation.<sup>34</sup> As law schools look to satisfy changing ABA standards—as well as pre-admission bar rules in place in New York and under consideration in California<sup>35</sup>—there is pressure to do so in a cost-effective manner, which could impact clinical staffing structures.<sup>36</sup>

*a. Expand Student Enrollment*

The typical staffing model of law school clinics is one clinical law professor per eight students.<sup>37</sup> Clinical programs have typically used

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<sup>34</sup> Memorandum from the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association to Interested Persons and Entities (Sept. 6, 2013), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20130906\\_notice\\_comment\\_chs\\_1\\_3\\_4\\_s203b\\_s603d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.authcheckdam.pdf); Memorandum from the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association to Interested Persons and Entities (Dec. 13, 2013), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/201312\\_notice\\_comment\\_stds\\_205\\_207\\_303a3\\_603a\\_c.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201312_notice_comment_stds_205_207_303a3_603a_c.authcheckdam.pdf). At the time of writing this article, the ABA has yet to select and implement one of its proposals. The ABA's decision to increase the minimum number of experiential coursework credits in its proposal from six to fifteen may likely have been influenced by its receipt of solicited comments, such as that provided by the Clinical Legal Education Association's (CLEA) recommendation for an increase in the standard to fifteen credits of experiential education. See Clinical Legal Education Association (CLEA) Comment on Draft Standard 303(a)(3) & Proposal for Amendment to Existing Standards 302(a)(4) to Require 15 Credits in Experiential Courses (July 1, 2013) (on file with authors). The previous ABA standard provided less guidance than the more recent proposed changes, and generally required at most that students complete one credit hour of experiential education. AM. BAR ASSOC., 2013-2014 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 302(a)(4) (2013).

<sup>35</sup> New York requires 50 hours of “qualifying *pro bono* service” before one can apply for a New York bar license. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16(a) (2013). The California Bar is considering requiring law students to have taken 15 units of coursework in core competencies “not covered by doctrinal learning, including problem solving, exercising good judgment client relations, time management, communication, and ability to see and understand opposing points of view.” STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 14 (June 24, 2013).

<sup>36</sup> For the history of the ABA's standards for clinical faculty and concomitant status issues, see Joy & Kuehn, *supra* note 24.

<sup>37</sup> A 2010 survey conducted by the Center for the Study of Applied Legal Education identified the most common student-faculty ratio for both classroom and casework components among responding law clinics to be 8:1 for the casework component. DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., THE 2010-2011 SURVEY OF APPLIED LEGAL EDUCATION 16 – 18 (2012) [hereinafter 2010

graduate teaching fellows, staff attorneys, or practitioners-in-residence to expand a clinic's capacity to enroll more students.<sup>38</sup> Alternatively, a clinic may engage outside attorneys to directly supervise student work on client cases in order to enroll more students in a clinic. Unlike fellows and staff attorneys, outside attorneys have "day jobs" and typically take on this supervisory work as part of their *pro bono* duties. Clinics may pay an outside attorney who supervises students a nominal stipend, but in most cases the attorney does not receive compensation or benefits.

*b. Balancing Responsibilities*

Engaging outside attorneys to supervise students or directly represent clinic clients is also an avenue to reduce the clinical teaching load and supervisory responsibilities of the clinical faculty member. With reduced clinical teaching and supervisory responsibilities, the clinical faculty member may be able to teach a non-clinical course or invest more time in research and scholarship. As clinical law professors have gained equal or similar tenure status as their non-clinical colleagues,<sup>39</sup> clinical law professors are expected to replicate the same scholarly, teaching, and service responsibilities as their non-clinical counterparts. This includes teaching other non-clinical courses and producing doctrinal, normative, theoretical, interdisciplinary and other types of legal scholarship.<sup>40</sup> Alternatively, if clinical law profes-

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CSALE SURVEY], available at <http://www.csale.org/files/CSALE.Report.on.2010-11.Survey.5.16.12.Revised.pdf>.

<sup>38</sup> Fellows are typically paid a salary that is half, or less than half, of what a full-time clinical law professor is paid. Staff attorneys and practitioners-in-residence may command more but still less than a full-time clinical law professor. Typically, neither fellows nor staff attorneys are given the occupational benefits or perks that full-time clinical law professors are given, such as time during the summer that can be devoted to scholarship, sabbatical or research leaves, conference or book budgets, and parental leave at the birth of a child. In line with these reduced benefits, these positions rarely require extensive scholarship production or service requirements to the law school or local community, or other typical incidental faculty responsibilities as part of the job description. Frequently, staff attorneys are hired in clinics primarily on the basis of their substantive legal knowledge and experience as practicing attorneys, in their role of supervising case matters or directly handling clinic cases. Fellows, staff attorneys, and practitioners-in-residence are typically hired on a full-time basis. Relying on fellows, staff attorneys, and practitioners-in-residence to expand student enrollment is not without controversy because these tend to be temporary positions without job security, and without a meaningful opportunity to participate in clinic decision-making.

<sup>39</sup> See Bryan L. Adamson, Bradford Colbert, Kathy Hessler, Robert Kuehn, Mary Helen McNeal, Calvin Pang, & David Santacrose, *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PROF. 353 (2012) (providing background on the historical and current challenges experienced by clinicians relating to status and job security within the legal academy).

<sup>40</sup> The 2010 CSALE Survey also reports that "[j]ust over 48% of full-time respondents

sors are not relieved of clinical teaching responsibilities but expected to maintain the same service and scholarship responsibilities as their non-clinical peers, they may seek out methods to ethically manage all of their responsibilities by collaborating with outside attorneys to aid in supervising clinic students or otherwise assisting in clinic operations.<sup>41</sup>

These cost saving measures to expand student enrollment and to reduce the teaching or supervisory responsibilities of the clinical law professor are not without controversy, and we discuss some concerns with these objectives in Part III.

## II. METHODS FOR COLLABORATION WITH OUTSIDE ATTORNEYS

In addition to identifying and considering her objectives for collaborating with outside attorneys, a clinician should consider the methods of establishing and structuring such a relationship. The manner in which outside attorneys participate in clinical programs

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are required to produce scholarship as part of their job.” 2010 CSALE SURVEY, *supra* note 37, at 30. Of this group, 95.1% receive financial support for research assistance but only 28.9% also have their teaching and supervision obligations reduced at some point (excluding summers) to permit them to pursue scholarship. Finding time to produce scholarship for a clinical law professor can be a challenge. Supervising students on client work is time-consuming. In addition to teaching a seminar, clinical law professors often meet multiple times a week with clinic students to discuss client work. Moreover, a client’s schedule does not follow the academic calendar and clinical law professors often have continuing client needs that must be addressed over the summer, an essential time for research and writing for most professors. Transactional law clinics often have greater flexibility than litigation-oriented clinics to manage client caseload; often, but not always, transactional work can be accomplished within a few months and can be more predictable than litigation. However, even in these situations, clinical faculty must often make some provision for monitoring clinic matters over the summer to meet unexpected client needs. Some clinical programs have looked to fellows, staff attorneys, and outside counsel to hand off summer caseloads in order to afford their tenured or tenure-track clinical law professors the time to dedicate to scholarship. According to the 2010 CSALE Survey, however, funding for summer coverage of clinic cases is still rare:

Just over 73% of all respondents report that their live-client clinics do *not* operate as student enrolled programs during the summer yet the clinic still has ongoing cases or matters. Among these “non-operating” clinics with ongoing cases, 55.5% received funding to hire interns to assist with case coverage. Among the 44.5% of clinics that have ongoing cases but receive no funding to hire interns, 1% receive funding to hire an attorney to *assist* with case coverage. Of the 99% of clinics who do not receive funds to hire an attorney to *assist* with case coverage, just over 15% receive funding to hire an attorney to take *primary responsibility* for ongoing cases.

*Id.* at 28.

<sup>41</sup> “Nearly 86% of respondents are permitted to teach non-doctrinal ‘skills’ courses. Of those who are permitted to teach skills courses, just over 78% are not relieved of their clinical teaching obligations while teaching such courses.” *Id.* at 29-30. Clinical law professors were also asked to “identify the major challenges their live-client clinics faced.” Fifty percent (50%) of respondents stated that “other demands on clinical faculty’s time” was a major challenge. *Id.* at 12.

varies between programs. Collaboration can be informal or formal, occasional or routine. Some clinics collaborate with outside attorneys on particular community projects that benefit constituencies within the clinic's client base, or as co-counsel to represent a common client. Some outside attorneys act as consultants who provide legal expertise to a clinic, and generally do not have a direct relationship with the clinic's clients. In other situations, outside attorneys may become more involved with clinic clients and act as adjunct law professors or volunteers who directly supervise students. There are many potential ways to engage outside attorneys in transactional law clinics. Here we will focus on four primary methods of integrating outside attorneys in transactional clinics and relevant considerations for each. These four methods include: (1) collaborative partnership on community projects; (2) working with outside attorneys as consultants; (3) working with outside attorneys as referral sources; and (4) working with outside attorneys as supervisors in the clinic.

#### *A. Collaborative Partnership on Community Projects*

In addition to direct representation of organizational clients, many transactional law clinics engage in projects that benefit a particular constituency or community. Community economic development clinics may, for example, host legal workshops for entrepreneurs on entity planning, local business and zoning codes, intellectual property law, and other regulations affecting small businesses. They may host legal workshops for nonprofit organizations on governance issues, applying for tax-exempt recognition by the Internal Revenue Service, distinctions between employees and independent contractors, and volunteer risk management and liability. Some transactional law clinics also prepare legal treatises or primers for the benefit of the nonprofit and small business community, either in conjunction with the legal workshops or as stand-alone resources. These legal workshops and materials are often presented in partnership with a local legal services organization or with a partnering law firm as part of the law firm's *pro bono* outreach. Through such partnerships, clinic students work with staff attorneys or law firm associates to prepare and present the requisite content and materials for the workshops or other collaborative project.<sup>42</sup>

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<sup>42</sup> Law school legal clinics typically collaborate with a variety of community-based organizations to augment their efforts to support and connect with organizations other than legal services organizations. These collaborators may include business and financial related organizations, university academic departments in other disciplines or specialized university centers, social workers, etc. There are rich collaboration opportunities with organizations and specialists available to clinics beyond those associated only with providing legal services; however, such collaborations are outside the scope of this article. For an example

Law school clinics may consider collaboration with legal services organizations in the community as a means of pooling resources to provide legal services to a larger client or for a broader initiative. This may occur in multiple ways. In some instances, a clinic may provide assistance directly to a collaborating law firm or legal services organization on a discrete legal issue that the firm or organization then incorporates into its representation of the client. As an example, a clinic may structure a collaborative project with a community-based legal services provider through which the clinic actively engages in targeted research on pre-identified issues and then provides this information to the legal services organization in the form of a white paper, formal presentation, or otherwise.<sup>43</sup>

Alternatively, a clinic may develop a project involving multiple collaborators, including both legal service provider organizations and non-legal service provider organizations, which may offer complementary services. Clinics are increasingly undertaking exciting action-based learning initiatives that integrate the clinic with the local community in this way. These initiatives vary in scope, but frequently engage law students in location-specific, service-oriented learning initiatives that are facilitated in large part through collaboration with a combination of legal-service based and non-legal services based organizations.<sup>44</sup> There also exists a rich, and often untapped, wealth of

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of transactional law clinic collaboration across multiple academic disciplines in a university setting see Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249 (2004).

<sup>43</sup> A successful example of such an approach is a research project on issues affecting art-based nonprofit organizations undertaken between The George Washington University Law School's Small Business & Community Economic Development Clinic and the Washington Area Lawyers for the Arts. See Amanda M. Spratley, *Connecting Law and Creativity: The Role of Lawyers in Supporting Creative and Innovative Economic Development*, 8 HASTINGS BUS. L.J. 221 (2012).

<sup>44</sup> These action-based law school learning initiatives are referred to using various terminology, which may also include "service-based learning" or "action-research." These initiatives are not limited to the transactional clinic context, but also expand to various subject-matter based clinics, as well as doctrinal law school courses. See Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum*, 56 N.Y.L. SCH. L. REV. 561 (2011/12); Susan R. Jones, *Innovative Approaches to Public Service through Institutionalized Action Research: Reflections from Law and Social Work*, 33 U. ARK. LITTLE ROCK L. REV. 377 (2011). The University of Massachusetts School of Law – Dartmouth provides an example of action-based clinical learning outside of the transactional clinic context, in which students enrolled in the law school's Immigration Law Clinic participated in a fact-finding trip to the Dominican Republic to investigate conditions for Haitian immigrants—led by Director of the clinic Professor Irene Scharf and Professor Fred Rooney, Director of the International Center for Post Graduate Development at Touro Law Center in New York. The success of the trip was further supported through collaboration with two community organizers from the nonprofit organization Red Fronteriza Jano Sikse, located in the Dominican Republic. Irene Scharf & Justine Steele, *UMD Law Students Travel to Haiti on Fact-finding Trip*, S. COAST TODAY (Aug. 25, 2013, 12:00 AM) <http://www.south>

opportunity for collaboration to occur between two or more clinical legal programs. Such collaboration may entail working together on a joint project or combining resources to assist an individual client that either clinic working alone may not otherwise be able to manage.<sup>45</sup> Law school clinic collaborations can offer an opportunity to connect with other law schools or to strengthen relationships between clinics within a single law school with each party achieving its own pedagogical objectives.<sup>46</sup>

Engaging in projects with local legal service providers or community organizations, or directly collaborating on a project with a team of outside attorneys can be a highly rewarding experience for students participating in law school clinics. Clinic students have the opportunity to develop their collaborative skills by working with other professionals, increase their substantive knowledge of a particular area of law by engaging in legal research, and develop leadership and professionalism skills by working on a project vesting them with authority to act.

These collaborative opportunities can also raise additional challenges. Work between multiple actors requires substantial coordination and consensus on the implementation of the representation or project. For this reason, we recommend adopting a collaborative process to reach a consensus on the goals, roles, and responsibilities of each collaborative partner, and subsequently maintaining open lines of communication during the collaboration. In Part IV, we discuss our recommended steps for structuring such a relationship, which include discussing expectations for the collaboration with any outside attorneys and entering into a written Memorandum of Understanding that

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[coasttoday.com/apps/pbcs.dll/article?AID=/20130825/NEWS/308250329&emailAFriend=1](http://coasttoday.com/apps/pbcs.dll/article?AID=/20130825/NEWS/308250329&emailAFriend=1).

<sup>45</sup> For example, the transactional law clinics at Georgetown Law, Michigan Law, and George Washington Law have partnered to provide legal support to the grantees/constituents of Ashoka, a global nonprofit organization that has pioneered social entrepreneurship by funding more than 3,000 social entrepreneurs around the world. The clinical law professors of each of the clinics regularly meet together with Ashoka's general counsel and plan research projects and individual representation of Ashoka's grantees that will help Ashoka advance its charitable mission. As a large nonprofit organization with numerous legal needs, collaborating with multiple legal clinics is the only way in which any of the clinics could have taken on Ashoka as a client. Deborah Burand, Susan R. Jones, Jonathan Ng, & Alicia E. Plerhoples, *Clinical Collaborations: Going Global to Advance Social Entrepreneurship*, \_\_ INT'L J. CLINICAL LEGAL EDUC. (forthcoming 2014). For possible ways to conceive of collaborative partnerships between law school clinical programs and community groups, see Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 355 (2008).

<sup>46</sup> See Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 CLIN. L. REV. 39 (2013) (providing additional background on the nature of community projects and identifying methods clinics may employ to maintain pedagogical objectives while engaging in community projects).

describes such expectations and the responsibilities of each party.

### *B. The Outside Attorney as Legal Consultant*

Outside attorneys may serve as legal consultants to clinical programs to provide practical knowledge, experience, and expert advice to law students, or to act as a sounding board for the clinical law professor. The consulting arrangement may be structured to limit outside attorney interaction with students and clients, or to expand the relationship to facilitate direct interaction between the consulting outside attorney and clinic students. Furthermore, consulting relationships with outside attorneys may be created with varying levels of formality to meet the unique needs of a particular clinical program.

#### *1. Practical Knowledge & Experience*

Many transactional law clinics collaborate informally with outside attorneys. Here, outside attorneys act as occasional legal consultants or advisors to the clinic. In their description of what transactional lawyers do, Professors Alicia Alvarez and Paul Tremblay state that business lawyers provide both “pure technical legal analysis” and “experience-based practical wisdom about how the world actually operates.”<sup>47</sup> Alvarez and Tremblay acknowledge that law students in a transactional law clinic “can be terrific at the former, but (perhaps) a bit less confident about the latter.”<sup>48</sup> That is, a student-attorney does not often have experience-based practical knowledge to offer to her clients. A typical third-year clinic student may have enrolled in law school straight from college, never having worked a full-time, non-temporary job. When a clinic student does not have experience-based practical knowledge to provide, the clinical law professor may direct the student to talk with more experienced outside attorneys. The student is tapping into the experience of the outside attorney as a resource, not for technical legal knowledge, but for experience-based practical knowledge that cannot otherwise be researched in a legal treatise, case, or book. For example, a student-attorney may have questions about how a particular regulatory or administrative body operates on informal levels.

The student-attorney could turn to the clinical law professor for such advice, but the clinical law professor may wish to preserve her role as the nondirective<sup>49</sup> teacher in order to maintain the student-

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<sup>47</sup> ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 9-10 (2013) (describing the need for clinic students to engage in “non-legal research” about how the world works).

<sup>48</sup> *Id.* at 10.

<sup>49</sup> A clinical law professor makes choices about how much direction to give her stu-

attorney's ownership of his role as lawyer to the client. The clinical law professor would thus direct the student-attorney to the outside attorney for non-technical legal advice, allowing the outside attorney to take on the role of experienced informant. With this informal method of collaboration, the outside attorney can tell the student-attorney about her experiences with various clients, and how she has navigated a particular issue for her clients.<sup>50</sup>

## 2. *Expert Advice*

An outside attorney may be called upon to provide expert advice when a legal issue arises with a clinic client in a legal area that the clinical law professor does not have expertise in, or that cannot be efficiently researched by the clinic students due to time constraints, complexity of the legal issue, or otherwise.<sup>51</sup> In collaborating with an outside legal expert, the clinical law professor and clinic students are benefitting from the attorney's expertise in the legal field as well as her understanding of current legal trends, influences, and practices. By engaging the attorney as an expert on a particular legal issue, the clinic students are tapping into legal, business, and practical knowledge that often only comes from full-time, continuous legal practice, particularly in the transactional setting where the legal structuring of contracts, transactions, and other business arrangements are not in the public domain. While it is expected that the clinician will similarly be up-to-date on legal issues, the breadth of subject matter that frequently intersects with transactional practice makes it common that the clinician and clinic students would benefit from quick and targeted advice from a practitioner experienced in a particular sub-specialty of law and well-versed in its nuances.

## 3. *Sounding Board for Clinician*

A clinical law professor may also consult with an outside attorney directly—without involving the outside attorney with any students or clients—to act as a sounding board to the professor. Such consultation

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dents at any given time. For example, when using a nondirective approach, the clinician may ask the student to define and assess a particular legal issue on her own, prior to consulting the clinician. Nondirective moments are often used by clinicians to enhance student autonomy and empower students to step into the role of lawyer. See James H. Stark, Jon Bauer & James Papillo, *Directiveness in Clinical Supervision*, 3 B.U. PUB. INT. L.J. 35 (1993).

<sup>50</sup> This approach may encourage a students' overreliance on the consultant's advice. Steps to enhance student autonomy despite participation of an outside attorney are discussed in Part IV.

<sup>51</sup> See Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J.L. & POL'Y 195, 200-01 (2003) (noting the increasing complexity of transactional business law).

may come at various points in the life cycle of a client representation or the clinic's operations. For example, a clinical law professor may independently consult with an outside attorney before accepting a client in an effort to get additional input on the feasibility of representation by the clinic and potential issues raised by the potential client's case. In other situations, the clinical faculty member may contact an outside attorney in a consultancy role early on in the representation of a client for input on mapping the representation, or when a roadblock or unique challenge arises in the case.

#### 4. *Structuring the Consulting Relationship*

A clinic may structure a collaborative consulting relationship with an outside attorney or law firm in multiple ways, such as through an informal consultant relationship, a formal consultant relationship, or by developing a Clinic Advisory Board.

##### *a. Informal Consultant Relationships*

In the most informal consultant situations, there may be no need to set up formal arrangements with outside attorneys. A natural give-and-take will likely arise through the normal course of work as the clinical faculty member calls on the knowledge of colleagues and vice versa. If approaching a consultant situation from an informal perspective, it may be preferable to generate a wide circle of outside attorney contacts that a clinician can work from, so as not to overburden any one relationship.

Under informal circumstances, it is likely that the outside legal expert does not have an attorney-client relationship with the clinic client, and to retain client confidentiality, the outside attorney is not told the name of the clinic client or given explicitly detailed information about the legal issue. The clinician or participating clinic students may provide generic information about the legal issue to the legal consultant and ask for advice on how to approach and analyze the issue, as well as ask for recommendations of legal sources for further legal research.

Outside attorneys also may participate in transactional clinics by serving as guest speakers to the clinic's seminar classes,<sup>52</sup> or by participating in presentations hosted by the clinic for the benefit of the local community or law school. Clinics may utilize outside attorneys in

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<sup>52</sup> Irmie K. Blanton III, *The Legal Clinic Expands into Business and Transactional Law*, 3 *TRANSACTIONS: TENN. J. BUS. L.* 5, 5-6 (2002); Ann Marie Cavazos, *The Journey Toward Excellence in Clinical Legal Education: Developing, Utilizing and Evaluating Methodologies for Determining and Assessing the Effectiveness of Student Learning Outcomes*, 40 *SW. U. L. REV.* 1, 25 (2010).

these ways as a means to strengthen bonds between the clinic and the private bar and to benefit from outside attorneys' specialized expertise. The interaction generally proves very stimulating for students who are enthusiastic about the opportunity to make connections with practicing lawyers and hear their varied perspectives.<sup>53</sup> Outside attorneys may also more readily agree to these types of interactions with the clinic because they involve less substantial and more flexible commitments from attorneys. Such opportunities also allow outside attorneys to highlight these speaking engagements on their resumes or as professional development.

*b. Formal Consultant Relationships*

If there are particular attorneys that a clinician wishes to work with on a continual basis due to their specialized expertise, receptivity, or otherwise, it may be wise to have a direct conversation about structuring a formal relationship to clarify mutual expectations about the arrangement. Motivations for formalizing a consulting arrangement may vary between clinics, but could be appropriate in instances in which a clinic is committing to the representation of a long-term client and it anticipates a need for sustained consulting support, or wants to solidify and maintain a valuable ongoing relationship between the clinic and the particular consulting attorney or firm. Many of the same considerations found in an informal consultancy situation arise in this context as well; however, for a formal consulting arrangement, the clinic should be knowledgeable about the potential collaborator and fairly confident about the ability of the clinic and collaborator to successfully work together.

The structuring of a formal relationship may involve committing both sides' understanding of the nature of the relationship to a written agreement, as we further explore in our discussion on creating a Memorandum of Understanding in Part IV. Even the most generous outside attorneys will likely share their time with clinics more willingly when they know up front the level of commitment desired from the clinic and have the opportunity to determine the level of commitment they are able to make.

Under more formal arrangements, the clinic may request permission from the client to share the details of the case with the legal expert to obtain more tailored assistance. In such situations, additional actions are necessary to clarify the nature of the outside attorney's involvement and to ensure that there are no conflicts of interest. In Part IV we further address how clinicians may proceed in structuring

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<sup>53</sup> See Schlossberg, *supra* note 51, at 211.

such collaborative relationships.

*c. Clinic Advisory Boards*

In deciding to arrange for multiple outside attorneys to serve as consultants to the clinic in a formal capacity, clinicians may wish to consider further formalizing such relationships with the creation of a Clinic Advisory Board. A Clinic Advisory Board allows outside attorneys and other members of the community to serve as formal advisors to the clinical program.<sup>54</sup> Asking local community members and law school alumni to become members of a Clinic Advisory Board also can bolster the clinic's legitimacy and relevance to the wider legal community. Clinics may define the role of advisory board members as appropriate to their needs. Advisory board members may assist as consultants in multiple and varied capacities, such as providing legal advice, conducting intake for the clinic, contributing financially to the law school or specific clinical program, or providing strategic planning.

In creating a Clinic Advisory Board, clinicians should consider creating a board charter or other written document that establishes the roles and responsibilities of the board. Attorneys and their law firms may be wary of committing to a formal role, and confusion may arise as to whether they are serving in a director-like capacity with respect to the operations of the clinic or are present solely to provide legal advice as queried. In such situations, clear and early communication about the intended arrangements between clinical faculty and participating outside attorneys is key, with such arrangements dedicated to writing to ensure all participants' understanding. Clear expectations also can temper the Clinic Advisory Board's over-reach or excessive involvement in clinic affairs.

*C. Outside Attorney as Referral Source*

A clinic may decide to collaborate with outside attorneys by referring actual or potential clients to an attorney or legal services organization with which the clinic has an established relationship. Working with outside attorneys in a referral capacity is one of the most common ways transactional clinics work with outside parties.<sup>55</sup> A clinic may choose to refer a case out for various reasons, such as instances where the clinic is unable to accept the case because it has a

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<sup>54</sup> Many law schools already employ advisory boards for the general law school composed of law school alumni members and local practicing attorneys. Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187, 194 (2012) (discussing interdisciplinary collaboration between transactional legal clinics and faculty in other subject matter and discipline areas).

<sup>55</sup> *Id.*

full case docket, the legal issues are complex, or there is not a pedagogical “fit.” Similar to the consultant relationships previously discussed, clinics may structure these referral-based relationships with varying levels of formality and make decisions on the degree to which law students will interact with outside attorneys in the referral relationship.

Many clinics are actively involved in developing relationships with local service providers and community organizations. Clinics often build relationships with other service organizations in the community as a means of expanding the resources available to their clients for legal assistance or complementary services, such as tax or business consulting assistance, and have aggregated knowledge on local legal resources.<sup>56</sup> In this way, clinics can serve as an important source of client referrals for other legal service providers in the area, often when the clinic is unable to assist a client with a particular issue or a prior client requires sustained or specialized assistance that may be better addressed through the private bar. Clinic clients may be intimidated or overwhelmed by the task of selecting legal counsel; clinics can help by providing them with well-tailored referrals for legal counsel.

These referral arrangements can also work both ways; certain clients may not be a good fit for the respective referring organization, but could prove to be excellent clinic clients. Some of the most disadvantaged organizational clients thrive in the unique clinic environment that focuses on client-centered representation. The client-centered approach of many clinics may create a less intimidating and more accessible environment for nascent and thinly resourced organizational clients that empowers these clients to build institutional knowledge of governance requirements and create stable foundations upon which to grow. Some referring organizations may recommend clients initially to the clinic for the primary purpose of getting the client into a position where the referring organization can more readily offer assistance. This can create a symbiotic relationship by which the clinic and outside legal organizations work together to provide services to clients, albeit accomplished in a phased manner.

In addition to exploring the *pro bono* committees of local, state, and regional bar associations, clinical programs may consider approaching community organizations and other nonprofit legal ser-

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<sup>56</sup> See Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 257 (2011/12) (noting that transactional law clinics can act as reputational intermediaries for their clients and also connect with the local bar to determine which lawyers are willing to represent micro-enterprises).

vice provider organizations as possible collaborators for client referrals. Examples of possible organizations include local legal aid organizations and other volunteer lawyer associations such as Volunteer Lawyers for the Arts.<sup>57</sup> Many of these organizations operate at an excess of capacity and would be happy to learn of legal providers to which they can refer potential clients. These organizations are also great resources for identifying lawyers committed to public interest and *pro bono* work who may be willing to take on extra cases. Transactional legal clinics at neighboring law schools may be interested in working with a client that is not a good fit for another law school's clinical program.

Additionally, in some situations where attempted collaboration between a clinic and outside attorney becomes problematic or difficult to sustain, it may be desirable to convert the relationship to a referral-based model to retain the benefits of collaboration and resource-sharing while allowing parties to maintain their independent operations.<sup>58</sup>

#### D. *Outside Attorney as Supervisor*

Outside attorneys may be called upon to directly supervise law student representation of clients within a clinic. Here, the outside attorney would allow the student-attorney to maintain the primary legal relationship with the client, while supervising the law student's legal work and ensuring competent and ethical representation. In this model of collaboration, the outside attorney is directly involved in the representation of the client in the capacity of supervisor.<sup>59</sup> The outside attorney may constitute the attorney-of-record for the representation. The clinical professor, the supervising outside attorney, and the student-attorney would work together to create a unified clinical learning experience.

Outside attorneys may be utilized as supervisors in varying ways

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<sup>57</sup> Volunteer Lawyers for the Arts is a network of volunteer-based legal-service provider organizations across the U.S., Canada and Australia that connect volunteer lawyers with low-resourced artists and arts-organizations to provide targeted *pro bono* legal assistance. For more information on this network of organizations, and to identify the nearest office, visit the website for the New York Volunteer Lawyers for the Arts, VOLUNTEER LAWYERS FOR THE ARTS, <http://www.vlany.org> (last visited Nov. 2, 2013).

<sup>58</sup> See Schlossberg, *supra* note 51, at 220–22 (law clinics and client-service organizations with inconsistent philosophies and approaches to serving clients may face challenges when attempting to collaborate; referral-based collaborations may be preferable in these situations).

<sup>59</sup> Alternatively, the outside attorney could maintain the primary legal relationship with the client and the student-attorney instead assumes a supporting role in the representation. This alternative collaborative model is used widely in internships, externships, and field placement clinics, which are beyond the scope of this article.

within the clinical program. An outside attorney may serve as the primary supervisor for all active cases in a given semester, or as the primary supervisor with respect to only one law student or one case that may present particularly complex legal issues deserving of the outside attorney's specialized expertise. Alternatively, a clinic may decide to simultaneously collaborate with multiple outside attorneys, so that each attorney acts as a primary supervisor to different clinic cases or law students. In some situations, a clinic may collaborate with a law firm that provides rotating attorneys to collectively serve as supervisors to law students on a particular case. Rather than involving an outside attorney in the clinic as primary supervisor, a clinician may devise an arrangement by which the supervisory role is shared between the clinician and the outside attorney. These permutations evidence a sampling of possible collaborative configurations with an outside attorney in the supervisor role.

A collaborative model employing the outside attorney as supervisor may elicit the greatest degree of initial discomfort among clinical faculty members in comparison to other modes of involving attorneys in clinics.<sup>60</sup> This is likely due in part to the unique benefits the clinical learning experience affords compared to other forms of legal and experiential learning, and the centrality of the supervisory role in the clinical experience.

Roy Stuckey's *Best Practices for Legal Education* identifies certain practices and characteristics of supervisors that are desirable in experiential education courses generally, and specifically in-house clinical programs.<sup>61</sup> Of primary importance is that supervisors make effective use of feedback to provide law students with the context in which to learn.<sup>62</sup> To give effective feedback, the supervisor must be familiar with lawyering theories in addition to practical matters. The supervisor must provide candid and constructive feedback to law students in a way that is not overly negative and supports a positive learning experience.<sup>63</sup> The supervisor must be prepared to guide law

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<sup>60</sup> This concern is voiced in the context of field placement courses by Nancy Maurer and Liz Ryan Cole, who recognize the pressures imposed on law schools to expand experiential learning opportunities while simultaneously cutting costs and "doing more with less," but caution against the danger of impairing the learning experience by replacing experienced full-time faculty members teaching field placement courses with cheaper instructors possessing limited experience and no job security. Nancy Maurer & Liz Ryan Cole, *Design, Teach and Manage: Ensuring Educational Integrity in Field Placement Courses*, 19 CLIN. L. REV. 115 (2012). Although this argument is presented within the context of field placement, the concern may easily extend to the clinical context and experiential courses generally.

<sup>61</sup> STUCKEY ET AL., *supra* note 24, at 174–75.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

students in their client representations, and understand that the supervisor role demands a more contextual and thoughtful approach to providing feedback than typically demanded in an internship or job.<sup>64</sup> The clinical law professor provides effective feedback but also teaches students the skill of reflective lawyering, i.e., disciplined reflection about one's past performance and lawyering roles, and integration of that experience to improve future performance and acquire expertise.<sup>65</sup> Reflective lawyering is a lifelong skill that students can use to move from novice to expert over the course of their careers. The clinical experience provides an opportunity for law students to consider such feedback and also reflect on their client work and their roles as lawyers. The clinical experience serves as a bridge to law practice for students; students are able to draw upon reflective lawyering skills developed in their clinical experience post-graduation.

Clinical faculty cannot assume that outside attorneys have the knowledge, time, or resources to be effective supervisors or teach reflective lawyering, even where the outside attorney is known to be an efficacious supervisor to employees or mentees. Outside attorneys are untrained in clinical pedagogy and have many competing demands in their profession that can take time away from the thoughtful deliberation, oversight, and pedagogical methods required of supervisors in clinical education. An outside attorney may not fully appreciate clinical teaching methods, and in an effort to maximize the realistic nature of the work experience for law students, treat supervisory sessions more as an opportunity for the student to observe the attorney in action, rather than allow the student to fully step into the role of lawyer and feel the uncertain and ultimately empowering aspects of holding primary responsibility for a client representation.

Moreover, clinical pedagogy cannot be distilled into a short preparatory program that would enable outside attorneys to replace or replicate the teaching and supervision of a clinician. Many new clinicians enter into clinical teaching through a clinical teaching fellowship precisely because such fellowships prepare them for clinical teaching over a two or three year period. Because outside attorneys have "day jobs," they usually cannot commit sufficient time to learn and practice clinical teaching methods. As such, the clinician's role of implementing and maintaining the integrity of clinical pedagogy, though challenging, remains critical when utilizing outside attorneys as supervisors in clinics.

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<sup>64</sup> *Id.*; Cavazos, *supra* note 52, at 23–25.

<sup>65</sup> Margaret Martin Barry, *Reflective Lawyering*, in *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS*, 145, 146–147 (J.P. Ogilvy, Leah Wortham & Lisa G. Lerman eds., 2007)

If a clinic does engage outside attorneys as supervisors of student work, at a minimum, the clinician should take steps to align the outside attorney's supervisory model with the goals of the clinic. Clinical faculty should proactively explain to outside attorney supervisors the unique goals and processes of clinical education generally, and specifically with regard to their particular clinic. Each clinic's approach will be slightly different in its operations and the learning objectives it identifies, but it is important that clinical faculty communicate the particular practices of their clinics to outside attorneys upfront to ensure everyone is operating from the same assumptions.

A wealth of information on clinical teaching and developing one's abilities as a clinical supervisor in the form of law articles and materials is available to the clinical community. Clinicians should access these materials and share relevant information with the outside attorneys serving as supervisors in their clinical programs, recognizing that many outside attorneys may not be aware of the wealth of available scholarship and guidance on clinical teaching.<sup>66</sup>

Clinical faculty may wish to provide each outside attorney supervisor with written materials at the start of the academic session to orient the supervisor to the goals and expectations of the supervisory relationship, which should include at minimum a Supervisor's Manual.<sup>67</sup> Additionally, we recommended that the clinical faculty member consider providing the outside attorney supervisor with a Memorandum of Understanding that we describe in Part IV, which may be sub-

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<sup>66</sup> A brief sampling of materials discussing clinician training and the role of the clinic supervisor follows: CLINICAL ANTHOLOGY: READINGS FOR LIVE-CLIENT CLINICS (Alex J. Hurder, Frank S. Bloch, Susan L. Brooks, & Susan L. Kay eds., 2d ed. 2011); CLINICAL LEGAL EDUC. ASSOC., NEW CLINICIANS HANDBOOK (2013), available at <http://www.clea.org/new-clinicians>; Justine A. Dunlap & Peter A. Joy, *Reflection-In-Action: Designing New Clinical Teacher Training By Using Lessons Learned From New Clinicians*, 11 CLIN. L. REV. 49 (2004); Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989); Wallace J. Mlyniec, *Developing a Teacher Training Program for New Clinical Teachers*, 19 CLIN. L. REV. 327 (2012); Mlyniec, *supra* note 3; William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View From the First Floor*, 28 AKRON L. REV. 463 (1995); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1993-1994); Stark, Bauer & Papillo, *supra* note 49; Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L.J. 301 (1986). Additionally, clinical faculty may look to externship program models and procedures for examples of how to effectively train and manage outside attorney supervisors, akin to "field supervisors" in externships. However, in referencing materials related to other forms of experientially-based courses such as externships, clinical faculty should remember that clinical supervisors generally commit to a higher degree of one-on-one interaction and consideration of individual attributes, strengths, and weaknesses of the student than may be required in externship programs. STUCKEY ET AL., *supra* note 24, at 192.

<sup>67</sup> Cavazos, *supra* note 52, at 12.

ject to negotiation between the clinic and the attorney.<sup>68</sup>

### III. COMMON CHALLENGES TO COLLABORATION

Throughout our preceding description of the primary models of collaboration, we have highlighted some advantages and disadvantages of each model. However, several common challenges to integrating outside attorneys in clinical work exist. First, complex cases in the clinic may be antithetical to nondirective teaching and law student autonomy. Second, the presence of outside attorneys may create a chilling effect on the otherwise safe clinical setting. Third, establishing a collaborative relationship with outside attorneys requires time and resources that a clinician may not have. Fourth, engaging outside attorneys raises concerns for the financial stability of clinical programs and the status of clinicians and clinical education within the legal academy.

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<sup>68</sup> The provision of a Supervisor's Manual to the supervisor may be preceded by a meeting held between the clinical faculty member and supervisor, or a group of clinical faculty and supervisors, during which some introduction of clinical education and pedagogical methods are discussed. The Manual will reinforce this understanding for supervisors, as well as identify the student outcomes supervisors must assess to gauge student progress. Included within the goals identified in the Manual should be requirements that supervisors employ ". . . frequent and meaningful communication, reflection, and evaluation, both written and oral. . . ." *Id.*, at 12. Supervisors should understand that they are required to abide by the guidelines provided in the Manual, but the Manual's content should be flexible enough to allow the supervisor reasonable latitude in accomplishing the objectives of the supervision. The Manual should include any preferred or required actions by the supervisor such as weekly meetings between supervisor, clinical law professor, and student and, at minimum, a mid-semester check-in point between the supervisor and clinical faculty member to discuss the student's experience and performance. The mid-semester meeting between the supervisor and the clinical faculty member may or may not also include the student's attendance.

Listed below are some guidelines for successful supervision identified by Cavazos that a clinician may wish to communicate both verbally and in writing to outside attorney supervisors:

- (1) Be sure that the student understands what is expected;
- (2) Take the time to explain the context of an issue and the nature of the task being assigned;
- (3) Discuss the student's initial response to the problem and help the student develop a problem-solving strategy;
- (4) Inform the student of resources which may be unfamiliar to the student;
- (5) Be sure the student understands the end result expected or the outcome desired;
- (6) In choosing a work assignment, select assignments that challenge the student's existing skills, and yet also provide new challenges to develop the student's knowledge base; and
- (7) To the extent possible, expect the student-attorneys to take independent responsibility for a matter, helping the student to have an authentic experience in the role of lawyer.

*Id.* at 12, 31-32.

### A. *Simple Cases Are Best*

Although collaborating with an outside attorney may allow a clinic to take on more complex client work, some would argue that complex client work cannot be undertaken by law students without compromising student autonomy or nondirective teaching—two aspects of clinical legal education that are often thought of as instrumental. Some clinical faculty members may worry that accepting the complex and novel types of cases in the clinic that would likely attract an outside attorney's interest could fail to fully engage clinical students. This lack of engagement could be due to various factors, such as: a difficult legal area that hinders the students' ability to adequately understand the case or legal issues involved; a short academic term that does not allow sufficient time for students to see the case through to completion; or the involvement of additional attorneys reducing the students' role in the case.

Nonetheless, complex legal work is “inevitable” in transactional law clinics, and law students gain valuable substantive and skills-based knowledge from working on complex cases.<sup>69</sup> As described in Part I, clients of transactional law clinics face a breadth of routine and specialized legal issues that require collaboration amongst multiple parties and attorneys. Even client representations that seem routine can quickly become complex in the transactional setting where tax, non-profit, real estate, intellectual property, and securities laws are implicated.<sup>70</sup> By engaging in these complex projects, law students gain specific transactional lawyering skills and knowledge. Law students navigate ethical issues related to conflicts of interest and multi-party representation. Law students learn: the substantive regulatory framework by which their clients must abide; how to collaborate with peers and other attorneys; how to participate in project management; and how to fulfill the multiple roles of a typical transactional lawyer, e.g., educator, project manager, transaction cost engineer,<sup>71</sup> negotiator, and sounding board.<sup>72</sup>

Moreover, complex cases can be structured to preserve law student autonomy and responsibility. Professor Laurie Hauber offers strategies to help law students maintain autonomy over complex

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<sup>69</sup> Hauber, *supra* note 18, at 247, 249-52 (describing complex work in transactional law clinics as “inevitable” and highlighting the benefits that complex projects provide to students, clients, and the law school).

<sup>70</sup> *Id.*

<sup>71</sup> Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Pricing*, 94 *YALE L.J.* 239, 255 (1984) (coining the term “transactional cost engineer” and arguing that the value of a transactional lawyer is the “ability to create a transactional structure which reduces transaction costs and therefore results in more accurate asset pricing”).

<sup>72</sup> *Id.* at 249-251.

transactional projects. She advocates that students meet and frequently communicate with the client, create a transaction plan, manage the client's file, and create a transition plan if the representation will continue after the student's participation in the clinic ends. Hauber also advises clinical law professors to give law students opportunities to reflect on their work given its complexity.<sup>73</sup>

### B. *The Chilling Effect*

An important, but often overlooked, concern related to collaborating with outside attorneys is the danger that law students may perceive an outside attorney as evaluating their performance for future employment. The clinical experience provides law students a unique opportunity to bridge theoretical study and post-graduate practice. This setting allows law students to benefit from a heightened level of protection and safety within a well-structured and reflective environment. In the clinic, law students are often encouraged to ask imprudent questions, make and correct their mistakes, and reflect on their professional and personal weaknesses. Removing the sense of safety from the clinic setting could negatively impact the learning experience. That is, an outside attorney and clinic may share the same legal community—whether the outside attorney comes from a law firm, legal aid office, or is in-house counsel at a nonprofit or corporation—in which the law student hopes to be employed post-graduation. If law students perceive that an outside attorney is making judgments about the students' performances, the students may not fully engage in the clinical experience to guard against premature judgments made about their post-graduate employability. Moreover, collaborating with outside attorneys raises the potential of the outside attorney *actually* making such evaluative employment decisions, possibly to the detriment of law students.

The clinical law professor might wish to raise this issue with the outside attorney and discuss ways to mitigate this concern. However, even collaborators with the best intentions may not be able to mitigate this concern, particularly in small legal markets where reputations travel quickly. When a clinician and outside attorney agree in advance that the attorney will not use interactions with law students as a basis for employment decisions, both the attorney and clinician will find this agreement difficult to respect and enforce. If the outside attorney works closely with a law student, she will undoubtedly form opinions about the student and may feel obligated to share her opinions with her colleagues should the student apply for employment at her legal

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<sup>73</sup> *Id.* at 254-256.

aid office, government agency, or law firm.

### *C. Time and Resource Limitations*

A third challenge is that implementing and maintaining collaborative relationships with outside attorneys could result in time-consuming relationships if not appropriately structured. Although a clinical law professor may seek out other attorneys in the legal community to gain the personal and professional satisfaction that comes from collaborating with others, establishing and maintaining relationships with outside attorneys and organizations requires a substantial investment of time and other resources. To avoid a need to “re-invent the wheel” and negotiate new working relationships with outside attorneys each semester, clinical faculty may attempt to secure a long-term commitment from outside attorneys to work with the clinic over several semesters. Even then, clinicians may have to adjust such arrangements if a relationship is unsuccessful or the outside attorney reneges on her commitment. The additional time and resources required to build a successful collaboration is often a barrier to integrating outside attorneys into clinical programs. If a clinician is unable to secure long-term commitments from outside attorneys to work with the clinic, the clinician may determine that the amount of resources required to train and establish procedures for the integration of outside attorneys in the clinic outweighs any personal or professional gains the clinician would receive from such arrangements.

### *D. Injury to Clinic Financial Stability and Clinician Status*

Pursuing clinical collaboration with outside attorneys for financial reasons may cause more challenges than pursuing collaboration for other objectives such as client service. We would be remiss not to directly address these concerns. First, clinicians may be concerned that working with outside attorneys for fundraising purposes may sanction the prevalence of “soft money” clinics. Second, extensive reliance on outside attorneys to perform the tasks of clinical law professors may challenge the improving status of clinical law professors and impede the advancement of quality clinical legal education.

#### *1. “Soft Money” Clinics*

To many, primary reliance on outside resources to support law clinics threatens the permanent integration of clinics into the law school curriculum. A clinic’s use of outside attorneys on a temporary or *pro bono* basis to fulfill programmatic objectives at the expense of investing in permanent full-time clinic faculty positions could destabilize clinic operations and stymie continued growth. Frequent

turnover of *pro bono* attorney collaborators may result in continual brain drain for the clinic and, over time, negatively impact the accumulation of experience and institutional knowledge within the clinic. Heavy reliance on the use of outside attorneys by clinics could encourage a culture where clinicians are expected to support a clinical program's growing needs through the constant maintenance of inexpensive *pro bono* attorney networks rather than require law schools to direct adequate resources to invest in the stabilization and growth of its clinical programs.

Historically, clinics and clinical faculty salaries have been funded through externally raised "soft money" rather than "hard money" from a law school's general budget. Some clinical legal programs continue to operate from a "soft money" budget, either entirely or partially.<sup>74</sup> With no guarantee of continual funding, clinics funded with "soft money" may lack permanency in the law school curriculum. If the funds dry up, clinic operations are at risk. Depending on the level of import that the law school dean and faculty assign to the clinic, it may be funded from the law school general budget until alternative funding can be found. Alternatively, loss of external funding for some clinics may cause them to be shuttered.

Over-reliance on outside resources or funding also poses a problem to academic freedom and autonomy, an issue that can be acutely felt in clinics. Many clinics take on unpopular cases and controversial clients. If a clinic is representing a client whose interests are at odds with a donor, a clinician's academic freedom and the clinic's client representation may be jeopardized. As an example, the Maryland state legislature considered cutting funding to the University of Maryland School of Law because its Environmental Law Clinic represented clients that accused one of the state's largest employers of adverse environmental impacts.<sup>75</sup> Similarly, a lobbying group in Louisiana proposed a state senate bill that would prohibit state law school clinics from suing government agencies or individuals for damages; the bill was targeted at Tulane Law School's Environmental Law Clinic.<sup>76</sup> The

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<sup>74</sup> According to the 2010 CSALE Survey, 8.4% of full-time clinicians responded that their clinics operate on "soft money"; 11.6% responded that their clinics operate on a combination of "hard" and "soft" money. Full-time respondents report the *source* of their salaries as: "hard money" (tuition dollars, endowment income, or, at a public institution, state subsidies) 80%; "soft money" (grants or other external funding) 8.4%; and a mix of "hard" and "soft" money 11.6%. Part-time respondents report the *source* of their salaries as: "hard money" 81.6%; "soft money" 6.1%; and a mix of "hard" and "soft" money 12.2%. 2010 CSALE SURVEY, *supra* note 37, at 28.

<sup>75</sup> Ian Urbina, *School Law Clinics Face a Backlash*, N.Y. TIMES, Apr. 4, 2010, at A12; Editorial, *First, They Get Rid of the Law Clinics*, N.Y. TIMES, Apr. 12, 2010, at A24.

<sup>76</sup> *Senate Bill Could Hobble Louisiana's University Law Clinics, Critics Say*, NOLA.COM (May 10, 2010, 1:57 PM), <http://www.nola.com/politics/index.ssf/2010/05/sen>

lobbying group also called upon its members to “stop all corporate donations to the university and cease recruiting its students.”<sup>77</sup> Fortunately, the senate bill was defeated before it came up for a full senate vote, and Maryland’s state legislature did not cut funding to the University of Maryland School of Law. Although these examples relate to public funding of law school clinics, they illustrate the analogous risk to clinics that rely on “soft money” and undertake unpopular causes.

Relying on a clinic’s engagement with the private bar to fund a clinic without a guarantee of institutional safeguarding or permanency strikes some clinical law professors as a step backward for clinical legal education for the reasons stated above. Nonetheless, as law schools’ operating budgets shrink, there have been calls—including by clinical law professors—for all aspects of a law school’s budget to be revisited and questioned—including financial resources made available for scholarship production and conference participation of doctrinal law professors<sup>78</sup>—and all potential revenue sources to be discussed. The worry continues to be, however, that clinical legal education will be at the forefront of these financial discussions and decisions, while other line items in a law school’s budget remain untouched under various justifications, such as remaining competitive in attracting and retaining doctrinal faculty.<sup>79</sup>

With differing but legitimate viewpoints on working with outside attorneys for fundraising purposes, law school administrators and faculty (including clinical faculty) should have comprehensive and sin-

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ate\_bill\_could\_hobble\_louis.html; Sonia Smith, *Louisiana Chemical Association Expands Attack on Tulane Environmental Law Clinic*, NOLA.COM (May 14, 2010, 11:08 AM), [http://www.nola.com/business/index.ssf/2010/05/louisiana\\_chemical\\_association.html](http://www.nola.com/business/index.ssf/2010/05/louisiana_chemical_association.html).

<sup>77</sup> Smith, *supra* note 76. Senate Bill 549 was ultimately deferred by the state Senate Commerce Committee and therefore did not advance to a vote by the legislature. Sonia Smith, *Bill Aimed at Limiting La. Law Clinics Dies*, BUS. WK. (May 20, 2010, 8:10 AM ET), <http://www.businessweek.com/ap/financialnews/D9FQIDHG0.htm>.

<sup>78</sup> For one such discussion, see Tamar Brickhead, *Clinical Legal Education and The Future of the Academy* (July 11, 2013, 12:32 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/07/clinical-legal-education-and-the-law-school-crisis.html>.

<sup>79</sup> And yet, experiential legal education should respond to challenges presented by the current crisis in legal education as opportunities for innovation in education and the delivery of legal services. While debates continue over tenure status, job security, and pay parity for clinical law faculty compared to other faculty members, all faculty and law school administrators must realize that *students and the public bear the high cost of legal education*. Students bear this cost in the form of loans that they must repay over thirty or more years. (Even where law students who are eligible for the federal income-based repayment plan do not bear their own costs of legal education, the public still bears the costs.) The public bears the high cost of legal education—when students are burdened by law school debt, graduate without the necessary skills to practice, cannot afford to take a post-graduation public interest jobs, and therefore cannot provide legal representation to low-income or middle-class clients—a population that desperately needs such representation to access the justice system and their basic human rights. This is a moral imperative for faculty at-large, but particularly for clinical faculty who are committed to social justice and access to justice.

cere conversations about diversification of their funding sources prior to seeking out the private bar to fund a law clinic. This conversation should entail a discussion of funding sources for a law school's entire curriculum and programs, not merely for law school clinics. Clinical law professors may have leverage to insist on an express agreement that provides for institutional safeguarding and permanency of the clinic where fundraising efforts fall short, and on institutional support if the clinic's client representation is questioned. In weighing the costs and benefits of working with outside attorneys as a fundraising mechanism, clinicians may insist that the funds raised do not affect the clinicians' salaries or status and only be used for non-salary operation costs. Clinician preferences may differ on whether external funding derived from clinic collaboration should be directed solely to clinical programs or instead directed to the school at-large and explicitly untied to the clinic's budget.

## 2. *Risks to Status and Quality of Clinical Legal Education*

The integration of outside attorneys in clinical programs—particularly as supervisors of law students' client work—may work against important recent advances in clinical legal education. Our concern is two-fold, concerning both perception and actual treatment of those involved in clinical education and the value of clinical education, as well as the actual rigor and quality of clinical legal education.

Clinicians have worked tirelessly over the years to impress upon their non-clinical colleagues the reality that clinical legal education constitutes a critical component of a complete law school curriculum.<sup>80</sup> These efforts have resulted in significant improvements in both the reach of clinical legal education and the status of clinical law professors. Whereas clinical law professors' employment was previously universally based on short-term contracts, more law schools now offer clinical or unitary tenure-track positions.<sup>81</sup> Additionally, law schools have expanded their clinical law programs and often tout their clinics as an innovative, value-adding feature. Such changes demonstrate an increased commitment to and integration of clinical legal education as an essential element of the law school curriculum, and

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<sup>80</sup> See, e.g., Erwin Chemerinsky, *Why Not Clinical Legal Education?*, 16 CLIN. L. REV. 35, 35 (2009) (arguing that “[t]here is no better way to prepare students to be lawyers than for them to participate in clinical legal education.”) Chemerinsky is the dean of U.C. Irvine, School of Law, which requires each of its students to participate in a clinic. UNIVERSITY OF CALIFORNIA, IRVINE, SCHOOL OF LAW, <http://www.law.uci.edu/academics/> (last visited Jan. 10, 2014).

<sup>81</sup> A unitary tenure-track position means that there is no distinction in status or otherwise between full-time faculty members teaching primarily clinical, skills-related, doctrinal, or other types of courses.

clinical law faculty as an essential element of law school faculty.

Despite these advances, we worry that extensive collaboration with outside attorneys where the outside attorney serves a substantial role in the clinic—such as supervising law students—will work against progress made to fully integrate clinical law programs and faculty into the main stream law school curriculum and community. Moreover, where outside attorneys working within clinics have substantial teaching and supervisory responsibilities but serve in temporary or low-security positions, another class of de-valued, isolated, and voiceless law teachers is created.

A second concern is that an increased use of outside attorneys in clinical programs at the expense of investing in full-time clinicians and staff that are trained and dedicated to providing a comprehensive clinical program may negatively impact the quality of clinical legal education. Clinical education requires a significant investment of time and resources to provide the unique benefits offered by this form of legal education as compared to other classroom environments in law school. By seeking to quickly and cheaply bolster clinical programs through the use of volunteer attorneys rather than clinical faculty members experienced and trained in the nuances of clinical teaching and supervision, the richness of the clinical experience may deteriorate.

In identifying the common concerns contained in this section, the clinician may be able to mitigate these concerns by proactively thinking through potential difficulties prior to collaboration and allowing time to make a deliberate decision about how to plan and structure the relationship. We recognize these challenges may be more difficult for some clinicians to overcome than others due to limitations imposed by the clinician's preferences or institutional context. Nonetheless, if upon evaluating the needs of the respective clinical program and considering the aforementioned concerns about collaborating with outside attorneys in the clinical setting the clinician remains comfortable with the decision to move forward in pursuing a collaborative relationship with an outside attorney, we have provided the additional recommendations that follow for the clinician to consider in structuring the collaborative relationship.

#### IV. IMPLEMENTING THE COLLABORATIVE RELATIONSHIP

If the clinician decides to move forward with collaboration despite the challenges discussed above, the clinician should consider how to implement the collaboration to maximize the potential for success. To aid in this process, we next discuss our recommendation for beginning the collaborative relationship by drafting and agreeing to a Mem-

orandum of Understanding with the outside attorney, as well as additional considerations to address when beginning the collaborative relationship. We then turn to strategies to maintain law student autonomy and responsibility while collaborating with an outside attorney.

*A. Beginning the Relationship with a Memorandum of Understanding*

As highlighted earlier, when beginning a relationship between a clinic and outside attorneys, we advise that the clinician draft a brief letter agreement or Memorandum of Understanding (“MOU”) that clearly states the goals, roles, and responsibilities for all parties involved. A written agreement is useful for collaborative arrangements that the clinician foresees involving consistent interaction between the clinic and the outside attorney, whether that interaction is long-term (e.g., over multiple semesters) or short-term (e.g., over a substantial portion or all of one semester). We also recommend implementing an MOU for formal collaborative relationships with outside attorneys; for example, where the clinic engages co-counsel, establishes an advisory board, takes on outside attorneys as supervisors, or works consistently with the same group of lawyers.<sup>82</sup> The benefits of an MOU diminish for collaborative relationships that are infrequent (such as a guest speaker) or informal (such as an informal consultant). In these latter informal situations, attempting an MOU is likely unnecessary and the time spent to create a formal agreement may actually frustrate the goal of quick and simple collaboration.

The MOU serves as a catalyst to prompt deliberate planning of the collaboration in contrast to a haphazard approach. There are upfront costs involved in entering into a written agreement. The clinical law professor must draft the agreement and discuss or negotiate it with the outside attorney. Future savings mitigate these upfront costs. Open discussion and deliberate planning of the collaboration can reduce misunderstandings over goals, roles, and responsibilities of the parties involved in the collaboration.

Clinics testing a collaborative arrangement for the first time may be hesitant to ask an outside attorney to sign an agreement for fear of imposing on the attorney’s autonomy or time. However, if the attor-

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<sup>82</sup> Where a clinical law professor may be working closely with only one or two attorneys, it may be desirable for the law school to formally hire the outside attorney as a consultant to the case or, if appropriate, an adjunct faculty member who is paid by the law school. Additional clinical resources exist that address outside attorneys assisting clinics as adjunct professors. See Marcia Gelpe, *Professional Training, Diversity in Legal Education, and Cost Control: Selection, Training and Peer Review for Adjunct Professors*, 25 WM. MITCHELL L. REV. 193 (1999); Karen L. Tokarz, *A Manual for Law Schools on Adjunct Faculty*, 76 WASH. U. L.Q. 293 (1998).

ney does not have time to discuss the collaboration and review an MOU, the clinical law professor should consider whether the attorney will have sufficient time to devote to the collaboration. Additionally, the clinical law professor should explain to the attorney that the MOU can be crafted to allow for both the clinic and attorney to retain autonomy for the client representation or collaborative project where appropriate.<sup>83</sup>

In Appendix A to this article we have provided an example Memorandum of Understanding. A clinical law professor should structure an MOU to the precise needs of her clinical program. The following questions highlight issues clinical law professors should consider when structuring a relationship with an outside attorney and determining what provisions to include in an MOU:

- What is the scope of the collaborative relationship? What party has responsibility for each aspect of the legal work, client representation, or community project? Will the non-responsible party be able to provide input on aspects of the work that they are not responsible for? How will decisions be made? How will conflicts be resolved?
- How long will the collaboration last? If the representation or project is not accomplished by the end of the academic term, who retains responsibility for its continuation and completion?
- Under whose bar license will work be accomplished?
- With which organization is the Retainer Agreement or Engagement Letter executed? Should the attorney use clinic letterhead and materials or firm letterhead and materials? Who is responsible for maintaining malpractice insurance and who does it cover? Who will maintain client or other legal records and how?
- What nature of interaction is expected between the clinical law professor and the attorney and at what intervals?
- Is the clinic collaboration with a single attorney, or with a group of attorneys at a particular firm that may be interchangeable? If the latter, who will act as the group representative?
- What are each of the parties' protocols for maintaining client confi-

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<sup>83</sup> If the clinician or attorney remains opposed to an MOU, a casual letter agreement setting out the parameters of the relationship is a second-best option. We recommend that the parties fully discuss their goals, roles, and responsibilities even if these terms are not memorialized in an MOU.

dentality? How will the parties deal with client confidentiality within the collaboration?

- Who will fund expenses incidental to the collaborative relationship? How will revenue or funds for the community project or derived from the collaborative relationship be expended?
- If the collaboration is for a referral or consultant relationship:
  - Is the outside attorney allowed to charge common or referred clients legal fees or must she provide *pro bono* representation?
  - Are there specialty areas in which the clinic or outside attorney possess expertise suitable for certain types of referrals?
- If the collaboration is for a community project:
  - Which party sets the standards for the project?
  - Which party oversees each aspect of the project?
  - Which party owns the copyright to the accomplished work product?
  - Is approval from the other party required before publicizing the collaboration?
  - Is the outside attorney responsible for supervising law students on any part of the project?
  - Is the outside attorney expected to provide feedback to the clinical law professor or the students on their work?
- If the collaboration requires some level of law student supervision by the outside attorney:
  - What are the logistical expectations for accomplishing the supervision? How often must the attorney meet with students? Will meetings take place at the clinic or the attorney's firm office? Must the attorney be present during student meetings with clients?
  - What type of feedback is the attorney expected to provide to students and/or clinical faculty members, and at what intervals?
  - Is the supervising attorney expected to attend any clinic seminars classes?
  - Is the attorney responsible for contributing to student assessment and/or determining course grades? What criteria should be considered? Must the attorney in any way document student performance during the course of supervision?
- How and when can the MOU be renewed? Terminated?

While there may be some concerns about whether an outside attorney or law firm will be willing to sign a written agreement with a clinic to memorialize the relationship, it is worth highlighting that outside attorneys may prefer to create such an agreement and may even proactively request that the clinic agree to enter into one.<sup>84</sup> As discussed earlier in this article, outside attorneys and law firms have much to gain from their participation with a law school clinic. As such, clinicians should not be reluctant to recommend the creation of a written agreement with outside attorneys and to candidly include their expectations of the outside attorneys to ensure a successful collaboration.

To test a new relationship, a clinician and outside attorney may wish to initially engage in a short-term collaboration for a straightforward project or client representation. Participating in a test run may illuminate unexpected challenges, and provide for an easy “out” if the collaboration does not go well. If the collaboration works well and is mutually beneficial, the clinician may wish to seek a longer-term relationship with the outside attorney. Establishing a long-term relationship will allow the clinic to mitigate some of the earlier concerns identified about lack of stability and uncertainty in operations experienced by clinics integrating multiple short-term and temporary participants. A long-term relationship will allow clinicians to plan for the future and induce them to invest time in tweaking and further developing ongoing relationships with outside attorneys.

### *B. Client Considerations*

Collaborating with outside attorneys will certainly impact a clinic’s clients. The clinician or law student should provide information about the collaboration to clients, and if the outside attorney is participating in legal decisions, clients’ consent must be obtained. Information about the collaboration should be clearly explained and included in the relevant Retainer Agreement or Engagement Letter entered into with client to ensure that the client consents to and understands the nature of the relationship between the clinic and the outside attorney, who the client’s attorney is and who, if any party, is receiving funds paid by the client or paid by another party in the form of referral fees. The clinician and outside attorney should also discuss methods to mitigate disruption to any clients should the collaboration

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<sup>84</sup> In the case of a non-supervisory consultancy arrangement between a local D.C. law firm and the Social Enterprise & Nonprofit Law Clinic at Georgetown University Law Center for specialized tax advice, the law firm requested that the two parties enter into a Memorandum of Understanding to facilitate navigating law firm bureaucracy and conflict checks.

end prematurely.

*C. Attorney “Peers”: Maintaining Student  
Autonomy & Responsibility*

Maintaining law student autonomy and responsibility despite collaboration with an outside attorney is imperative to many clinical law professors. An MOU with an outside attorney does not suffice to meet this challenge. The law student is likely not a party to the MOU and may never see the MOU that was signed by the outside attorney and clinical law professor. Rather, we recommend that in any collaboration with outside attorneys (other than an outside supervision model), the clinical law professor mitigate challenges to law student autonomy by requiring the student to retain the attorney “peer” role, i.e., that the student act as the outside attorney’s peer and colleague, as opposed to intern or subordinate. Strategies for setting such expectations include requiring that the law student: (1) meet and communicate directly with the client (either with or separately from the outside attorney); (2) develop the “theory of the project”<sup>85</sup> and transaction plan for the portion of the client representation the student is responsible, which includes legal research, identifying decision points and contingencies, and project mapping; (3) draft contracts, advice memos, white papers, or other documents, where necessary; and (4) counsel the client on the student’s portion of the client representation.

For example, if the collaboration involves working with an outside attorney as a legal consultant, the law student should interact with the consultant directly as one attorney would to another. This requires that the law student research the legal issue for which the consultant is engaged, identify gaps in information and knowledge, prepare questions for the consultant (and “moot” or practice the conversation where warranted), lead the conversation with the consultant, be prepared to answer any questions the consultant poses, and subsequently form a plan of action based on the consultant’s advice.

Undoubtedly, when working with outside attorneys, the responsibility will fall on the clinician to protect the law student’s attorney “peer” role when necessary. This may entail informing the outside attorney that he or she will be working directly with law students, deferring to the student in meetings with the outside attorney (similar to how the clinical law professor may behave in a client meeting), and directing the outside attorney to contact and communicate with the student directly.

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<sup>85</sup> ALVAREZ & TREMBLAY, *supra* note 47, 75-91 (describing the “theory of the project” and how to strategically plan transactional legal work).

## V. CONTEXT-SPECIFIC, SYSTEMATIC DECISION-MAKING

Deciding whether and how to collaborate with an outside attorney should be a context-specific process that is informed by the myriad of objectives, methods, and concerns discussed in this article. When a clinical law professor asks herself whether she should collaborate with an outside attorney on a client representation or community project, she should answer the question systematically and thoroughly. While we have presented some common advantages, challenges, and disadvantages in this article, we recommend that the clinical law professor engage the decision-making process as she might ask her law student to do—in full “problem-solving” mode that takes into account the specific context in which the professor sits. To assist the professor with this process, we have provided a decision tree in Appendix B that raises the objectives, methods, and concerns discussed in this article but allows the professor to consider collaboration in light of her own clinical setting.

As a starting point, the clinical law professor might consider whether the clinic has the capacity and capability to undertake the client representation or community project without collaborating with an outside attorney. If the answer is yes, the inquiry might stop here. However, as the clinical law professor often teaches her law student, one’s first answer is not always the best answer. The clinical law professor might probe further. *Even if the clinic has capacity and capability, might other objectives be met through collaboration?* Perhaps the clinical law professor is working in a new legal community and would like more input on the clinic’s work or would benefit from the guidance of others who have worked within the particular community before. Perhaps the client representation or community project is complex, and although the clinic could handle it solo, the client would benefit from having more lawyers and more stakeholders involved. After assessing her objectives, the clinical law professor should assess the synergies and conflicts between them. Where conflict is present, the conflict should be resolved prior to engagement through prioritization of objectives or other methods. This assessment necessarily takes into account the particular context in which the clinical law professor finds herself. As a final step in this part of the decision-making process, the clinical law professor should determine if the benefits of collaboration outweigh the costs and concerns. This step is iterative and the clinical law professor will likely find herself asking this again and again.

If the clinical law professor chooses to preliminarily move forward with the collaboration, she will need to determine how to structure it. Will the collaboration require frequent oversight and

consulting from the outside attorney? Will the collaboration require shared responsibilities for a community project? This is where consideration of the provisions in the sample Memorandum of Understanding might guide the planning process or discussion amongst all involved in the collaboration. At this point too the clinical law professor should identify the risks and costs involved and either continue to implement procedures—such as informational training sessions—to mitigate those risks, or avoid the collaboration.

Finally, collaborating with outside attorneys is not a static endeavor. Clinical law professors should seek input from clients, law students, and collaborative partners about the progress, benefits, costs, and failures of the collaboration. Reflection on the implementation of the collaboration may reveal that it works well, that it requires improvement, or possibly that it needs to end. After an initial determination to engage in collaboration, the chart highlights the need to routinely re-assess the usefulness of maintaining the collaboration. As with all components of a clinical legal program, collaboration should be reviewed and adjusted as necessary.

#### CONCLUSION

The recommendations that we have provided contribute to an ongoing discussion amongst the clinical community and greater legal academy about how clinics can structure successful collaborative relationships with outside attorneys. Collaboration with outside attorneys by clinical programs may not always be advisable given a host of concerns. However, we have provided recommendations for systematizing the decision-making process of when to enter into a collaborative relationship with an outside attorney, and how to initially structure that relationship. Managing the collaborative relationship as problems arise and evaluating the success of ongoing collaborations are subjects that merit further exploration in future scholarship.

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## APPENDIX A

**Example MOU for Consulting Attorney Practice or Firm**

[Consulting Attorney Practice/Firm Address]

Re: XYZ Clinic Memorandum of Understanding with [Consulting Attorney Practice/Firm]

Dear [Consulting Attorney]:

This Memorandum of Understanding (“MOU”) confirms our understanding of the relationship between [Consulting Attorney Practice/Firm] and the XYZ Clinic at ABC Law School. It summarizes our conversations and correspondence and will serve to guide our relationship for the school year. This MOU refers to [Consulting Attorney or Law Practice/Firm] as “you” or “Consulting Attorney” and to the Clinic as “we” or “the Clinic.”

**1. Scope of Engagement.** The scope of Consulting Attorney’s engagement will be (i) to provide advice to the Clinic and its law student attorneys on [tax, intellectual property, securities, corporate, and transactional] legal matters as they assist organizational clients of the Clinic; and (ii) to act as a guest speaker in the Clinic’s seminar on [insert topic].

**2. Clinic’s Mission.** You understand that the Clinic is an educational program. The Clinic’s primary mission is to train ABC Law School students, [and the Clinic is committed to doing so in a manner that prioritizes student autonomy, initiative, and self-reflection]. Your advice to law student attorneys enrolled in the Clinic will aid the Clinic in its educational mission.

**3. Legal Advice.** Consulting Attorney will not have a direct attorney-client relationship with Clinic clients unless agreed upon in writing by the Clinic, Consulting Attorney, and the Clinic client, or as otherwise recognized by law. In seeking advice from Consulting Attorney on legal matters for Clinic clients who do not have an attorney-client relationship with Consulting Attorney, the Clinic will maintain client confidentiality and seek non-specific, abstract advice from Consulting Attorney. When a Clinic client has agreed in writing to receive legal assistance from both the Clinic and Consulting Attorney, the Clinic will act as primary counsel to the client and Consulting Attorney will advise the Clinic on the client’s legal matter(s). Consulting Attorney’s engagement by and representation of any Clinic client remains subject to Consulting Attorney’s normal client-intake and con-

flicts-clearance procedures and other legal professional ethical obligations.

**4. Notification to Clinic Clients; Clinic Client List.** The Clinic will provide written notification to each of its clients about the Clinic's working relationship with Consulting Attorney, and seek written agreement from the client for disclosure of the client's name and nature of its legal matter to Consulting Attorney. The Clinic will identify the Clinic clients it would like assistance with from Consulting Attorney only in the instances when Consulting Attorney will be formally engaged by the Clinic client. Consulting Attorney will have sole discretion to determine on which of the Clinic-selected client matters Consulting Attorney will assist the Clinic.

**5. Fees and Expenses.** Representation of Clinic clients will be on a *pro bono* basis. Neither the Clinic nor Consulting Attorney will collect fees for the services provided to Clinic clients. Nonetheless, the Clinic and Consulting Attorney can request that Clinic clients reimburse them for reasonable and actual out-of-pocket expenses (such as filing fees or international mailings) associated with the legal representation.

**6. Referrals.** In accordance with the [insert jurisdiction] Rules of Professional Conduct, the Clinic may refer potential clients or Clinic clients to Consulting Attorney for legal services that the Clinic cannot or is unwilling to render, and Consulting Attorney may refer potential clients to the Clinic. The Clinic and Consulting Attorney each retain sole discretion to accept or reject such referrals and to determine the terms of each such engagement. This is not an exclusive referral arrangement and each of the Clinic and Consulting Attorney may refer potential or actual clients to other attorneys.

**7. Working Relationship and Representatives.** You understand that your cooperation and the cooperation of your representatives are essential to the success of this collaboration and to the success of our working relationship. To that end, you will:

- i. Make appropriate representatives of Consulting Attorney available to us and identify to us a primary contact who is authorized to act on behalf of Consulting Attorney with respect to our collaboration. At the time of the signing of this letter, Consulting Attorney has designated [insert name(s) of representative], as its authorized representative(s) for our collaboration;

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- ii. Advise us promptly of any changes in your authorized representative(s) and contact information; and
- iii. Make available your authorized representative(s) for meetings and participation in the Clinic, as reasonably necessary. [This includes the mandatory consulting attorney orientation/training required of all consulting attorneys prior to engagement with the Clinic. Such orientation/training will be held on [\_\_\_\_\_] at [\_\_\_\_\_].]

The Clinic has designated [insert name of Clinic representative (typically clinical professor)] as the authorized representative of the Clinic. We will promptly advise you of any changes in our authorized representative.

**8. Terminating the Relationship.** This MOU terminates on [insert date (possibly end of school year)], or at the time of termination in the manner provided below. Any continuing relationship beyond [date], must be created through a new MOU. You may terminate this MOU at any time prior to [date], by providing written notice to us of your decision. We are also free to terminate this MOU at any time in accordance with our professional and educational obligations.

**9. Publicity.** The Clinic may describe the relationship set forth in this MOU in scholarly and educational publications and in internal and external communications, including on ABC Law School's website or marketing materials. We will do so on an anonymous basis unless you have given us oral or written permission to use Consulting Attorney's name. You agree that you will not issue any press release or otherwise mention the Clinic, its authorized representatives, or its law students by name in any public communication (including websites) without first obtaining our approval.

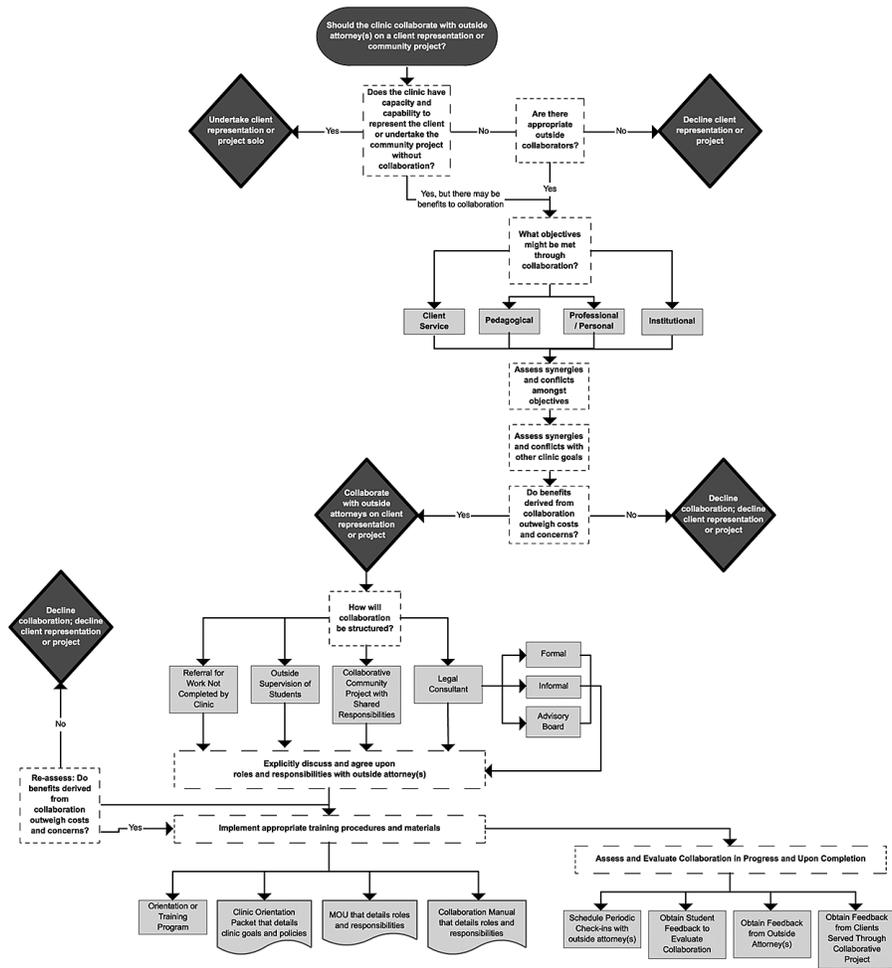
Please confirm that this MOU correctly and completely describes our understanding of the relationship between Consulting Attorney and the Clinic by signing where indicated below and returning the signed letter to us. Please retain a copy for your records.

Sincerely,

**[CLINIC SIGNATURE BLOCK]**

**[CONSULTING ATTORNEY SIGNATURE BLOCK & CONFIRMATION]**

**APPENDIX B**  
**DECISION TREE FOR COLLABORATION**  
**WITH OUTSIDE COUNSEL**



[To access an enlarged version of the decision tree diagram, please contact the authors.]