

4-20-2006

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Recommended Citation

Ursula H. Weigold *The Attorney-Client Privilege as an Obstacle to the Professional and Ethical Development of Law Students*, 33 Pepp. L. Rev. Iss. 3 (2006)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol33/iss3/5>

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The Attorney-Client Privilege as an Obstacle to the Professional and Ethical Development of Law Students

Ursula H. Weigold *

- I. INTRODUCTION
- II. PREPARATION FOR LAW PRACTICE: THE NECESSARY PROFESSIONAL SKILLS AND ETHICS
 - A. *Necessary Lawyering Skills*
 - B. *Professional Ethics and Judgment*
- III. THE CONTENT AND METHODS OF TRADITIONAL LEGAL EDUCATION
- IV. EXPERIENTIAL LEARNING AND PROFESSIONAL DEVELOPMENT
 - A. *The Importance of Experiential Learning*
 - B. *Experiential Learning Through Mentoring and Apprenticeships*
 - C. *The Shortage of Experiential Learning Opportunities in Law Schools*
 - D. *Innovative Approaches to Providing Experiential Learning*
- V. THE ATTORNEY-CLIENT PRIVILEGE AS AN OBSTACLE TO EXPERIENTIAL LEARNING
 - A. *Communications to a Professional Legal Adviser or Privileged Person*
 - 1. Law Students Generally
 - 2. Certified Law Students
 - B. *Communications Made in Confidence and Not Waived*
 - C. *Communications Protected at the Client's Instance*
- VI. THE ROLE OF THE ATTORNEY-CLIENT PRIVILEGE IN DEVELOPING SKILLED AND ETHICAL LAWYERS

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I. INTRODUCTION

We generally learn best by practice and experience. This is just as true for legal education as it is for the education of other professionals, but in most American law schools, students may graduate having very little practice or experience in many of the skills that lawyers must possess to represent clients competently and ethically. Although they spend hundreds of classroom hours learning legal analysis in various doctrinal contexts, law students have only limited opportunities to learn other lawyering skills that are essential for practice. Their clients suffer the consequences. Among these critical lawyering skills are some that are learned chiefly by practice and experience rather than by theory alone: communication skills, client interviewing and fact investigation skills, client counseling skills, problem solving skills, and ethical judgment.

Most law schools provide limited opportunities for experiential learning in live-client legal clinics and externships, but law clinics are relatively expensive learning vehicles, so they typically accommodate only a fraction of the enrolled students. Despite the urgent need for additional experiential learning opportunities for law students, partnerships between law schools and practicing lawyers to provide hands-on training in essential lawyering skills have run into an unlikely obstacle: the attorney-client privilege rules. The very rules that are designed to protect the proper working of the attorney-client relationship may prevent law students from preparing themselves adequately to work with their future clients.

The attorney-client privilege rules protect interests that are at the core of an attorney's representation of a client in the adversarial system. The evidentiary privilege reinforces the attorney's own professional duty of confidentiality, which encourages client disclosure and trust. The resulting client confidences and candor are necessary to inform the attorney's judgment and decisions about how best to represent the client's interests.¹ However, because the privilege limits the discovery of potentially relevant information, the privilege is construed narrowly, and certain acts or circumstances may waive the privilege.²

Relevant to law students and legal education is the waiver of the attorney-client privilege that can occur when communications between the attorney and client take place in the presence of a third party who is not an

1. See *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 408 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

2. See, e.g., *Floyd v. Floyd*, 615 S.E.2d 465, 483-84 (S.C. Ct. App. 2005); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 443 (Minn. 1998); *Ullman v. State*, 647 A.2d 324, 330-31 (Conn. 1994); *In re Jacqueline F.*, 391, 972 N.E.2d 967 (N.Y. 1979); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973).

attorney.³ Although some exceptions to the waiver rules exist, these exceptions do not protect all confidential communications between clients and their attorneys in situations when law student apprentices legitimately may be present.⁴ Lawyers and legal educators have recognized the value of experiential learning and advise that law students should observe and participate first-hand in the work of attorneys.⁵ However, attorneys willing to mentor law students cannot risk compromising their clients' right to confidentiality, and they may exclude law students from the lawyering experiences that could be most instructive: direct contact with real clients.

Although there are compelling reasons—critical to the professional and ethical development of future lawyers—for distinguishing law students from other third parties with regard to the attorney-client privilege, the law largely ignores that distinction. One early court held that confidential legal communications with a law student were no more privileged than similar communications with a blacksmith.⁶

This article argues that the law of attorney-client privilege should treat law students differently from other third parties.⁷ The gap in the law that excludes law students from the attorney-client privilege represents a failure to support the direction and needs of modern legal education and impedes practical attempts by law schools to enhance the competence and ethical

3. See, e.g., *Wesp v. Everson*, 33 P.3d 191, 196-97 (Colo. 2001); *State v. Romeo*, 542 N.W.2d 543, 548 (Iowa 1996); *Commonwealth v. Senior*, 744 N.E.2d 614, 617-18 (Mass. 2001); *State v. Rhodes*, 627 N.W.2d 74, 85 (Minn. 2001); *Doe v. Poe*, 700 N.E.2d 309, 310 (N.Y. 1998).

4. As used in this article, the term “law student apprentices” includes law clinic students, law student externs, law students participating in unpaid attorney mentor programs, volunteer law clerks, and law students involved in other legal education experiences supervised by a volunteer attorney.

5. See ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 234-35 (1992) (the “MACCRATE REPORT” named for Robert MacCrate, Esq., chair of the taskforce) [hereinafter MACCRATE REPORT]; ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE (1996) [hereinafter LEARNING PROFESSIONALISM]; see generally Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998) [hereinafter SCHILTZ – LEGAL ETHICS IN DECLINE].

6. *Dierstein v. Schubkagel*, 18 A. 1059, 1060 (Pa. 1890) (“A law student is, in this respect, on no higher plane than a blacksmith retained in a like service.”); accord *People v. Doe*, 416 N.Y.S.2d 466, 469 (Sup. Ct. 1979).

7. The focus of this article is chiefly on the waiver of the privilege that can occur because of a law student's presence as a third party during confidential communications. It does not argue that all law students should be considered independent “legal advisers” in their own right deserving of the privilege regardless of the presence or supervision of a licensed attorney.

development of future members of a profession that is criticized frequently on grounds of competence and ethics.⁸

II. PREPARATION FOR LAW PRACTICE: THE NECESSARY PROFESSIONAL SKILLS AND ETHICS

There is general consensus about the core competencies of effective lawyers, even though opinions about the ideal preparation for law practice and the proper curricular emphases of law schools have varied and evolved over time.⁹ Legal analysis and reasoning tops most lists of essential lawyering skills, but there are other skills that are also considered indispensable: oral and written communication, client interviewing and fact investigation, client counseling, problem solving skills, and ethical judgment.¹⁰ These client-centered skills, which are learned chiefly by experience, are important because both the lawyer-client relationship and the lawyer's ability to work effectively on behalf of the client depend on them.¹¹

In 1992, the American Bar Association's Task Force on Law Schools and the Profession, chaired by Robert MacCrate, issued its seminal report on legal education and professional development.¹² In the course of evaluating the state of American legal education, the MacCrate Report provided an extensive analysis of the fundamental skills and values necessary for effective law practice.¹³ In the years since its appearance, the MacCrate report and its recommendations have been in turn both hailed and criticized,¹⁴ but there has been no serious disagreement with its description of the professional skills and values essential for law practice.

8. See, e.g., Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1345 n. 23 (1997); Patrick J. Schiltz, *On Being a Happy Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 907 (1999) [hereinafter SCHILTZ – ON BEING AN ETHICAL LAWYER]; DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE, REFORMING THE LEGAL PROFESSION (2000).

9. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S* (1983); see discussion *infra* Part III.

10. See, e.g., John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training and Job Satisfaction*, 26 WM. MITCHELL L. REV. 327, 335 (2000) [hereinafter SONSTENG & CAMAROTTO]; Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 473 (1993) [hereinafter GARTH & MARTIN]; MACCRATE REPORT, *supra* note 5, at 135, 138-40.

11. MACCRATE REPORT, *supra* note 5.

12. *Id.*

13. *Id.*

14. See, e.g., Russell Engler, *The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109 (2001); Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 288-90, 353 (1994); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994).

All fundamental lawyering skills relate to four basic values of the legal profession: (1) providing competent representation, (2) striving to promote justice, fairness, and morality, (3) honoring the profession's duty to enhance the capacity of law and legal institutions to do justice, and (4) continuing to develop professionally.¹⁵ Thus, "fundamental" skills are those necessary for basic professional competence and those necessary to fulfill a lawyer's ethical duty to promote justice.

A. Necessary Lawyering Skills

The MacCrate Report identified ten key practice skills that every attorney needs: problem-solving, legal analysis and reasoning, legal research, fact investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and the ability to recognize and resolve ethical dilemmas.¹⁶ Among these key lawyering skills are some that are learned well only in a practice setting: communication skills, client interviewing and fact investigation skills, counseling skills, and problem solving skills.

First, effective communication skills are consistently rated by lawyers as essential to the lawyer-client relationship and to a lawyer's ability to practice law.¹⁷ Communication skills are required in interactions with the client and in the lawyer's contact with other parties, with witnesses and third persons, and with a court on behalf of the client. It is through effective communication with the client that an attorney can first inspire the client's confidence and trust, building the basis of a productive attorney-client relationship.¹⁸ Without effective communication skills, the attorney is unlikely to learn all of the facts and circumstances relevant to resolve the client's legal problem or objectives. Communication is also critical when the attorney seeks to advise a client about legal options or to recommend a desirable course of action.¹⁹

Effective communication in a legal context is not simply an uncomplicated exchange of information. It requires specialized abilities,

15. MACCRATE REPORT, *supra* note 5, at 140-41.

16. *Id.* at 138-40. There is some overlap among these skills, but the Report's structured list is useful in isolating and analyzing in depth many of the skills that are necessary for law practice.

17. See GARTH & MARTIN, *supra* note 10, at 473-74; MACCRATE REPORT, *supra* note 5, at 172-75.

18. See ROBERT F. COCHRAN ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* § 5.6 (1999).

19. MACCRATE REPORT, *supra* note 5, at 161.

many of which are not intuitive, but must be learned.²⁰ Communication in a lawyer-client relationship depends not only on the overt transmission and reception of information, but may be affected by emotional and interpersonal factors, and by the concerns, assumptions, and goals of the client.²¹ A lawyer must be able to assess these factors, understand the perspective of the client, and tailor the communication to suit the purpose of the communication.²² A lawyer also must be able to organize information logically for the listener and convey ideas clearly, precisely, with economy, and by choosing appropriate words.²³

It is the lawyer's responsibility to make sure the communication achieves its goals. Being a successful communicator requires that lawyers not only be able to impart information efficiently; lawyers must have certain "people skills" that will help them communicate with different personalities and elicit all information pertinent to the client's problem.²⁴ Communication skills and client-relation skills also become important for instilling confidence and for client development and retention, which are a significant part of the practice of law.²⁵ Lawyers' poor communication and client relation skills contribute more generally to the negative public perception of lawyers.²⁶

Communication skills provide a necessary foundation for the other essential lawyering skills of client interviewing and fact gathering, and client counseling.²⁷ Those skills, in turn, are important to a lawyer's overall problem solving abilities.

Client interviewing and fact investigation skills enable a lawyer to obtain the information from the client that is necessary for solving the client's legal problem.²⁸ The facts of a client's case will trigger certain legal consequences and not others, so a lawyer must discover all potentially relevant facts. Without a full understanding of these facts, the lawyer will not be able to identify all legal issues, find the applicable legal rules, predict how a court would handle the case, and evaluate possible solutions to the client's problem.²⁹

20. See generally COCHRAN, *supra* note 18.

21. See MACCRATE REPORT, *supra* note 5, at 173-75.

22. *Id.*

23. *Id.* at 173-74.

24. *Id.* at 166-68, 178-79; see SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5, at 721 n. 41.

25. See Neil Hamilton, *Is Law School Relevant to the Practice of Law?* MINNESOTA LAWYER, May 19, 2003, at 4 [hereinafter HAMILTON – IS LAW SCHOOL RELEVANT]; RHODE, *supra* note 8, at 198-99; SONSTENG & CAMAROTTO, *supra* note 10, at 336-39; GARTH & MARTIN, *supra* note 10, at 474.

26. See HAMILTON – IS LAW SCHOOL RELEVANT, *supra* note 25.

27. MACCRATE REPORT, *supra* note 5, at 172.

28. *Id.* at 141-42, 166-68.

29. *Id.* at 141-48, 163-64.

Client interviewing requires both basic and specialized communication skills.³⁰ A lawyer must be adept at general communication processes, as well as the peculiar interpersonal dynamics that can be involved in client interviewing.³¹ A lawyer must be a sympathetic listener, a careful questioner, and a shrewd judge of people and situations. Clients who need an attorney's help are facing problems they cannot solve by themselves and may be suffering from extreme stress.³² During an interview, the lawyer must be able to establish rapport with a client and make the client feel comfortable enough to reveal relevant information that the client may prefer not to disclose.³³ The lawyer must be able to listen actively and to correctly interpret both verbal and nonverbal communications from the client.³⁴

In gathering facts from the client, the lawyer must know how to ask questions in the way best suited to inspire confidence, honesty, and full disclosure by the client. Both memory and observation are subjective, and the process of reconstructing events is affected by biases, interests, expectations, and personality.³⁵ The lawyer must be able to discover the client's motivations and understand the client's perspective. The lawyer must be able to obtain the most complete and accurate version of the facts from the client.

In interviewing a client, the lawyer also must be observant enough to recognize signs of trouble during the interview.³⁶ For example, a client may react negatively to something in the lawyer's manner, feel uncomfortable disclosing information that is embarrassing, or exaggerate or skew the facts favorably to the client.³⁷ Or there may be significant cultural factors that could impede the communication.³⁸ If the lawyer does not have the skills to recognize and heed these potential problems, the representation will not be a success.

30. See STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 79-106 (2d ed. 2003) [hereinafter KRIEGER & NEUMANN]; MACCRATE REPORT, *supra* note 5, at 167-68.

31. MACCRATE REPORT, *supra* note 5, at 167; KRIEGER & NEUMANN, *supra* note 30, at 81-85.

32. KRIEGER & NEUMANN, *supra* note 30, at 81, 101-02.

33. ALI-ABA, *ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW: THE LAWYER'S GUIDE* 328-29 (2d ed. 2000); KRIEGER & NEUMANN, *supra* note 30, at 101-02.

34. KRIEGER & NEUMANN, *supra* note 30, at 81-85; MACCRATE REPORT, *supra* note 5, at 174.

35. KRIEGER & NEUMANN, *supra* note 30, at 63-65 (quoting MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 152-55 (1990)).

36. KRIEGER & NEUMANN, *supra* note 30, at 100-04.

37. *Id.* at 81.

38. *Id.* at 49-57.

Counseling, the next necessary lawyering skill, serves the central objective of the lawyer-client relationship.³⁹ It is for expert legal advice that clients seek the assistance of a lawyer. As counselors, lawyers provide clients with an informed understanding of their legal rights and obligations and explain the impact of the law on the client's own situation.⁴⁰

Effective counseling requires that the lawyer be able to communicate advice in a way that the client will understand and find helpful.⁴¹ In counseling a client, the lawyer must strike a balance between objectivity, in order to recognize issues or options the client does not see, and partisanship, in order to understand the client's point of view and communicate the lawyer's commitment to protecting the client's interests.⁴² Counseling requires that the lawyer understand the client's goals and motivations; the client's concerns about possible costs, risks, or consequences; and the extent to which the client's perspective may differ from the lawyer's.⁴³

Counseling requires more than just knowledge of the ethical rules that define the nature and bounds of the lawyer's role as an adviser.⁴⁴ The lawyer as counselor owes the client moral advice as well as technical legal skill.⁴⁵ The law often does not provide sufficient guidance for a lawyer counseling a client and may permit "a great deal of discretion."⁴⁶ In those situations, the lawyer must be able to use intuition, conscience, training, and judgment to approach the client's problems and give sensible advice.⁴⁷ However, professional judgment is not innate, but develops gradually through experience and reflection.⁴⁸

39. See Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 533 (1994) (citing DAVID BINDER, ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 259-60 (1991)).

40. MODEL RULES OF PROF'L CONDUCT pmbl. [2] (2003).

41. MACCRATE REPORT, *supra* note 5, at 180.

42. *Id.* at 177-78.

43. *Id.* at 178-79.

44. *Id.* at 177.

45. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003). Model Rule 2.1 provides, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." However, some critics charge that a lawyer's duty should be confined to the technical and that anything more smacks of paternalism. See WILLIAM F. MAY, *BELEAGUERED RULERS, THE PUBLIC OBLIGATION OF THE PROFESSIONAL* 67 (2001) [hereinafter MAY].

46. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L. J. 1545, 1598 (1995).

47. *Id.* at 1607-08; see SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5, at 721 n. 41.

48. See Deborah J. Cantrell, *Teaching Practical Wisdom*, 55 S.C. L. REV. 391, 395-96 (2003) (noting that research strongly indicates that practical wisdom is best learned experientially); see also David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995) [hereinafter LUBAN & MILLEMANN] (positing that good judgment can be innate, but also that it can be taught through practice and experience); Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP.

Finally, clients expect their lawyers to be effective problem solvers. "At their best, lawyers serve as society's general problem solvers, skilled in avoiding as well as resolving disputes and in facilitating public and private ordering."⁴⁹ In surveys of lawyers, the "ability to diagnose and plan solutions to legal problems" is ranked high among important practice skills,⁵⁰ as is the ability to integrate facts and law and exercise good judgment on behalf of the client.⁵¹ Legal problem solving requires that a lawyer call upon a variety of individual skills to solve a problem. The lawyer must identify and diagnose the client's problem, gather and analyze relevant facts, evaluate applicable legal rules, generate solutions to the problem, exercise professional judgment in advising the client about the options, and implement the chosen course of action.⁵² In practice, these steps are not neatly separated.⁵³ Lawyers must be able to handle a complex situation as an integrated whole and to address many unknowns with clients, sometimes in a rapidly changing situation.⁵⁴ This synthesis of all necessary lawyering skills required to solve a client's problem is difficult to learn in a classroom.

B. Professional Ethics and Judgment

Fundamental lawyering skills include more than those necessary for technical proficiency. Lawyers also need ethical judgment and decision making ability. They must be able to recognize and resolve the issues relating to ethical duties and professional values that may arise in a lawyer's relationship with clients.⁵⁵ Lawyers must be able to identify ethical problems, determine how to act, and resist the pressure to act improperly.⁵⁶

PROBS., Summer/Autumn 1995, at 5, 7 [hereinafter BREST] (noting that the case method may help develop professional judgment by giving students repeated practice in problem solving).

49. Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811, 811 (1999) [hereinafter BREST & KRIEGER – LAWYERS AS PROBLEM SOLVERS].

50. See, e.g., SONSTENG & CAMAROTTO, *supra* note 10, at 335 (citing GARTH & MARTIN, *supra* note 10, at 472-73).

51. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 326 (1995).

52. MACCRATE REPORT, *supra* note 5, at 141-51.

53. KRIEGER & NEUMANN, *supra* note 30, at 28.

54. See BREST, *supra* note 48, at 7.

55. See MACCRATE REPORT, *supra* note 5, at 203-06; see also Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 684-85 (1996).

56. See Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 360-61 (1998).

Moral decision making involves identifying which principle is most important in a given situation, and that requires judgment.⁵⁷

In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. . . . Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules⁵⁸

Ethical judgment requires a lawyer to look beyond the narrow interests of the client and to recognize the costs and consequences of alternative courses of action to others.⁵⁹ It develops from experience, common sense, instinct,⁶⁰ personal conscience, and the regard of professional peers.⁶¹ Many believe that ethical lawyering is an acquired habit that is reflected in the decisions good lawyers make every day,⁶² and acquired habits come from practice and experience.

In fact, all of these necessary client-focused skills are learned primarily by observation and experience. Theory provides a foundation for learning, but it is in the practice of these skills—communication, client interviewing and fact investigation, client counseling, problem solving, and the exercise of ethical judgment—that students actually learn them. To be effective, legal education should combine instruction in theoretical knowledge with repeated practice.

III. THE CONTENT AND METHODS OF TRADITIONAL LEGAL EDUCATION

The dominant model of instruction at most American law schools remains traditional. The case method approach requires students to dissect appellate court opinions to extract key legal rules and reasoning, and then to

57. See LUBAN & MILLEMANN, *supra* note 48, at 39.

58. MODEL RULES OF PROF'L CONDUCT pmb1. [9] (2003).

59. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 119 (1994) [hereinafter SHAFFER & COCHRAN].

60. See SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5, at 718-19; see also Mary Jo Eyster, *Clinical Teaching, Ethical Negotiation, and Moral Judgment*, 75 NEB. L. REV. 752, 761 (1996) (discussing ethical judgment in the context of negotiation).

61. MODEL RULES OF PROF'L CONDUCT pmb1. [7] (2003).

62. See Pepper, *supra* note 46, at 1608 (arguing that moral character itself is made up of habits of moral perception and conduct, and that one acquires moral habits from parents, teachers, and mentors, and from growing in a community that embraces a moral tradition); SCHILTZ – ON BEING AN ETHICAL LAWYER, *supra* note 8, at 911-12, 949; see also SHAFFER & COCHRAN, *supra* note 59, at 113.

apply those principles to new hypothetical facts. Originally, the purpose of this approach was to have students identify the core principles of the common law, but eventually the emphasis shifted from learning doctrine to learning process.⁶³ The case method became a means of teaching students analytical habits of mind. However, even in the early days of the case method, practitioners questioned its effectiveness in training lawyers because of its difficulty and inefficiency in teaching legal rules.⁶⁴

In the eighteenth-century infancy of the legal profession in America, the predominant method of legal education was largely self-directed and consisted of some form of apprenticeship under the tutelage of a practicing lawyer.⁶⁵ Legal apprentices would work (and sometimes pay for the privilege of working) in a lawyer's office to observe and learn from the senior lawyer, and would read law books on their own to acquire knowledge of doctrinal rules.⁶⁶

Both rule mastery and practical skills were recognized as important for new lawyers. "The best system would be . . . to require that all applicants [for admission to the bar] should learn the principles of the law in a school, then apply them for at least a year in an office, and finally pass a public examination by impartial examiners appointed by the courts."⁶⁷ However, there was criticism of the abuses of the apprenticeship system by busy or neglectful supervising lawyers and a growing movement toward formal university-based legal education in the late nineteenth century.⁶⁸ By 1930, most states had bar exams, and both law school and law office training were acceptable ways for preparing for practice. By that time, few states still *required* a law office apprenticeship period for students.⁶⁹ In the following decades, most states moved away from practical training toward formal law school classroom instruction as the primary method for educating lawyers.

In more recent years, critics have condemned the "disjunction" between the methods of American legal education and the need of the legal

63. STEVENS, *supra* note 9, at 52-56.

64. *Id.* at 57-58.

65. *Id.* at 3 (noting that "of the thirteen original states, only one [Virginia] had no prescribed period of training at all").

66. *Id.* at 3, 10-11 n.5.

67. *Id.* at 27-28 (quoting Lewis L. Delafield, *The Conditions of Admission to the Bar*, 7 PA. MONTHLY 968, 969 (1876)). This is the system of legal education adopted by many foreign legal systems. See *infra* note 133.

68. STEVENS, *supra* note 9, at 3, 24 ("No doubt what was meant by apprenticeship varied considerably from an important educational experience to gross exploitation . . .").

69. *Id.* at 174.

profession for properly trained, ethical practitioners.⁷⁰ They have charged that law schools are concerned too much with theory and have neglected teaching the skills necessary for even basic competence in law practice. Most lawyers believe that law schools teach theory and legal analysis well,⁷¹ but they fault law schools for neglecting other necessary lawyering skills, especially those involving client contact.⁷² Law schools place relatively little emphasis on teaching client-focused skills and ethical values,⁷³ and formal American legal education typically ends without much required practical skills or ethics training. New lawyers have to learn these skills haphazardly on the job, often without the guidance of a mentor attorney.⁷⁴

Formal standards governing legal education and bar admission impose few skills training requirements.⁷⁵ The American Bar Association's standards for law school accreditation require generally that "[a] law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession."⁷⁶ As part of this general charge, law schools must provide students with "substantial instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession," as well as "substantial opportunities for live-client or other real-life practice experiences."⁷⁷ However, law schools are not required to offer clinical or field placement experiences to every student, and schools have great flexibility in meeting the requirement of substantial instruction.⁷⁸

70. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 232-33 (1973); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992).

71. See *Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 *WM. & MARY L. REV.* 353, 371-73 (1973) [hereinafter *STUDENT PRACTICE AS A METHOD OF LEGAL EDUCATION*]. But see Edwards, *supra* note 70 (criticizing law schools for not focusing sufficiently on teaching doctrinal skills, inter alia).

72. See *STUDENT PRACTICE AS A METHOD OF LEGAL EDUCATION*, *supra* note 71, at 371-73; see also GARTH & MARTIN, *supra* note 10; SONSTENG & CAMAROTTO, *supra* note 10, at 349.

73. RHODE, *supra* note 8, at 197; BREST, *supra* note 48, at 5 (arguing for a complementary curriculum of advanced courses integrating lawyering skills with insights from other disciplines).

74. SONSTENG & CAMAROTTO, *supra* note 10, at 330.

75. ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, *ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 18-20 (2005-06)* [hereinafter *ABA STANDARDS*].

76. *Id.* at 18, Standard 301(a).

77. *Id.* at 18-19, Standards 302(a)(4), 302(b)(1). Standard 302(b)(1) requires that a law school provide students with "substantial opportunities for live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence."

78. *Id.*, Interpretation 302-5. In a recent ABA survey, twenty-nine percent of the 152 law schools responding reported that they required a "skills, simulation, clinical or externship experience" for graduation. See ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, *A SURVEY OF LAW SCHOOL CURRICULA, 1992-2002, 20-21 (2003)* [hereinafter *ABA SURVEY OF LAW SCHOOL CURRICULA*]. Due to the broad wording of the question however, it does not reveal

Beyond law school, only a minority of jurisdictions require that graduates complete certain courses or skills training for licensing.⁷⁹ In most states, law school graduates must pass only a bar examination and a character and fitness investigation before being allowed to perform all the functions of an attorney.⁸⁰

Given how important it is for law practice for students to learn fundamental lawyering skills and professional values, it is remarkable that American legal education still provides so few opportunities for skills training. In even shorter supply are the opportunities for students to learn skills and values by the most effective method: by learning experientially in an authentic practice setting.

IV. EXPERIENTIAL LEARNING AND PROFESSIONAL DEVELOPMENT

Experiential learning should play a significant role in a law student's preparation for law practice. Educational philosopher John Dewey spoke decades ago of "the organic connection between education and personal experience."⁸¹ "[E]ducation in order to accomplish its ends both for the individual learner and for society must be based upon experience . . ."⁸² When a student learns in an authentic context, the learning that occurs is

the percentage of schools that specifically require a live-client clinic experience. Anecdotal conversations with clinicians suggest that less than ten percent of schools require an in-house live-client clinic course.

79. NATIONAL CONFERENCE OF BAR EXAMINERS & ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (2002) [hereinafter NAT'L CONFERENCE OF BAR EXAMINERS], available at http://www.ncbex.org/pubs/pdf/031505_COMPGUIDE2005.pdf (noting in chart IV that Alaska, Delaware, Maryland, and South Carolina require either ethics instruction or some kind of "bridge-the-gap" skills training before admission; Arizona, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Rhode Island, and West Virginia require either a professionalism or skills training course within one year of admission; New Hampshire and Utah require a skills course within two years of admission; New Jersey requires a skills course within three years; Nevada requires a bridge-the-gap course; and Vermont requires six months of law office study). See also ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, STANDING COMMITTEE ON CLIENT PROTECTION & WASHINGTON STATE BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES 1, 6 (2003), available at http://www.abanet.org/cpr/model-def/taskforce_rpt_429.pdf.

80. NAT'L CONFERENCE OF BAR EXAMINERS, *supra* note 79. About thirty states have added a practice skills test (the Multistate Performance Test) to their bar exam that requires test takers to analyze a hypothetical client file and write a related document. The list of jurisdictions using the test is available on the website of the National Conference of Bar Examiners: <http://www.ncbex.org/tests.htm>.

81. Baker, *supra* note 14, at 324-25 (citing JOHN DEWEY, EXPERIENCE AND EDUCATION 12 (1954)).

82. DEWEY, *supra* note 81, at 113.

deeper and more meaningful, because the sense of personal involvement infuses that learning with special meaning and richness.⁸³

In legal education especially, the difference between the emphasis of the traditional classroom and the demands of law practice can be striking. Practical experience is a powerful teacher, but law schools rarely provide students with enough of it.⁸⁴

If it were not for a tradition which blinds us, would we not consider it ridiculous that, with litigation laboratories just around the corner, law schools confine their students to what they can learn about litigation in books? What would we say of a medical school where students were taught surgery solely from the printed page? . . . Who would learn golf from a golf instructor, contenting himself with sitting in the locker-room analyzing newspaper accounts of important golf-matches that had been played by someone else several years before?⁸⁵

For lawyers, repeated experience is the leading source of learning for the skills of oral and written communication, client relations, and fact gathering.⁸⁶ But students rarely are able to get consistent exposure to actual law practice during their law school years and therefore do not learn these skills before graduation.⁸⁷ Even though lawyers are allowed to represent legal clients immediately upon licensing in most states, many new law graduates are unequipped for this responsibility.

In addition to learning by hands-on practice and experience, students can absorb a great deal just by observing practicing lawyers at work with clients.⁸⁸ Observation can improve a student's own lawyering skills by making an abstract problem concrete and by helping the student understand the demands and dynamics of a lawyering situation.⁸⁹ Observing the interactions between an experienced attorney and client can teach students about the subtleties of client characteristics, behavior, and needs, as well as about the required attention, flexibility, and responses a lawyer must use to guide the working relationship. Students also can observe in a meaningful context how ethical issues arise, and learn how a lawyer recognizes and

83. See Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1 (1995) [hereinafter GIVELBER].

84. GARTH & MARTIN, *supra* note 10, at 482.

85. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 229 (1950).

86. See GARTH & MARTIN, *supra* note 10, at 482.

87. See *id.* at 491.

88. J.P. OGILVY, LEAH WORTHAM & LISA G. LERMAN, LEARNING FROM PRACTICE, A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS 113-14 (1998).

89. *Id.* at 116-17.

resolves them. “Exposure to law practice may be the only way through which students can really begin to understand the written and unwritten standards of law practice and the degree to which those standards are followed.”⁹⁰

Simulations are not a substitute for live-client interactions, even though they certainly can add value to traditional law school teaching methods.⁹¹ Role playing, even with skilled actors, does not have the feeling of reality and therefore does not demand as much from students as does live-client work.⁹² Simulation does not involve the level of responsibility for results that live-client experience entails.⁹³ “Even the best simulation-based courses . . . provide make believe experiences with no real consequences on the line.”⁹⁴ Simulation also lacks the complexity that leads to the depth of learning possible in experiences involving real clients.⁹⁵ “We cannot be said truly to understand anything until we understand it in context and in complexity.”⁹⁶

The shortage of experiential learning opportunities in legal education contrasts sharply with those in medical education, which prepares students for another learned profession requiring both theoretical knowledge and practical skills. Medical students are exposed to experiential learning in clinical settings early in their medical studies. Long before they are licensed to practice, they participate in clinical training and case studies with licensed physicians and real patients to learn essential skills by observation and

90. Clinical Legal Educ. Ass’n, Best Practices for Legal Education 151 (Dec. 15, 2005), <http://professionalism.law.sc.edu/downloads/bestpractices/20051215-Text.pdf> [hereinafter BEST PRACTICES].

91. See, e.g., *id.* at 151. See also SONSTENG & CAMAROTTO, *supra* note 10, at 349 (citing John Sonsteng et al., *Learning by Doing: Preparing Law Students for the Practice of Law, The Legal Practicum*, 21 WM. MITCHELL L. REV. 111, 116-117 (1995) [hereinafter SONSTENG ET AL. – LEARNING BY DOING]). The Sonsteng & Camarotto article notes that a “controlled simulation [can provide] clear objectives, reinforcement, and feedback, positive learning environments, accommodation of various learning styles, and a consistent lesson cycle.” SONSTENG & CAMAROTTO, *supra* note 10, at 349. See also Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 471 (1995) (noting that simulations “motivate students, provide a significant degree of experiential learning along a number of dimensions, and can effectively introduce or teach skills as well as substance”).

92. Richard Grimes, *The Theory and Practice of Clinical Legal Education*, in *TEACHING LAWYERS’ SKILLS* 140 (Julian Webb & Caroline Maughan eds., 1996). o

93. BEST PRACTICES, *supra* note 90, at 151.

94. *Id.*

95. Marjorie Anne McDiarmid, *What’s Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 287-88 (1990).

96. *Id.* at 287.

experience.⁹⁷ A number of these skills parallel those necessary for law practice. For example, medical students must learn to communicate effectively with the patient to ensure the success of the doctor-patient relationship.⁹⁸ They must learn to interview patients carefully to obtain the facts necessary for an accurate diagnosis.⁹⁹ They must learn to factor into their analyses the personal characteristics and circumstances of a patient who may be uncommunicative or in considerable distress.¹⁰⁰ They must decide when additional fact investigation is important.¹⁰¹ They must learn how to counsel patients about different treatment options, explaining procedures and the benefits and risks of those options.¹⁰² Medical students learn these skills by observing experienced practitioners and by practicing them, with supervision, on real patients.¹⁰³ Experiential learning is no less important for acquiring the skills to be a lawyer.

A. *The Importance of Experiential Learning*

Each of the client-focused practice skills discussed previously is learned best by experience, and the earlier the better. For example, effective communication skills are acquired by observation and practice. Indeed, higher level interpersonal social and communication skills are developed only in active learning situations, and not by lecture in a classroom.¹⁰⁴ Although the case method makes a law classroom more active than lecture for the reciting students, the ability to “think like a lawyer” taught by the case method does not necessarily translate into effective client

97. See Erin A. Egan, et. al., *Comparing Ethics Education in Medicine and Law: Combining the Best of Both Worlds*, 13 ANNALS HEALTH L. 303 (2004) (comparing the formalized ethics instruction of law schools with the more informal process of socialization and customary experiential learning in medical ethics education); Frederick W. Hafferty & Ronald Franks, *The Hidden Curriculum, Ethics Teaching, and the Structure of Medical Education*, 69 ACAD. MED. 861 (1994) (discussing medical ethics training and arguing that most of what medical novices will internalize comes not from the formal curriculum, but from a hidden curriculum that, for good or ill, socializes students to accept the culture and values of the medical profession); John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993) (advocating that law schools expand their financial resources so that law students can obtain skills training comparable to that of medical students).

98. See, e.g., Ass’n of Am. Med. Colls., *Medical School Objectives Project, Report 1, Learning Objectives for Medical Student Education 6-7* (January 1998), available at <http://www.aamc.org/meded/msop/msop1.pdf>.

99. *Id.*

100. *Id.*

101. *Id.*

102. See *id.*

103. See, e.g., Costonis, *supra* note 97, at 158.

104. See TEACHING LAWYERS’ SKILLS 13-18 (Julian Webb & Caroline Maughan eds., 1996).

communication skills.¹⁰⁵ Law students learn these communication skills by interacting with live clients and by observing an experienced lawyer during client meetings. The context of live client contact generates deeper understanding, learning, and retention for novices than other settings. Reflecting upon their experiences and discussing them with a mentor enriches the learning experience.¹⁰⁶

Students also come to appreciate the difficulty of client interviewing and fact investigation by observing or participating in interviews between lawyers and their clients. Extracting relevant facts from live human beings is infinitely more challenging than reading the prepared facts of a case in an edited court opinion. With real clients, students can observe a range of different personalities and learn how a lawyer's approach to questioning must adapt to the particular client's characteristics. They can observe how a skilled lawyer can coax information from a reticent client, give focus to the ramblings of a verbose client, put a worried client at ease, or impress a nonchalant client with the seriousness of a situation. They can observe both the verbal and non-verbal exchange of information between two persons with a real stake in their working relationship. Finally, students can get a sense of a client's non-legal concerns as well, and learn how lawyers must often address more than strictly legal issues.¹⁰⁷

For counseling skills too, absorbing the words, actions, and demeanor of both lawyer and client gives students a special perspective.¹⁰⁸ Lawyers must be able to inspire their clients' trust. They may have to tell clients what they do not want to hear or present clients with equally unpleasant options. They may have to explain that the law does not afford a remedy. It is in counseling a client that "people skills" are perhaps most important, and observing experienced practitioners can help students develop those abilities.¹⁰⁹

Problem-solving ability, which requires legal judgment and sound analysis, is also most likely to develop with context and repeated experience.¹¹⁰ "In every other human endeavor, experience in problem-

105. Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1229-33 (2004).

106. Steven Hartwell, *Six Easy Pieces: Teaching Experientially*, 41 SAN DIEGO L. REV. 1011, 1012-14 (2004); HAMILTON – IS LAW SCHOOL RELEVANT, *supra* note 25, at 4.

107. See BREST & KRIEGER – LAWYERS AS PROBLEM SOLVERS, *supra* note 49, at 811.

108. SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5 (discussing the value of mentors).

109. *Id.*; see GARTH & MARTIN, *supra* note 10, at 482.

110. BREST & KRIEGER – LAWYERS AS PROBLEM SOLVERS, *supra* note 49; RHODE, *supra* note 8, at 199.

solving is acquired by solving problems. There may be better and worse ways to learn to solve problems, but there appears to be no substitute for context.”¹¹¹ In observing client meetings, students can learn how a lawyer must synthesize the intricate dimensions of practice. Lawyers generally encounter unstructured situations in which the issues have not been identified in advance, and without exposure to the demands and constraints of such situations, students’ problem-solving skills cannot mature.¹¹²

Finally, context and experience are also critical in learning professional responsibility and ethical judgment. The law school years have a profound influence on students’ professional values and their understanding of ethical practice,¹¹³ but by teaching law students to focus primarily on rules and to screen out other concerns, law schools may frustrate the development of students’ own moral judgment.¹¹⁴

Because ethics rules focus on the relationships between the lawyer and the client, bench, bar, and public,¹¹⁵ students must learn how the rules work within those relationships. By observing and participating in conversations with clients struggling with legal problems, students begin to understand an attorney’s role and a client’s expectations, and to grasp the practical and ethical challenges of the rules and duties that will govern their professional careers.

Students need practical ethical training to develop the reflective judgment necessary to wrestle with difficult questions.¹¹⁶ Exposing students to situations that require ethical judgment within a confidential relationship is especially important, because it is in confidential conversations with clients that a lawyer will first recognize potential ethical problems and have to address them.¹¹⁷ “[M]uch of what a lawyer does is done in private—

111. Blasi, *supra* note 51, at 386-87 (calling for law schools at least to “replicate in hypothetical ‘problems’ as closely as possible the complexities and nuances of a situation that might arise in practice, including the ever present background noise of only potentially relevant detail”).

112. See BEST PRACTICES, *supra* note 90, at 151; BREST, *supra* note 48, at 5, 7.

113. LEARNING PROFESSIONALISM, *supra* note 5, at 9-10.

114. See Susan Daicoff, (*Oxymoron?*) *Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 FLA. L. REV. 197, 216-19 (1996); Eyster, *supra* note 60, at 755-56. Although Professor Eyster’s article focuses on teaching ethical negotiation practice, and not skills of client interviewing and counseling, she notes:

I do not think that the problems of developing a satisfactory ethic of legal professionalism begin and end with negotiation; I think, instead, that the tensions which arise in the teaching and practice of negotiation are an important indicator of the extent of our failure to adequately incorporate the notion of moral judgment in our standards of professional responsibility.

Eyster, *supra* note 60, at 757 (footnote omitted).

115. James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 98 (1991).

116. Edwards, *supra* note 70, at 38.

117. SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5, at 711-12.

indeed, in situations that are secret by force of law.¹¹⁸ Although exposure to law practice may not be efficient in transmitting doctrinal rules, it is more effective than classroom instruction for teaching the standards and values of the legal profession.¹¹⁹ Finally, exposure to law practice can also inspire a student's commitment to professionalism.¹²⁰

B. Experiential Learning Through Mentoring and Apprenticeships

Learning by experience, however valuable, can be difficult and inefficient if it happens without guidance. The richest possibilities for learning occur when a student encounters the day-to-day demands of law practice under the direction of an attorney-mentor. Working with a mentor can help a student acquire essential skills and professional values early and significantly reduce the risks to clients of being represented by a newly licensed attorney.¹²¹ Experienced attorneys can serve as role models for students not only in displaying technical proficiency, but also in exercising sound judgment in difficult circumstances.

Mentors can model the attitudes, habits, and virtues that characterize good attorneys as well.¹²² They can model professionalism in personal interactions and diligence in managing legal work. They can display ethical judgment in difficult situations.¹²³ They can awaken students to the competing pressures and demands and the need for balance in professional

118. *Id.* at 714.

119. See BEST PRACTICES, *supra* note 90, at 84-87, 158.

120. *Id.*

121. Required apprenticeships have their critics. The "standard litany of concerns" is that the work may be trivial and repetitive, that the quality of supervision may be poor, and that the work lacks sufficient educational value. See, e.g., GIVELBER, *supra* note 83, at 7-9. Joseph Story believed that "the dry and uninviting drudgery" of the law offices of his day were "utterly inadequate to lay a just foundation for accurate knowledge in the learning of the law." 2 LIFE AND LETTERS OF JOSEPH STORY 486 (William W. Story ed., 1851).

122. Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 275 (2002). At least one study has shown that apprentice-like employment experiences have a significant impact (for good or ill) on new lawyers' ethical and professional attitudes. Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 537-39 (1991).

123. Arguably some lawyers in a work environment could serve as poor role models and influence a law student or new lawyer negatively. Eleanor W. Myers, "Simple Truths" *About Moral Education*, 45 AM. U. L. REV. 823, 824-25 (1996); Hellman, *supra* note 122, at 537-38. However, Professor Patrick J. Schiltz maintains that volunteer attorney-mentors are different, because they are "almost by definition people who value something other than money" even in the face of intense pressure to bill hours to clients. See SCHILTZ - LEGAL ETHICS IN DECLINE, *supra* note 5, at 731 n. 78.

life.¹²⁴ Indeed, mentors can have a profound effect on the ethical development of law students by influencing the formation of character at a critical stage of their education and by helping them to integrate their own moral values into their professional lives.¹²⁵ “Some of what experienced lawyers know seems capable of transmission to younger lawyers only through the process of individual mentoring or apprenticeship.”¹²⁶

Mentoring can connect novices to their mentors, future clients, and other members of the legal community.¹²⁷ Attorney-mentors socialize students into the profession by exposing them to the moral and ethical dimensions of law practice and allowing them to observe the standards of experienced attorneys.¹²⁸ Regular contact with attorney-mentors serves to initiate novices into the culture and language of the profession, and the values and beliefs of practitioners.¹²⁹

These connections implicate fundamental responsibilities of the bar. As members of a self-regulating profession, lawyers must ensure that those entering the profession are competent and have learned the profession’s shared ethical norms.¹³⁰ This is not an abstract, collective responsibility. Each lawyer has an ethical obligation to improve the competence of the bar and to ensure its integrity.¹³¹ By providing novices with practice experience and modeling ethical behavior, mentoring allows individual attorneys to discharge one of the profession’s core responsibilities: protecting the public by helping to educate new lawyers.¹³² Despite its widely recognized value by other legal systems,¹³³ individual mentoring has declined in the American

124. SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5, at 732.

125. *Id.*; see Patrick J. Schiltz, *Making Ethical Lawyers*, 45 S. TEX. L. REV. 875 (2004); THOMAS SHAFFER, FAITH AND THE PROFESSIONS 130 (1986).

126. Blasi, *supra* note 51, at 388 (but noting that to the extent some expert knowledge can be generalized, “it can be learned in less mentor-intensive settings”); see also BREST, *supra* note 48, at 5, 17.

127. SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5, at 735-36.

128. See Neil W. Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions*, 42 S. TEX. L. REV. 227, 237 (2001) [hereinafter HAMILTON – THE ETHICS OF PEER REVIEW]; Neil Hamilton, *Building the Social Capital of the Profession*, MINNESOTA LAWYER, Mar. 17, 2003 [hereinafter HAMILTON – BUILDING THE SOCIAL CAPITAL]; John Law, *Articling in Canada*, 43 S. TEX. L. REV. 449, 460 (2002).

129. See Law, *supra* note 128, at 470; Pepper, *supra* note 46, at 1608.

130. See generally HAMILTON – THE ETHICS OF PEER REVIEW, *supra* note 128; HAMILTON – BUILDING THE SOCIAL CAPITAL, *supra* note 128. See also Law, *supra* note 128, at 470.

131. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 1 (1980).

132. See Law, *supra* note 128, at 469; MACCRATE REPORT, *supra* note 5, at 103-105, 287.

133. In many countries, the norm for professional preparation requires that new law graduates complete a period of practical training under an experienced attorney before licensing. See, e.g., Law, *supra* note 128, at 449; Lynette G. McLennan & Peter J. Norman, *The Legal System of Australia*, in 2 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.6 (C)-(D) (Kenneth R. Redden ed., 1989); CATHERINE ELLIOTT & FRANCES QUINN, ENGLISH LEGAL SYSTEM 113-18 (2d ed. 1998); DAVID M. WALKER, THE SCOTTISH LEGAL SYSTEM 350-58 (2d ed. 1997); Alain A. LeVasseur, *The Legal System of France*, in 3 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.6 (B)(2)(a)(ii) (Kenneth R.

legal profession over the years.¹³⁴ The pressure on lawyers to produce billable hours, meet clients' demands, and cultivate new clients leaves little time for intensive mentoring of new attorneys.¹³⁵ Not coincidentally, the job market for law graduates has become increasingly competitive, and employers expect new lawyers to be ready for practice upon graduation and licensing, with little additional guidance.

However, the absence of mentoring can lead to declining professionalism, unethical conduct, and a sense of anonymity within the professional legal community. Courts have observed that the lack of supervision of novice lawyers, much less collegial support or guidance, can cause considerable damage to those lawyers and their clients.¹³⁶ Because new graduates no longer are likely to receive significant mentoring in their early years of practice, it is essential that students have opportunities to learn experientially from attorney-mentors during their law school years.

C. *The Shortage of Experiential Learning Opportunities in Law Schools*

Although learning and professional development should continue throughout a lawyer's career, the most formative stage of legal education occurs during the law school years.¹³⁷ Students in law school are "as receptive to being taught as they will ever be."¹³⁸ It is during law school that students begin to explore their vision of what it means to be a good attorney and how to realize that vision. Experiential learning during the law school years is an important means not only to sustain student interest and develop

Redden ed., 2001); Helmuth Aldinger, *The Legal System of the Federal Republic of Germany*, in 3 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.4 (A)(1)(b) (Kenneth R. Redden ed., 2001); Louis F. Del Duca, *The Legal System of Italy*, in 3 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.7 (Kenneth R. Redden ed., 2001); 4 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.11 (B) (Kenneth R. Redden ed., 1989) (Switzerland); DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 232 (2003). This apprenticeship period gives the new law graduate a structured means of preparing for law practice through experiential learning, skills training, and instruction in proper professional habits and attitudes. See Law, *supra* note 128.

134. SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5, at 739.

135. *Id.* at 744 n. 138; Edwards, *supra* note 70, at 38; Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 273 (1994); Louise A. LaMothe, *Where Have All the Mentors Gone?*, 19 LITIGATION 1 (Winter 1993).

136. See, e.g., *In re Barry*, 447 A.2d 923, 925 (N.J. 1982); *In re Yacavino*, 494 A.2d 801, 803 (N.J. 1985).

137. See Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 57 (2003); Robert MacCrate, *Keynote Address—The 21st Century Lawyer: Is There a Gap to be Narrowed?*, 69 WASH. L. REV. 517, 524 (1994).

138. SCHILTZ – LEGAL ETHICS IN DECLINE, *supra* note 5, at 776. See also MACCRATE REPORT, *supra* note 5, at 3.

practice skills, but also to further students' ethical development.¹³⁹ Exposure to practicing lawyers and real clients shows them in the most authentic way what it means to be a lawyer. Teaching necessary skills in law school protects the public as well. "[I]t is preferable for an aspiring attorney to acquire the skills he will need in practice while a student, under professional supervision, than to do so at the expense of the first clients who walk through the newly licensed attorney's office door."¹⁴⁰

In traditional doctrinal classes, students may get little sense of law practice as problem-solving for real people. In the typical first-year curriculum, studying appellate opinions makes the law seem remote for those students whose passion for people brought them to law school.¹⁴¹ By the second year, class "attendance, preparation, and participation decline," and students may lose much of the enthusiasm for helping people that initially interested them in the law, unless they have contact with real clients in a clinical program, volunteer work, or paid employment.¹⁴²

Unfortunately, the number of opportunities for hands-on experiential learning and mentoring is limited at most law schools, mostly for economic reasons. Because the student/faculty ratio in live-client clinical courses must be low, the cost of instruction is dramatically higher than the cost of typical doctrinal classes, in which one professor can teach dozens of students at a time. As a consequence, only a fraction of all students take law clinic or externship courses in which they represent real clients under the supervision of a law faculty member or outside attorney.

The bar itself has acknowledged significant shortcomings in legal education. The MacCrate Report found it unrealistic to expect even the most committed law schools, without help from the practicing bar, to produce graduates who are fully prepared to represent clients without supervision.¹⁴³ The response of law schools and the profession to the MacCrate Report's calls for educational reform has been mixed.¹⁴⁴ Many law schools

139. Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001).

140. STUDENT PRACTICE AS A METHOD OF LEGAL EDUCATION, *supra* note 71, at 421. New lawyers may assume the responsibility for representing clients before they are ready to serve those clients. A significant number of law graduates still enter solo or small-firm practice immediately after law school and licensing, and therefore may not have the benefit of experienced attorney-mentors or supervisors. See Mark Galanter, "Old and in the Way": *The Coming Demographic Transformation of the Legal Profession and its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1090 (1999) (noting that of the roughly 700,000 lawyers engaged in private practice in 1999, about 47 percent were in solo practice).

141. See Maranville, *supra* note 139, at 53.

142. *Id.* at 51.

143. MACCRATE REPORT, *supra* note 5, at 4.

144. See, e.g., Russell Engler, *The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 116 (2001).

implemented at least modest curricular reforms in response to the MacCrate Report; others approached skills and values training more aggressively.¹⁴⁵

The challenge for law schools is to make opportunities for experiential learning more widely available to students, and partnerships between law schools and the practicing bar raise a number of promising possibilities. The MacCrate Report visualized law teachers, practicing lawyers, and members of the judiciary as engaged in a common enterprise—building an educational continuum for all lawyers, from law school throughout a lawyer's professional life.¹⁴⁶ Law schools can realize that vision by bringing together students and the practicing bar in their communities for experiential learning through externships, clinical programs, pro bono activities, and mentorship programs.¹⁴⁷

D. Innovative Approaches to Providing Experiential Learning

Although clinical courses involve the most intensive and realistic kind of experiential learning, they are not the only vehicle for experiential learning. The expansion of law school sponsored mentoring and externship programs involving practicing attorneys could offer new educational experiences for law students by allowing them to observe and experience law practice outside of the classroom, while also learning analytical skills and legal doctrine inside.¹⁴⁸ Mentoring programs could complement a school's clinical offerings and make at least limited live-client contact possible for a much larger percentage of law students before graduation.

The American Bar Association has encouraged law schools to be creative in developing instruction in professional skills related to a lawyer's practice responsibilities, using the strengths and resources available to the school.¹⁴⁹ The MacCrate Report, in turn, urged the practicing bar to live up to its responsibility of mentoring law students and new lawyers.¹⁵⁰ If law schools cooperated with the bar to place students in mentored practice

145. *Id.* at 123. See also SONSTENG ET AL. – LEARNING BY DOING, *supra* note 91; Graham C. Lilly, *Skills, Values, and Education: The MacCrate Report Finds a Home in Wisconsin*, 80 MARQ. L. REV. 753 (1997).

146. MACCRATE REPORT, *supra* note 5, at 3-8.

147. *Id.* at 6, 333.

148. As of 2002, only a minority of law schools reported offering externship placements with law firms; most schools place externs with government agencies and courts. See ABA SURVEY OF LAW SCHOOL CURRICULA, *supra* note 78, at 35-36.

149. See ABA STANDARDS, *supra* note 75, Interpretation 302-1.

150. MACCRATE REPORT, *supra* note 5, at 332 (recommendation number C.18.).

situations, a significant number of practicing attorneys might be able to commit the limited time required for mentoring a law student.¹⁵¹

One example of how law schools might provide cost-efficient mentoring and experiential learning opportunities for students is in progress in Minnesota. In 2001, the University of St. Thomas School of Law instituted a required mentor externship program, in which every student was paired with a volunteer mentor attorney or judge.¹⁵² Unlike mentor/alumni programs that are mostly social in nature, St. Thomas' program is academic and structured, combining experiential learning with reflective lawyering.¹⁵³

The program provides each student with an attorney-mentor in all three years of law school.¹⁵⁴ Students must complete a certain number of designated learning "experiences" and spend a minimum number of hours in mentor program activities each year.¹⁵⁵ The law school compiles the list of approved experiences, which include a broad array of lawyering tasks (e.g., the student may observe a deposition, a settlement conference, or a motion hearing, review a draft document with a mentor attorney, or attend a mediation in which the mentor is participating).¹⁵⁶ Students observe or participate in these lawyering tasks, record their experiences in a journal, and together with their mentors try to reflect on broader issues common to practicing lawyers.¹⁵⁷ This mentor externship program—voluntary for mentor attorneys, but mandatory for students—provides students with meaningful, even if limited, experiential learning at a fraction of the cost of more traditional educational options.¹⁵⁸

Partnerships between law schools and the practicing bar hold great promise for providing all students with relatively low cost experiential learning opportunities, but their success may be frustrated by a peculiar aspect of the attorney-client privilege rules. A strict reading of those rules

151. Cf. SCHILTZ – ON BEING AN ETHICAL LAWYER, *supra* note 8, at 927 (noting that sustained one-on-one mentoring of law firm associates is disappearing chiefly due to time pressures).

152. UNIV. OF ST. THOMAS SCHOOL OF LAW, UNIVERSITY OF ST. THOMAS SCHOOL OF LAW MENTOR EXTERNSHIP MANUAL 1 (2004) [hereinafter UST SCHOOL OF LAW MENTOR EXTERNSHIP MANUAL], available at <http://law.gsu.edu/ccunningham/Professionalism/Award05/Apps/Brab-UST%2004-05%20Student%20Manual.pdf>.

153. *Id.*

154. *Id.*

155. *Id.* at 5. First-year students must complete a minimum of four mentor "experiences" for a total of at least twelve "experience hours" during the year. *Id.* Additionally, students attend an orientation, prepare a professional development plan, attend small peer-group sessions, write two short debriefing summaries of their experiences, and write a year-end evaluation. *Id.* Students also log their activities and submit the log to the program director. *Id.* In the second and third years, students must complete five mentor experiences for a total of at least fifteen experience hours, in addition to meeting the other requirements of the first-year program. *Id.*

156. UST SCHOOL OF LAW MENTOR EXTERNSHIP MANUAL, *supra* note 152, at 10-12.

157. *See id.* at 1-12.

158. There are significant administrative costs associated with a required academic mentorship program, but they do not approach the cost of providing clinical education for the same number of students.

prohibits the presence of unpaid law students in meetings involving confidential communications between lawyer and client, with few exceptions. Because the attorney-client privilege ordinarily does not apply to law students, the practicing bar may have to exclude mentored law students from client contact and experiential learning in those situations that could teach them the most about skilled and ethical practice.

V. THE ATTORNEY-CLIENT PRIVILEGE AS AN OBSTACLE TO EXPERIENTIAL LEARNING

“The attorney-client privilege may well be the pivotal element of the modern American lawyer’s professional functions.”¹⁵⁹ The attorney-client evidentiary privilege against disclosure enforces and protects a lawyer’s ethical duty of confidentiality, which is recognized as one of the most fundamental duties an attorney owes to a client.¹⁶⁰ Both the fiduciary relationship existing between a lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of the client.¹⁶¹ The promise of confidentiality engenders trust, which is critical to the proper working of the attorney-client relationship. Attorneys must have full information from the client for effective representation,¹⁶² and clients are unlikely to reveal embarrassing or incriminating information unless they know the information will remain secret. In representing a client, the lawyer may need information that the client otherwise has a right to keep confidential. By appeasing the client’s fears about revealing sensitive or unfavorable facts, the privilege makes it more likely that the lawyer will obtain the information necessary for

159. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978).

160. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 3 (2003).

161. MODEL CODE OF PROF’L RESPONSIBILITY EC 4-1 (1980). The attorney confidentiality rules have their critics. See, e.g., Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 5-6 (1998) (arguing that confidentiality rules should be abolished because they benefit mainly the legal profession by increasing the demand for legal services, and not clients or society: litigation is a “zero-sum” game, and the gain to one party is offset by the loss to the other); see also Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 861 (1998) (suggesting the attorney-client privilege should be abandoned because it results in unnecessary burdens on the litigation process); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 353-56 (1989) (arguing that the attorney-client privilege is too inflexible and often causes attorneys to violate ethical and moral obligations). This article is premised on the current law of attorney-client privilege. If the privilege were abolished altogether and confidential attorney-client communications were subject to discovery, lawyers would have no reason to exclude law students from those client communications, and the law would not impede the goals of legal education discussed in this article.

162. See *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998).

advising the client or for advocating on the client's behalf.¹⁶³ Without the privilege, the client might not disclose secrets in the first place, and this justifies the loss of evidence that results from the privilege.¹⁶⁴

The attorney-client privilege also furthers larger societal goals. Confidentiality may encourage laymen to seek early legal assistance and obtain the full advantage of the legal system.¹⁶⁵ Given the complexity of the law, the privilege is important because it encourages citizens to use lawyers' skills and expertise to protect their rights and navigate within the legal system.¹⁶⁶ A lawyer's loyalty to a client protects the citizen, right or wrong, against an abuse of power by the government, and thus, confidentiality protects the public interest.¹⁶⁷ Although detractors of the privilege argue that it chiefly protects clients with "bad" secrets or intentions who benefit from secrecy, even then confidentiality may enable the lawyer, who is in a relationship of trust with the client, to exercise moral influence and give advice that is not only important to the client, but is also socially desirable.¹⁶⁸ Clients who trust their lawyers are more likely to accept the lawyer's advice to do the right thing.¹⁶⁹

Thus, the privilege does not protect the client's secrets for the sake of privacy, but rather is intended to promote broader interests, including respect for the rule of law.¹⁷⁰ The privilege is directed at the proper working of the legal system and the attorney-client relationship within it. The intended beneficiary is not the individual client but the system-wide administration of justice, which depends on frank and open client-attorney communication.¹⁷¹

163. See *id.* at 403, 407-08; see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1998); PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1:12, at 38-41 (2d ed. 1999).

164. *Swidler*, 524 U.S. at 408.

165. MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2003).

166. *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833).

167. MAY, *supra* note 45, at 53-54.

168. *Id.*; see also ROBERT F. COCHRAN & TERESA S. COLLETT, CASES AND MATERIALS ON THE LEGAL PROFESSION 7-8 (2d ed. 2003); SHAFFER & COCHRAN, *supra* note 59, at 119; Thomas L. Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY'S L.J. 195, 214 (1986) ("[T]he lawyer in modern business practice in the United States is a source of moral guidance for his clients.").

169. See, e.g., Shaffer, *supra* note 168, at 214-15 (detailing a situation in which a law firm encouraged its client, an insurance company, to pay a claim that it was not legally required to pay because it would be the "moral" thing to do).

170. See *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *In re Investigating Grand Jury*, 593 A.2d 402, 406 (Pa. 1991); *State v. Holsinger*, 601 P.2d 1054, 1058 (Ariz. 1979).

171. See *In re Investigating Grand Jury*, 593 A.2d at 406.

The attorney-client privilege is recognized in all fifty states.¹⁷² The majority of states have codified the privilege, either by statute or by evidentiary rule. However, even if the privilege is statutory, most courts assert the inherent authority to adopt and to change evidentiary standards (e.g., privilege rules) as they deem appropriate.¹⁷³ Only if the state constitution confers rulemaking power on the legislature must a court defer to statutory rules of evidence.¹⁷⁴ In federal courts, the Federal Rules of

172. ALA. R. EVID. 502; ALASKA R. EVID. 503; ARIZ. REV. STAT. ANN. § 12-2234 (2003); ARK. R. EVID. 502; CAL. EVID. CODE § 954 (West 1995); COLO. REV. STAT. ANN. § 13-90-107(1)(b) (West Supp. 2005); CONN. CODE EVID. § 5-1 (privileges are defined by common law); Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 869 A.2d 653, 656 (Conn. 2005); DEL. UNIF. R. EVID. 502; FLA. STAT. ANN. § 90.502 (West Supp. 2006); GA. CODE ANN. §§ 24-9-21(2), -24, -25 (1995); HAW. R. EVID. 503; IDAHO R. EVID. 502; Fischel & Kahn, Ltd. v. Van Straaten Gallery, 727 N.E.2d 240, 243 (Ill. 2000); IND. CODE ANN. § 34-46-3-1(1) (LexisNexis 1998); IOWA CODE ANN. § 622.10 (West 1999); KAN. CIV. PROC. CODE ANN. § 60-426 (West Supp. 2005); KY. R. EVID. 503; LA. CODE EVID. ANN. art. 506 (1995); ME. R. EVID. 502; MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (LexisNexis 2002); Purcell v. Dist. Attorney for the Suffolk Dist., 676 N.E.2d 436, 438 (Mass. 1997); MICH. R. EVID. 501 (privileges are defined by common law); McCartney v. Attorney Gen., 587 N.W.2d 824, 828 (Mich. Ct. App. 1998); MICH. COMP. LAWS ANN. § 767.5a(2) (West 2000) (privilege in criminal cases); MINN. STAT. ANN. § 595.02(b) (West 2000); MISS. R. EVID. 502; MO. ANN. STAT. § 491.060(3) (West Supp. 2006); MONT. CODE ANN. § 26-1-803 (2005); NEB. REV. STAT. ANN. § 27-503 (LexisNexis 2004); NEV. REV. STAT. ANN. §§ 49.035-.115 (LexisNexis 2002); N.H. R. EVID. 502; N.J. R. EVID. 504; N.M. R. EVID. 11-503; N.Y. C.P.L.R. § 4503 (McKinney Supp. 2006); N.C. R. EVID. 501 (privileges are defined by common law); In re Miller, 584 S.E.2d 772, 779 (N.C. 2003); N.D. R. EVID. 502; OHIO REV. CODE ANN. § 2317.02(A) (LexisNexis 2005); OKLA. STAT. ANN. tit. 12, § 2502 (West Supp. 2006); OR. R. EVID. 503; 42 PA. CONS. STAT. ANN. §§ 5916, 5928 (West 2000); R.I. R. EVID. 501 (privileges are defined by common law); DeFusco v. Giorgio, 440 A.2d 727, 731 (R.I. 1982); S.C. R. EVID. 501 (privileges are defined by common law); Floyd v. Floyd, 615 S.E.2d 465, 482-84 (S.C. 2005); S.D. CODIFIED LAWS §§ 19-13-2 to -5 (2004); TENN. CODE ANN. § 23-3-105 (1994); TEX. R. EVID. 503; UTAH R. EVID. 504; VT. R. EVID. 502; Sevachko v. Commonwealth, 544 S.E.2d 898, 902 (Va. Ct. App. 2001); WASH. REV. CODE ANN. § 5.60.060(2) (West Supp. 2006); *see* W. VA. R. CIV. P. 26(b); State ex rel. Allstate Ins. Co. v. Madden, 601 S.E.2d 25, 33-34 (W. Va. 2004); WIS. STAT. ANN. § 905.03 (West 2000); WYO. STAT. ANN. § 1-12-101(a)(i) (2005).

173. *See* State v. Gianakos, 644 N.W.2d 409, 415-16 n.10 (Minn. 2002) (holding that the judicial branch has ultimate and final authority in evidentiary matters, despite the Minnesota legislature's attempts to limit the court's power with regard to rules of privilege); People v. Diaz, 985 P.2d 83, 87 (Colo. Ct. App. 1999) (noting that under the Colorado Constitution, "the supreme court had the power to promulgate rules governing practice and procedure," including procedural rules of evidence, but that a statute affecting the practice or procedure of the courts was not unconstitutional unless it conflicted with a rule of court); Meadows v. Meadows, 468 S.E.2d 309, 312 (W. Va. 1996) (holding that the court possessed "paramount authority to adopt rules of evidence" for state courts); City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992) (holding that the court was "constitutionally authorized to promulgate rules of procedure," including evidence, and unless there was a conflict, statutory rules simply supplemented the court's rules); State ex rel. Collins v. Seidel, 691 P.2d 678, 681-82 (Ariz. 1984) (holding that the supreme court possessed procedural rulemaking power, but it would recognize a reasonable, workable statutory rule that did not conflict with the court's rules).

174. *See* Cramer v. Peavy, 3 P.3d 665, 670 (Nev. 2000); *see also* Hitt v. State, 53 S.W.3d 697, 704 (Tex. App. 2001) (holding that because the state constitution "specifically authorizes the legislature

Evidence prescribe the common law rule of decision with regard to privilege where it is not otherwise provided by applicable federal law,¹⁷⁵ which has been interpreted as conferring the authority on the courts to determine privileges on a case-by-case basis.¹⁷⁶

The basic parameters of the privilege in many jurisdictions follow the instrumentalist formulation of the rule by John Henry Wigmore: where a client seeks legal advice from a professional legal adviser in that capacity, the communications relating to that purpose, made in confidence by the client, are at the client's instance permanently protected from disclosure by himself or by the legal adviser, unless the protection is waived.¹⁷⁷ Under this formulation, the problems in applying the privilege to law students arise from the requirements that the communication: must be made to a professional legal adviser, must be made in confidence, may not be waived (i.e., by the presence of a law student), and the privilege must remain solely the client's to assert.

Alternatively, the Restatement (Third) of the Law Governing Lawyers formulates the elements of the privilege more generally and requires a communication between privileged persons, in confidence, for the purpose

to write rules of evidence," an evidence statute "trumps" a court-adopted rule); *Roberts v. City of Palmdale*, 853 P.2d 496, 501 (Cal. 1993).

175. FED. R. EVID. 501.

176. See *Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990) (holding that Congress has manifested a desire "not to freeze the law of privilege," but rather to provide courts with the flexibility to develop rules of privilege on a case-by-case basis (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)); see also *In re Dinnan*, 661 F.2d 426, 429 (5th Cir. 1981). Congress has plenary power "over the promulgation of evidentiary rules for the federal courts," but this authority has been delegated to the federal courts on the condition that court rules are consistent with federal statutes. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976). Many federal courts are reluctant to create new privileges and hold that existing federal privileges are to be strictly construed. See, e.g., *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998). However, some commentators interpreted Federal Rule of Evidence 501 as giving the federal courts the authority to innovate on a case-by-case basis, as long as the interpretation of the common law proceeds "in light of reason and experience." 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5425 (1980) [hereinafter WRIGHT & GRAHAM]. Based on the legislative history of the proposed and rejected federal rules of evidence and privilege, Congress may not have shared the view that privileges should generally be curtailed and indeed intended that the courts should be more receptive to novel claims of privilege than they had been in the past. *Id.*

177. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, p. 554 (John T. McNaughton rev. ed. 1961) [hereinafter WIGMORE]. The instrumentalist approach has been described as allowing a privilege to conceal information to a tribunal only if it leads to a desired end, i.e., it is justified by furthering some other social policy. WRIGHT & GRAHAM, *supra* note 176, at § 5422, 5422.1. The non-instrumentalist arguments for a privilege do not focus on the effect of the privilege and instead rest on moral grounds, i.e., it is morally wrong for courts to compel disclosure of attorney-client confidences, because that would involve a compulsory betrayal that violates loyalty, fairness, and justice contrary to notions of human dignity. See *id.* at § 5472. Professors Wright and Graham argued that Congressional rejection of the Advisory Committee's judgment on privileges indicated a rejection of the instrumentalist approach, and that in assessing novel claims of privilege, courts should place less reliance on the Wigmore criteria and give greater emphasis to humanistic values such as privacy and personal autonomy to justify the exclusion of evidence. *Id.*

of obtaining or providing legal assistance for the client.¹⁷⁸ The corresponding elements at issue for law students in this formula are whether a law student is a privileged person and whether a communication is made in confidence if a law student apprentice is present during the communication. The courts' interpretation and application of the other elements of the attorney-client privilege in either formulation do not pose special concerns for law students.

The courts construe privilege rules narrowly, following Wigmore's views of decades ago:

There must be good reason, plainly shown, for [the privileges'] existence . . . The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.¹⁷⁹

Thus, the issues relating to the attorney-client privilege that affect law students in experiential learning situations with real clients are: (1) whether a law student qualifies as a professional legal adviser or privileged person, (2) whether the client intended the communication to be confidential given the presence of a law student, or whether the student's presence waives the privilege, and (3) whether the client-focused right to the privilege requires non-essential law student apprentices to be excluded from client conferences.

178. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

179. WIGMORE, *supra* note 177, § 2192, at 73; *see* *Pierce County v. Guillen*, 537 U.S. 129, 144 (2003) (holding that "statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth."). *But see* WRIGHT & GRAHAM, *supra* note 176, § 5422 (discussing Congress' rejection of the strict construction views of the instrumentalists). Although some federal courts have stressed that the Federal Rules of Evidence allow courts to create new privileges, *see, e.g., In re Dinnan*, 661 F.2d at 429, the United States Supreme Court has said that it is disinclined to exercise the authority granted by rule 501 expansively. *See* *Univ. of Penn. v. EEOC*, 493 U.S. at 189.

A. Communications to a Professional Legal Adviser or Privileged Person

1. Law Students Generally

A law student ordinarily does not qualify as a “professional legal adviser” or enjoy the attorney-client privilege.¹⁸⁰ “[A] mere *student at law*, aspiring to future entrance to the profession, is without the privilege, however much legal skill he may possess in comparison with some of those who are within it.”¹⁸¹

Courts have used bar admission as a threshold for deciding whether an individual qualifies as a professional legal adviser and is covered by the privilege.¹⁸² Where the legal adviser is presumed by the bar to be unqualified to practice law, the policy underlying the privilege, promoting the free flow of information between lawyer and client, does not apply.¹⁸³ “There is no ground for encouraging the relation of client and legal adviser except when the adviser is one who has been formally *admitted to the office of attorney or counselor* as duly qualified to give legal advice.”¹⁸⁴ One court reasoned that giving the privilege to an unsupervised law student would blur the dividing line between qualified and unqualified attorneys, and encourage the public to entrust secrets to the unskilled, to the detriment of the legal profession.¹⁸⁵ It would also undermine the power of the state to regulate the profession, whose members play a vital role in the preservation of society.¹⁸⁶ Thus, even a law graduate, if not formally licensed, ordinarily does not qualify as a professional legal adviser for purposes of the privilege.¹⁸⁷

180. See, e.g., *People v. Doe*, 416 N.Y.S.2d 466, 469 (Sup. Ct. 1979); *State v. Lender*, 124 N.W.2d 355, 359 (Minn. 1963); *Dierstein v. Schubkagel*, 18 A. 1059, 1060 (Pa. 1890).

181. WIGMORE, *supra* note 177, § 2300, at 581 (citing *Andrews v. Soloman*, 1 Fed. Cas. 899, 901 (No. 378) (C.C. Pa. 1816); *Barnes v. Harris*, 61 Mass. (7 Cush.) 576 (1851); *Dierstein*, 18 A. at 1060; *Holman v. Kimball*, 1850 WL 3500 (Vt. 1850)).

182. See, e.g., *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994); *Perkins v. Gregg County*, 891 F. Supp. 361, 363 (E.D. Tex. 1995); *United States v. Lipshy*, 492 F. Supp. 35, 41 (N.D. Tex. 1979); *Dabney v. Inv. Corp. of Am.*, 82 F.R.D. 464, 465 (E.D. Pa. 1979); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1169 (D. S.C. 1974); see also *State v. Van Landingham*, 197 S.E.2d 539, 547 (N.C. 1973).

183. WIGMORE, *supra* note 177, § 2300, at 580. The litmus test of bar admission supports the arguments by critics of the privilege that it is chiefly intended to protect and benefit the legal profession, which jealously guards against the unauthorized practice of law. See *Fischel*, *supra* note 161.

184. WIGMORE, *supra* note 177, § 2300, at 580 (citing *Sample v. Frost*, 10 Iowa 266 (1859); *State v. Smith*, 50 S.E. 859 (N.C. 1905); *Brayton v. Chase*, 3 Wis. 456 (1854)). But see *Benedict v. State*, 11 N.E. 125, 129-30 (Ohio 1887) (holding that the privilege did apply to communications with someone who had long practiced before justices of the peace, but who was not admitted to the bar).

185. *Dabney*, 82 F.R.D. at 466.

186. *Id.* But see *Fischel*, *supra* note 161.

187. *People v. Doe*, 416 N.Y.S.2d 466, 469 (Sup. Ct. 1979); *State v. Lender*, 124 N.W.2d 355, 359 (Minn. 1963).

Where state law recognizes a privilege against disclosure of confidential communications between a lawyer and client, a “lawyer” means a person duly authorized to practice law.¹⁸⁸

Few cases have considered the application of the attorney-client privilege to law students or unlicensed law graduates in any depth.¹⁸⁹ In *State v. Lender*, the Minnesota Supreme Court held that the attorney-client privilege did not apply to a law graduate who was not yet formally licensed.¹⁹⁰ While working for the Legal Aid Society of Minneapolis, the law graduate had given legal advice to an 18-year-old unwed mother who asked for assistance in suing to establish the paternity of her child.¹⁹¹ Initially, the lower court looked to the essential nature of the consultation and the relationship and found that the records in dispute were protected by the attorney-client privilege.¹⁹² Although the law graduate was not admitted to practice until a month after the consultation with the client, the trial court found that the client consulted him in a “legal capacity,” and held that the privilege should apply.¹⁹³

The Minnesota Supreme Court reversed the lower court’s decision and refused to extend the privilege to unlicensed law graduates.¹⁹⁴ The court held that the evidence did not satisfy the required elements of the privilege, because there was no evidence that the client had made confidential disclosures to the law graduate “under a reasonable belief that he was authorized to practice law and for the purpose of obtaining legal advice”¹⁹⁵ The court’s underlying assumption seemed to be that an 18-year-old unwed mother who visited the Legal Aid Society to seek assistance in establishing the paternity of her child did not have a “reasonable” belief that a law graduate she spoke with there was authorized to practice law.¹⁹⁶ “[E]ven though we might speculate that those were the facts, we are not prepared to extend the scope of the attorney-client privilege to prevent disclosure of communications made to a law graduate awaiting his formal admission to practice.”¹⁹⁷ The court noted that some legal commentators

188. See, e.g., *People v. Doe*, 416 N.Y.S.2d at 469; *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); WIGMORE, *supra* note 177, § 2300, at 581.

189. In most cases in which the subject arises, law students are simply included (often in dicta) in a list of persons to whom the attorney-client privilege does not apply.

190. *Id.* at 359.

191. *Id.* at 357.

192. *Id.*

193. *State v. Lender*, 124 N.W.2d 355, 357 (Minn. 1963).

194. *Id.* at 359.

195. *Id.*

196. *Id.*

197. *Lender*, 124 N.W.2d at 359.

had supported the extension of the privilege to someone not admitted to practice, but it found no reported cases to that effect and held that “it would seem unreasonable to grant the privilege to a person who makes no inquiry concerning whether he is consulting with a lawyer or a layman.”¹⁹⁸

In *People v. Doe*,¹⁹⁹ the court faced a similar situation and also held that the attorney-client privilege did not apply to a law school graduate not yet admitted to the bar.²⁰⁰ Because the state rule granted the privilege only to “an attorney,” the court held that graduation from law school alone would not bring someone within the scope of the privilege rule.²⁰¹ To be an attorney, the individual “must be licensed by the state to practice law.”²⁰² Most of the other cases that specifically excluded law students from the privilege simply held, with little explanation, that confidential communications to a law student as a legal adviser were not privileged.²⁰³

Despite the privilege’s traditionally strict construction and the accepted maxim that the privilege applies only to “professional legal advisers” who are licensed attorneys, courts in more recent years have broadened its coverage to include some non-attorneys. For example, since the advent of student practice rules, the scope of the attorney-client privilege must include law students specially certified under those rules.²⁰⁴

2. Certified Law Students

Although the attorney-client privilege ordinarily applies only to licensed attorneys, i.e. those authorized to practice law in the jurisdiction, all states have now passed student practice rules that allow certified law students to perform the functions of attorneys in certain circumstances.²⁰⁵ Because

198. *Id.*

199. 416 N.Y.S.2d 466.

200. *Id.* at 469.

201. *Id.* (quoting *Dierstein v. Schubkagel*, 18 A. 1059, 1060 (Pa. 1890)).

202. *Id.* (quoting *Kent Jewelry Corp. v. Kiefer*, 113 N.Y.S.2d 12, 18 (1952)).

203. *See, e.g., Dierstein*, 18 A. at 1060; *Barnes v. Harris*, 61 Mass. (7 Cush.) 576, 578 (1851).

204. *See infra* note 205 and accompanying text.

205. ALA. ST. LEGAL INTERNSHIP R. I-IV; ALASKA BAR PART IV, R. 44; ARIZ. SUP. CT. R. 38(d); ARK. BAR ADMISSION R. XV; CAL. CT. R. 983.2; COLO. REV. STAT. ANN. §§ 12-5-116.1 TO -116.4 (West 2003); CONN. R. SUPER. CT. § 3-17; DEL. SUP. CT. R. 56; D.C. CT. APP. R. 48 (2004); FLA. BAR R. 11-1.1 TO -1.9 (2005); GA. SUP. CT. R. 91 (2005); GA. CODE ANN. §§ 15-18-22 (d), 15-20-8 (2005); HAW. SUP. CT. R. 7(7.1)-(7.7); IDAHO BAR COMM’N R. 221(a)-(t); ILL. SUP. CT. R. 711(a)-(f); IND. ATTORNEY ADMISSION AND DISCIPLINE R. 2.1; IOWA CT. R. 31.15; KAN. SUP. CT. R. 709; KY. SUP. CT. R. 2.540; LA. SUP. CT. R. XX; ME. R. CIV. P. 90; ME. R. CRIM. P. 56; MD. R. GOVERNING ADMISSION TO THE BAR R. 16; MASS. SUP. JUDICIAL CT. R. 3:03; MICH. CT. R. 8.120; MINN. STUDENT PRACTICE R. 1-2; MISS. CODE ANN. § 73-3-201 to 211 (2005); MO. SUP. CT. R. 13.01-13.06; ORDER IN RE ESTABLISHMENT OF A MONT. STUDENT PRACTICE R. (1975); NEB. R. OF LEGAL PRACTICE BY APPROVED SENIOR LAW STUDENTS (2000); NEV. SUP. CT. R. 49.5; N.H. SUP. CT. R. 36; N.J. CT. R. 1:21-3; N.M. CT. R. 1-094.1; N.Y. JUD. LAW §§ 478, 484 (McKinney 2005); N.C. BAR R. §§ .0200-.04, N.C. ADMIN. CODE tit. 27, r. 1C.0204 (2001); N.D. R. ON LIMITED PRACTICE OF LAW BY LAW STUDENTS § 11 (2005); OHIO SUP. CT. R. FOR THE GOV’T OF THE BAR R.

some law students are authorized to practice law under these rules, the scope of the attorney-client privilege necessarily has been expanded to encompass those law students.

Student practice rules were enacted primarily to encourage clinical programs and further the goals of legal education. Other goals included serving indigent clients and assisting state and governmental agency lawyers.²⁰⁶ Many practice rules are based on the American Bar Association's Model Student Practice Rule, adopted in 1969 to encourage clinical programs in law schools and to provide legal services to indigent persons.²⁰⁷

The emphasis in most states' rules is on promoting legal education. For example, California's rule is intended to provide a program of practical training for law students as a "valuable complement to academic classes."²⁰⁸ Mississippi's rule acknowledges the public interest in encouraging effective legal internship and clinical legal education programs as a form of legal education.²⁰⁹ Utah's rule is intended "[t]o ensure the provision of competent legal services [and to] increase the opportunity of law students to have first-hand contact with the legal system and participate directly in the court process."²¹⁰ Courts across the country have recognized the need for "hands-

II; OKLA. STAT. ANN. tit. 5, ch. 1, app. 6, r. 1.1-11 (West 2005)); OR. CT. R. 13.05-.30; PA. BAR ADMISSION R. 321-22; R.I. SUP. CT. R. art. II, r. 9(c); S.C. APP. CT. R. 401; S.D. CODIFIED LAWS § 16-18-2.1 to 2.10 (1995); TENN. SUP. CT. R. 7 § 10.03; TEX. R. & REGS. GOVERNING THE PARTICIPATION OF QUALIFIED LAW STUDENTS & QUALIFIED UNLICENSED LAW SCHOOL GRADUATES IN THE TRIAL OF CASES IN TEXAS R. IV-V (2003); UTAH CT. R. 11-30; VT. SUP. CT. R. OF ADMISSION TO THE BAR § 13 (2005); VA. SUP. CT. R. part 6 § 4, ¶ 15; WASH. ADMISSION TO PRACTICE R. 9; W. VA. R. FOR ADMISSION TO THE PRACTICE OF LAW 10.0-.5 (2005); WIS. SUP. CT. R. §§ 50.01-.085; WYO. SUP. CT. R. PROVIDING FOR THE ORG. & GOV'T OF THE BAR ASS'N 12. The American Bar Association promulgated a Model Student Practice Rule in 1969; the United States Judicial Conference adopted a model student practice rule in 1979. See John E. Exton et al., *Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule*, 4 CLINICAL L. REV. 539, 549 (1998) [hereinafter EXTON]. Although the focus of this section is on state law student practice rules, many federal courts have adopted student practice rules as well. For example, the United States Courts of Appeals for the First, Second, Third, Eighth, Ninth, and Tenth Circuits have local rules governing appearance and argument by eligible law students, as do the federal district courts in approximately forty states.

206. See Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 12-16 (2000) (discussing the social justice dimension of clinical education and noting that law school clinics play an important part in making access to justice a reality for low-income people).

207. ABA MODEL STUDENT PRACTICE RULE (1969), reprinted in STUDENT PRACTICE AS A METHOD OF LEGAL EDUCATION, *supra* note 71, at 476-79.

208. CAL. R. & REGS. GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS 1.0 (1997).

209. MISS. CODE ANN. § 73-3-203.

210. UTAH CT. R. 11-301.

on” legal training,²¹¹ and without a student practice rule, experiential clinical programs could not exist, given the prohibitions against the unauthorized practice of law.²¹²

Student practice rules allow qualified law students to perform some of the functions of an attorney in the specific situations defined by the rules. There is wide variation among states about which law students are eligible for certification and what they may do. Depending on the state, the eligibility of law students may be restricted by year of study or hours of law school credit completed, by the type of clients they may serve, by the types of cases they may handle, by the courts in which they may appear, and by the types of legal tasks they may perform.²¹³ Some states prefer, or restrict student practice to, students enrolled in a law school clinical program.²¹⁴ All states require that students have completed their first year of law studies; many restrict student practice to even more senior students.²¹⁵ Some states allow law students to serve only indigent clients or the state.²¹⁶ Students may appear in court under most student practice rules, but some limit court appearances to lower courts or less serious cases, and most states require a supervising attorney to be present in the courtroom when the student appears on behalf of a client.²¹⁷ Thus, certified law students have been accorded the status of “professional legal advisers” in some circumstances under the law student practice rules.²¹⁸

211. EXTON, *supra* note 205, at 548.

212. *Id.*

213. *See* STUDENT PRACTICE AS A METHOD OF LEGAL EDUCATION, *supra* note 71, at 465-76. Although one would expect that the educational value of student practice experience would vary significantly depending on the scope of the state’s student practice rule, one survey of students, supervisors, and legal educators did not find such a correlation. *Id.* at 376. However, the same survey did find a consensus that student practice experience of some kind had a strong positive impact on a law student’s education. *Id.* at 374. To the extent that state rules restrict student practice to narrow groups of students (e.g., only those enrolled in law school clinical programs) and eliminate the potential for all students to participate in other law school sponsored mentoring or apprentice programs that involve outside attorneys and live clients, the scope of student practice rules may well have a detrimental impact on legal education.

214. *See, e.g.*, D.C. CT. APP. R. 48; MD. R. GOVERNING ADMISSION TO THE BAR 16; MISS. CODE ANN. § 73-3-205; N.M. CT. R. 1-094, 1-094.1.

215. *See, e.g.*, GA. SUP. CT. R. 91; N.J. CT. R. 1:21-3; OR. CT. R. 13.20; UTAH CT. R. 11-301.

216. *See, e.g.*, FLA. BAR R. 11-1.2; MICH. CT. R. 8.120.

217. *See, e.g.*, UTAH CT. R. 11-301; GA. SUP. CT. R. 91.

218. This holds true even as against some clients’ rights. For example, courts have acknowledged the legitimacy of certified students in the courtroom by holding that the mere fact that a criminal defendant was represented by a certified law student rather than a licensed attorney did not deny the defendant the constitutional right to assistance of counsel, as long as the law student provided reasonably competent representation under the immediate supervision of an experienced attorney. *See, e.g.*, *People v. Perez*, 594 P.2d 1, 5 (Cal. 1979); *People v. Masonis*, 228 N.W.2d 489, 491 (Mich. Ct. App. 1975). Courts have recognized that a rigid adherence to the requirements of licensing for students who in limited circumstances function as attorneys “would undermine the programs undertaken by the bar and the law schools to ensure that newly admitted lawyers are competent to undertake the independent responsibility” of representing clients. *Perez*, 594 P.2d at 5;

Although all states now have a law student practice rule, only four states explicitly provide in their rules or rule commentary that certified students are covered by the attorney-client privilege: Arizona, Ohio, Washington, and Massachusetts.²¹⁹ Arizona's rule states, "[t]he rules of law and of evidence relating to privileged communications between attorney and client shall govern communications made or received by professors or students certified under the provisions of this rule."²²⁰ Ohio's rule states, "[t]he communications of the client to the legal intern shall be privileged under the same rules that govern the attorney-client privilege."²²¹ Washington's rule provides, "[f]or purposes of the attorney-client privilege, an intern shall be considered a subordinate of the lawyer providing supervision for the intern."²²² Finally, the Massachusetts Supreme Judicial Court in its order implementing the student practice rule, provided: "The rules of law and of evidence relating to privileged communications between attorney and client shall govern communications made or received by any student acting under the provisions of [the student practice rule]."²²³

Despite the absence of explicit provisions extending the attorney-client privilege to certified law students in other states, such an extension of the privilege must be implied. It is unthinkable that the student practice rules of a jurisdiction could sanction a law student's representation of live clients, including interviewing and counseling them, without expecting students to observe client confidentiality and in turn, according the protection of the attorney-client privilege to their clients. In the reported cases involving the appearance of or representation by certified law students, no challenge to the attorney-client privilege has arisen, and courts have not questioned this aspect of their status as legal advisers.²²⁴

see also In re Joseph Children, 470 S.E.2d 539, 541 (N.C. Ct. App. 1996). However, some courts have insisted that the requirements of the student practice rules be strictly followed. *See, e.g., Adams v. State*, 693 N.E.2d 107, 109 (Ind. Ct. App. 1998) (finding a violation of defendant's right to counsel where he was represented by an unsupervised law student who was totally unfamiliar with the case); *Cheatham v. State*, 364 So. 2d 83, 84 (Fla. Dist. Ct. App. 1978) (granting relief where the student practice rule requiring the client's consent was not met, and the law student lawyer was not properly supervised).

219. ARIZ. SUP. CT. R. 38(h)(4) (2005); OHIO SUP. CT. R. FOR THE GOV'T OF THE BAR II(5)(e) (2000); WASH. ADMISSION TO PRACTICE R. 9(d)(6); MASS. SUP. JUDICIAL CT. R. 3:03 (2005).

220. ARIZ. SUP. CT. R. 38(h)(4).

221. OHIO SUP. CT. R. FOR THE GOV'T OF THE BAR II(5)(e).

222. WASH. ADMISSION TO PRACTICE R. 9(d)(6).

223. Order Implementing MASS. SUP. JUDICIAL CT. R. 3:03, § 3.

224. *See, e.g., People v. Perez*, 594 P.2d 1 (Cal. 1979); *People v. Masonis*, 228 N.W.2d 489 (Mich. App. 1975); *In re Joseph Children*, 470 S.E.2d 539 (N.C. Ct. App. 1996); *State v. Dwyer*, 512 N.W.2d 233 (Wis. Ct. App. 1994).

Extending the attorney-client privilege to certified law students is consistent with the provisions in many states' rules requiring certified students to abide by the rules of professional conduct for licensed attorneys, including the duty of confidentiality.²²⁵ Requiring students to adhere to professional conduct rules adds to the authenticity of their experiential learning. Some states enforce these rules by threatening to prevent a law student who has violated professional conduct rules from sitting for the bar examination or from being licensed.²²⁶ Other states' rules simply enjoin certified students, without further elaboration, from disclosing privileged or confidential communications.²²⁷

Additional safeguards of the client's right to confidentiality from student legal advisers derive from the professional responsibility of the supervising attorney. Many student practice rules specifically impose upon the supervising attorney a duty to supervise both the law student's conduct and work product to comply with all professional obligations to the client.²²⁸ For example, Ohio's rule addresses this professional responsibility:

The supervising attorney shall provide the legal intern with the opportunity to engage in and observe the practice of law, shall discuss and counsel the intern regarding matters of professional responsibility that arise, and shall train and supervise the legal intern on matters assigned to the intern to the extent necessary to properly protect the interests of the client and to properly advance and promote the intern's training.²²⁹

Safeguarding client confidentiality to protect the client's interests would make little sense without a corresponding extension of the attorney-client privilege to certified students.

In summary, the state student practice rules were adopted to encourage and support experiential learning and law school clinical programs, and to some extent, student practice has filled some of the educational gaps in the traditional case method system of training lawyers.²³⁰ However, the scope of student practice rules is limited in all jurisdictions to only specific categories

225. See, e.g., RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS, 1997 State Bar of Cal. 4.2.1.3; COLO. REV. STAT. ANN. § 12-5-116.2 (f); WASH. ADMISSION TO PRACTICE R. 9(a)(5).

226. See, e.g., WASH. ADMISSION TO PRACTICE R. 9 (c).

227. See, e.g., ARIZ. SUP. CT. R. 38(h)(4).

228. See, e.g., IDAHO BAR COMM'N R. 221(i)(1) (stating that the supervising attorney "shall be fully responsible for the acts and conduct of the legal intern while acting within the scope of authority and work assigned . . . by the supervising attorney"); S.D. CODIFIED LAWS § 16-18-29 (1995) (stating that a supervising lawyer "shall assume personal professional responsibility for the conduct of the legal intern").

229. OHIO SUP. CT. R. FOR THE GOV'T OF THE BAR II, § 7(B).

230. See STUDENT PRACTICE AS A METHOD OF LEGAL EDUCATION, *supra* note 71, at 375; see also *supra* discussion Part III.

of eligible law students in sometimes narrowly defined circumstances.²³¹ Even the most liberal state practice rule does not apply to first-year law students, who need exposure to attorney-mentors and experiential learning opportunities for the same reasons upper-level students benefit from such contact.²³² Thus, the express or implied extension of the attorney-client privilege that has evolved from state student practice rules is inadequate to serve the greater needs of legal education.

B. *Communications Made in Confidence and Not Waived*

The second requirement of the privilege with implications for law students is that clients must intend communications with their lawyers to be confidential. Most privilege rules define a communication as confidential only if the client does not intend it to be disclosed to any third persons other than those supporting the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.²³³ If unnecessary third parties are present, courts will presume that the client did not intend secrecy, and without confidential intent, the client waives the attorney-client privilege.²³⁴

231. See David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1517 (1998). The limited nature of the student practice rules in some states may also have been connected to initial concerns that certified law students might take legal work away from practicing lawyers. Although the emphasis in state student practice rules is on furthering legal education, the initial impetus of the A.B.A. Model Student Practice Rule seems to have been access to legal services for the poor. See *id.* at 1515-16 n.28. A broadly worded student practice rule might have allowed students to further their education by also representing clients who otherwise would have to pay an attorney. Without a student practice rule, students would be deterred from assisting legal clients for fear of engaging in the unauthorized practice of law. See *id.* Thus, the limits in many practice rules on service to poor clients or to the government not only served goals of altruism and public service, but may have allayed concerns of practicing lawyers about competition from certified students.

232. See CAL. R. & REGS. GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS; CAL. CT. R. 983.2.

233. See, e.g., ALA. R. EVID. 502; ALASKA R. EVID. 503; ARK. R. EVID. 502; DEL. UNIF. R. EVID. 502; FLA. STAT. ANN. § 90.502; HAW. R. EVID. 503; IDAHO R. EVID. 502; KY. R. EVID. 503; LA. CODE EVID. ANN. art. 506; ME. R. EVID. 502; MISS. R. EVID. 502; NEB. REV. STAT. ANN. § 27-503; N.H. R. EVID. 502; N.M. R. EVID. 11-503; N.D. R. EVID. 502; OKLA. STAT. ANN. tit. 12, § 2502; OR. R. EVID. 503; S.D. CODIFIED LAWS §§ 19-13-2 to -5; TEX. R. EVID. 503; UTAH R. EVID. 504; VT. R. EVID. 502; WIS. STAT. ANN. § 905.03. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 70, 71 (2000).

234. See *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001). But see *Rosati v. Kuzman*, 660 A.2d 263, 266 (R.I. 1995) (holding that the mere presence of a third party does not waive the privilege; it is the client's intent that controls).

The burden is on the party asserting the privilege to show that the communication was confidential and not waived.²³⁵ Although the client need not request secrecy expressly, the courts will not infer the required intent simply from the fact that the communication was between a lawyer and client.²³⁶ Instead, the court will look at the circumstances surrounding the communication to decide whether the client intended secrecy.²³⁷ If the client intends the communication to be confidential, presumably he would take precautions to ensure that no third persons could overhear the conversation.²³⁸ This includes anyone not necessary to the communication, because it indicates intent that the communication not be confidential. For example, courts have held that the presence of a client's son during communications with an attorney waived the privilege.²³⁹ "Communications made by a client to an attorney in the presence of a third person, are regarded as made to such third person, and are not protected."²⁴⁰ Any third person who overhears an otherwise privileged communication may testify about it.²⁴¹

The exceptions to the third-party waiver rule include only those persons necessary to support the attorney's representation of the client or those necessary to transmit the communication, because the presence of these parties does not negate confidential intent. At common law, an agent,

235. See, e.g., *In re* Reorganization of Elec. Mut. Liab. Ins. Co., 681 N.E.2d 838, 840 (Mass. 1997); *Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988); *State v. von Bulow*, 475 A.2d 995, 1004-05 (R.I. 1984); *United States v. Kelly*, 569 F.2d 928, 938 (5th Cir. 1978). But see *In re* Investigating Grand Jury, 593 A.2d 402, 406 (Pa. 1991) (holding that under Pennsylvania law, the burden of showing waiver is on the party asserting waiver).

236. See *von Bulow*, 475 A.2d at 1005.

237. See, e.g., *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984); *Hutton v. Hutton*, 337 P.2d 635, 639 (Kan. 1959).

238. See *In re* Reorganization of Elec. Mut. Liab., 681 N.E.2d at 841. The inference that the client did not intend secrecy is questionable when applied to law students present during confidential communications with an attorney. Ordinarily clients would assume that a law student present with the attorney is either a clerk or an employee and would not question the law student's presence. Clients may also assume that law students are subject to the same confidentiality requirements as lawyers. Additionally, a client who is unfamiliar with the methods of legal education reasonably may believe that just as medical students observe patient care at the side of licensed physicians, law students routinely apprentice with experienced attorneys to learn to practice. Thus, a law student's presence in a law office would seem quite ordinary and proper and should not negate the client's confidential intent.

239. Although older cases extended the third-party waiver rule to cover even family members, see, e.g., *Marshall v. Marshall*, 295 P.2d 131, 134 (Cal. Ct. App. 1956) (holding that the attorney's conversation with the client in the presence of the client's son was not privileged), some more recent decisions hold that the presence of family members does not necessarily negate confidential intent. See, e.g., *State v. Sucharew*, 66 P.3d 59, 65 (Ariz. Ct. App. 2003) (holding that the presence of a witness' father during a consultation with his attorney did not negate confidential intent); *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984). But see *State v. Rhodes*, 627 N.W.2d 74, 85 (Minn. 2001) (holding that the presence of the client's wife waived the privilege, because she was a non-client third party).

240. *Goddard v. Gardner*, 28 Conn. 172 (1859), available at 1859 WL 1260.

241. See *Hoy v. Morris*, 79 Mass. (13 Gray) 519 (1859), available at 1859 WL 7383.

intermediary, or interpreter for an attorney who facilitated communications between the attorney and client stood “upon the same footing” as the attorney and was not allowed to divulge any confidential fact learned while acting as the conduit of information between the attorney and client.²⁴² Courts have recognized that an attorney’s effectiveness often depends upon the assistance of secretaries, office administrators, messengers, clerks not yet admitted to the bar, and other kinds of aides.²⁴³ If the support of agents or employees is essential to the attorney’s work, or the attorney or client requires assistance in communicating, then the privilege includes those agents.²⁴⁴

The codified attorney-client privilege rules in twenty-three states expressly extend the privilege to a “representative” of the attorney.²⁴⁵ A representative typically is defined as one “employed” to assist the lawyer in the rendition of professional legal services.²⁴⁶ Three states’ rules extend the privilege specifically to “employees” of the attorney instead.²⁴⁷ A representative or employee presumably includes clerks, stenographers, paralegals, investigators, and interpreters,²⁴⁸ but a few states’ rules identify more specifically to which of the attorney’s support staff the privilege applies. For example, Iowa’s rule includes only a stenographer or confidential clerk in the privilege in addition to the attorney,²⁴⁹ and Colorado’s rule names secretaries, paralegals, legal assistants, stenographers, and clerks.²⁵⁰ Privilege rules that cover a representative or employee of the

242. See, e.g., *Hawes v. State*, 7 So. 302, 313 (Ala. 1890). Rules of professional responsibility now require reasonable efforts by an attorney to ensure that the conduct of non-lawyers employed by or associated with the attorney is compatible with the professional obligations of the attorney. See MODEL RULES OF PROF’L CONDUCT R. 5.3 (2003); see also MODEL CODE OF PROF’L RESPONSIBILITY EC 4-5 (1980).

243. See *von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136, 146 (2d Cir. 1987).

244. WIGMORE, *supra* note 177, § 2301; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70.

245. See ALA. R. EVID. 502; ALASKA R. EVID. 503; ARK. R. EVID. 502; DEL. UNIF. R. EVID. 502; HAW. R. EVID. 503; IDAHO R. EVID. 502; KAN. CIV. PROC. CODE ANN. § 60-426; KY. R. EVID. 503; LA. CODE EVID. ANN. art. 506; ME. R. EVID. 502; MISS. R. EVID. 502; NEB. REV. STAT. ANN. § 27-503; NEV. REV. STAT. ANN. § 49.095; N.H. R. EVID. 502; N.M. R. EVID. 11-503; N.D. R. EVID. 502; OKLA. STAT. ANN. tit. 12, § 2502; OR. R. EVID. 503; S.D. CODIFIED LAWS §§ 19-13-2 to -5; TEX. R. EVID. 503; UTAH R. EVID. 504; VT. R. EVID. 502; WIS. STAT. ANN. § 905.03.

246. See generally *supra* note 245. Although “employed by the attorney” arguably could mean “used by the attorney,” the more common meaning suggests a paid employee.

247. See KAN. CIV. PROC. CODE ANN. § 60-426; MINN. STAT. ANN. § 595.02(b); N.Y. C.P.L.R. § 4503.

248. See, e.g., *People v. Doe*, 416 N.Y.S.2d 466, 469 (Sup. Ct. 1979); WRIGHT & GRAHAM, *supra* note 176, at § 5482.

249. IOWA CODE ANN. § 622.10 (West 1999).

250. COLO. REV. STAT. ANN. § 13-90-107(1)(b).

attorney would include law students working for an attorney during a paid clerkship.

The language of the privilege rules does not appear to cover law students in unpaid volunteer positions or in law school sponsored extern or mentorship programs. Nor does the privilege allow for the presence of law students during client meetings for purely educational purposes. Early cases held that the privilege did not extend to a student at law just because the student was studying in an attorney's office or under the attorney's direction.²⁵¹ The privilege attached to the law student only if he was acting as agent or clerk for the lawyer in the particular transaction with the client; "[b]eyond that the privilege does not extend."²⁵² Thus, a privilege rule covering only representatives or employees does not cover students interested in unpaid public interest legal work, students in externships who receive credit rather than money as they learn to practice, or students observing an experienced attorney-mentor who is not an employer. Paradoxically, it is those unpaid law students most interested in the learning experience that exposure to law practice and attorney-mentors can provide who must be kept away from real clients, for fear that their presence might jeopardize the attorney-client privilege.

Many of the codified privilege rules that extend the privilege to representatives or employees of the attorney restrict those categories further by covering only those persons who are "necessary" to enable the attorney and client to communicate with each other.²⁵³ This is consistent with the common law rule. Even if a law student were included in a privilege rule covering the attorney's employees or representatives, the presence of the law student additionally must be "reasonably necessary for the transmission of the communication" or "in furtherance of the rendition of professional legal services."²⁵⁴ Such a restriction excludes law students who simply wish to learn professional skills and values by observing the interaction between an attorney-mentor and the client, however educational that experience could be. To avoid a loss of the privilege because of the law student's presence, the attorney would have to contrive some task for the student to accomplish that would arguably be necessary for the representation of the client. More

251. See, e.g., *Walker v. State*, 19 Tex. Civ. App. 176 (1885), available at 1885 WL 6893; see also *Holman v. Kimball*, 22 Vt. 555 (1850) at 1850 WL 3500; *Barnes v. Harris*, 61 Mass. (7 Cush.) 576, 576 (1851); *Goddard v. Gardner*, 28 Conn. 172 (1859), available at 1859 WL 1260.

252. *Wartell v. Novograd*, 137 A. 776, 778 (R.I. 1927).

253. See ALA. R. EVID. 502; ALASKA R. EVID. 503; ARK. R. EVID. 502; DEL. UNIF. R. EVID. 502; FLA. STAT. ANN. § 90.502; HAW. R. EVID. 503; IDAHO R. EVID. 502; KY. R. EVID. 503; LA. CODE EVID. ANN. art. 506; ME. R. EVID. 502; MISS. R. EVID. 502; NEB. REV. STAT. ANN. § 27-503; N.H. R. EVID. 502; N.M. R. EVID. 11-503; N.D. R. EVID. 502; OKLA. STAT. ANN. tit. 12, § 2502; OR. R. EVID. 503; S.D. CODIFIED LAWS § 19-13-2 to -5; TEX. R. EVID. 503; UTAH R. EVID. 504; VT. R. EVID. 502; WIS. STAT. ANN. § 905.03. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 70, 71 (2000); *Hoy v. Morris*, 79 Mass. (13 Gray) 519 (1859), available at 1859 WL 7383.

254. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 70, 71.

likely, however, the uncertainty in the law on this subject deters cautious attorneys from risking their clients' rights by allowing the presence of law students during client conferences.

Under the current attorney-client privilege rules, a limited number of students are allowed the opportunity for meaningful experiential learning with clients, but many others are not. Law students are not covered by the privilege if they are not "necessary" to the representation of the client or if they merely observe a lawyer's work with clients as part of a law school mentorship program. No matter how important experiential learning may be to the professional and ethical development of law students, the law draws no distinction between students and other third persons with regard to the attorney-client privilege. The law student is considered no different from an eavesdropper and may be required to testify about client communications that otherwise would be confidential, were it not for the law student's presence.

C. Communications Protected at the Client's Instance

In current attorney-client privilege jurisprudence, the privilege is client-focused and client-controlled. The privilege belongs to the client, not to the attorney.²⁵⁵ The underlying reasoning posits that clients will be encouraged to make a full disclosure of their secrets to counsel only if they alone can control the secrets that they share with their attorneys.²⁵⁶

This was not always so. At early English common law, the privilege belonged to the attorney and was based, at least in part, on consideration for "the oath and the honor of the attorney," rather than on the benefit of the client.²⁵⁷ The first duty of the attorney was to keep his clients' secrets, and the exemption from testifying protected this "point of honor" for the attorney and the profession.²⁵⁸ However, there is also some indication in the early reports that the privilege contributed to the proper functioning of the

255. See, e.g., *Floyd v. Floyd*, 615 S.E.2d 465 (S.C. 2005); *United States v. Noriega*, 917 F.2d 1543, 1551 (11th Cir. 1990); WIGMORE, *supra* note 177, § 2321.

256. *In re Sean H.*, 586 A.2d 1171, 1176 (Conn. App. Ct. 1991) (holding that "[t]he privilege is therefore reserved for those whose interests it is designed to protect and not adverse parties or the general population."). This contradicts the general policy emphasis that the privilege exists chiefly to protect the proper working of the legal system and not to protect the privacy of individual clients. See *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998).

257. See, e.g., *Preston v. Carr*, (1826) 148 Eng. Rep. 634; *Regina v. Derby Magistrates' Court*, [1996] 1 A.C. 487 (H.L.); see also WIGMORE, *supra* note 177, § 2290, at 543. One commentator has criticized this "status-based justification for special treatment," which was apparently to spare the attorney from the "unseemly" task of having to testify in court. Fischel, *supra* note 161, at 3.

258. See WIGMORE, *supra* note 177, §2290, at 543; Hazard, *supra* note 159, at 1070.

adversarial system: among the different types of lawyers in English courts, the privilege was granted to barristers (who had the exclusive right to present evidence and argue the law in court) more often than to solicitors (who advised clients and only prepared cases for the barrister's presentation in court).²⁵⁹ The privilege protected barristers especially, because deposing a lawyer with such a direct connection to litigation would disrupt the court proceedings. Additionally, barristers were considered not just to be officers of the court, but also members of it, and as such could not be required to reveal a client's confidences, just as "a modern judge could not be [required] to disclose matters heard in camera."²⁶⁰ Initially then, the privilege belonged to the attorney.²⁶¹ Because the privilege protected the attorney's honor, the attorney could waive the privilege.²⁶² This justification for the privilege eventually fell out of favor, but the privilege itself endured, because a new justification—protecting the client's confidence in his legal adviser—was developed to replace the older one.²⁶³

It is now fairly settled that the client is the holder of the privilege, and the client may prevent any other person from disclosing confidential communications made to facilitate the rendition of professional services between the client and lawyer.²⁶⁴ The client is not the only one who can assert the privilege, but the client is the only person who has the authority to waive it. The attorney may assert it on the client's behalf.²⁶⁵ However, an attorney alone cannot assert a client's privilege when the client agrees to waive it,²⁶⁶ and an attorney cannot voluntarily waive a client's privilege when the client wants to preserve it.²⁶⁷ The holder of the privilege, the client, is the only one who can waive it voluntarily, at least with regard to testifying about confidential information.²⁶⁸ If clients choose to waive the benefits to which they are entitled, no one else has standing to complain.²⁶⁹

A corollary to this principle is that an attorney may not waive the client's privilege by testifying against the client's wishes. The privilege

259. See Hazard, *supra* note 159, at 1070-71.

260. *Id.* at 1071. Cf. WIGMORE, *supra* note 177, § 2290.

261. See Hazard, *supra* note 159, at 1071.

262. See WIGMORE, *supra* note 177, § 2290(3).

263. See WIGMORE, *supra* note 177, § 2290; Hazard, *supra* note 159, at 1070 n.39.

264. See, e.g., State v. Charlesworth, 951 P.2d 153, 164 (Or. Ct. App. 1997).

265. See, e.g., State v. Bean, 239 N.W.2d 556, 560 (Iowa 1976); State *ex rel.* Stovall v. Meneley, 22 P.3d 124, 141 (Kan. 2001). See also State v. Lender, 124 N.W.2d 355, 359 (Minn. 1963) (refusing to recognize the privilege, in part because it was not the client, the holder of the privilege, who had claimed the attorney-client privilege, nor apparently had it been asserted on her behalf).

266. See, e.g., United States v. Noriega, 917 F.2d 1543, 1551 (11th Cir. 1990); *Ex parte* Lipscomb, 239 S.W. 1101, 1103 (Tex. 1922).

267. See CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 73.1 (1999).

268. See WRIGHT & GRAHAM, *supra* note 176, § 5487.

269. Note, *Persons Entitled to Waive or Claim Privileges as to the Admission of Testimony*, 30 COLUM. L. REV. 686, 686 (1930).

prohibits the disclosure of the subject matter, and the policy of the privilege is to protect the holder's legal interests from being prejudiced by the disclosure.²⁷⁰ Because the prohibition against waiver by the attorney presumably extends not just to testifying, but also to other acts that may trigger a waiver of the privilege, the attorney has no authority to disclose confidential communications to third persons without the client's permission. The attorney thus has an obligation imposed by the privilege rules, in addition to the professional duty to maintain confidentiality, to exclude law students from confidential client communications to avoid any danger of waiving the client's rights. If the client were to consent to the disclosure of allegedly confidential information to an outsider, for example by allowing the presence of a law student observer during communications with the attorney, the client as the holder of the privilege would lose it, for lack of confidential intent.

It is in the interest of clients, individually and collectively, and of the proper working of the legal system—the underlying justification for the privilege to exist at all—to have skilled and ethical lawyers. However, the narrow client-centered focus in defining the parameters of the privilege, without regard to its effect on experiential legal education, impedes fundamental systemic goals.

VI. THE ROLE OF THE ATTORNEY-CLIENT PRIVILEGE IN DEVELOPING SKILLED AND ETHICAL LAWYERS

The law of privilege was not meant to remain frozen in time.²⁷¹ Courts have periodically reshaped privilege rules when necessary and appropriate, even though they remain conservative in defining the parameters of the privilege overall. The longer evolution of the privilege recognizes that there are consequences more detrimental to the interests of society than the rejection of evidence that might be disclosed.²⁷² Privileges exist because certain interests and values are more important than the discovery of information,²⁷³ and the attorney-client privilege exists to serve the administration of justice, not any particular client.²⁷⁴

270. *Id.* at 692.

271. *Trammel v. United States*, 445 U.S. 40, 47 (1980); *see* FED. R. EVID. 501.

272. *See, e.g., Swidler & Berlin v. United States*, 534 U.S. 399, 408 (1998); *State v. Holsinger*, 601 P.2d 1054, 1058 (Ariz. 1979) (holding that a criminal defendant does not “waive the . . . privilege when she takes the stand to testify on her own behalf”); *People v. Shapiro*, 126 N.E.2d 559, 562 (N.Y. 1955).

273. *See, e.g., Swidler*, 524 U.S. at 408; *In re Dinnan*, 661 F.2d 426, 429 (5th Cir. 1981).

274. *See, e.g., Holsinger*, 601 P.2d at 1058; *Shapiro*, 126 N.E.2d at 562.

The current scope of the attorney-client privilege rules deprives a significant number of law students of the opportunity for experiential learning with real clients, even though the attorney-client relationship is the central focus of professional ability and ethical decision making. Encouraging students to observe and participate in the work of experienced attorneys with live clients can address a critical shortcoming in current legal education. However, as discussed above, the attorney-client privilege does not apply to law students as such, and student practice rules have not solved the problem of educational access to experiential learning with real clients. Student practice rules encompass only limited student practice in defined situations and do not broadly encompass other options for experiential learning with actual clients. Thus, students who are not fortunate enough to participate in clinical law courses or who otherwise do not fall within the coverage of student practice rules must be excluded from confidential client communications to preserve the attorney-client privilege.

Many states extend the privilege to employees of the attorney, but this exception protects only those law student employees who are “necessary” to the representation. Even paid student law clerks are excluded from the coverage of the privilege if they are not necessary to the attorney’s work with that particular client. Non-employee student externs who work for course credit, students enrolled in unpaid mentor programs, and volunteer law student clerks all may jeopardize the client’s right to secrecy if they are present at any meeting involving confidential communications to the attorney. Thus, except in limited situations, law students must be excluded from the experiences that could be most valuable for their professional preparation.

Law schools are struggling to provide cost-efficient opportunities for students to learn skills in an authentic setting with real clients. Yet partnerships with the practicing bar—through volunteer clerkships or attorney mentoring programs—must be limited by concerns about the attorney-client privilege. Attorneys cannot risk their clients’ rights under the law, even in the course of fulfilling their own professional obligation to help educate future attorneys.

The legal profession has a duty to promote high standards of performance. Legal education builds the foundation, but law schools alone cannot carry the full responsibility for educating lawyers. The practicing bar plays an important role as well. Licensed attorneys, who enjoy the privilege of practicing law and representing clients to the exclusion of others, share the obligation to ensure that those entering the profession are not only competent, but also properly socialized into the profession by learning its shared ethical values. Collaborations between law schools and the practicing bar could fill an urgent need to ensure basic competence in lawyering skills before a student graduates from law school. However, the

attorney-client privilege rules restrict the kind of mentoring programs and externships that could supplement classroom learning and clinical programs in a cost-effective way.

Policy concerns ordinarily at issue about expanding the privilege do not apply to the question of whether the privilege should protect law students. The law student privilege proposed here is derivative of that of the supervising lawyer—it would not affect the scope of the privilege for licensed attorneys. No information that was not protected before will suddenly become secret if law students, supervised by licensed attorneys, are allowed the protection of the privilege. No expectations of discovery will be thwarted because of this modest extension of the privilege. Some law students enjoy the privilege already, for sound pedagogical and public policy reasons, and extending that protection to all law students will work no unfair surprise on the parties to a law suit. It will simply make an important opportunity for professional and ethical development equally available to all law students.

The need for additional experiential learning and mentoring during law school is more important than ever before, because opportunities for hands on learning in an authentic setting are severely limited in law schools, meaningful mentoring by senior attorneys in the early years of practice is declining, and the loss of mentoring is having a damaging effect on the professional skills and ethics of new lawyers. Rulemaking bodies in all jurisdictions should amend their law student practice or attorney-client privilege rules to allow the presence of law students, under the supervision of a licensed attorney, during confidential client communications.

