

# Ethics Bureau at Yale: Combining Pro Bono Professional Responsibility Advice with Ethics Education

Lawrence J. Fox

The idea came to me under gratifying circumstances. I was teaching professional responsibility for the first time at the Yale Law School. I had a very small class (more later about that). As the semester was drawing to a close, I was asked if I could prepare an amicus brief in a case called *Holland v. Florida*<sup>1</sup> on behalf of a yet-to-be-assembled group of ethics geeks, including professional responsibility teachers and practitioners. It was an exciting project but there remained only two weeks before the holidays and the brief was due New Year's Eve. How could I get this done?

I was teaching my last class for the semester when the idea came to me: maybe, just maybe, my students would help me out. I asked for volunteers, not really expecting any. But, lo and behold, two stepped forward and offered their enthusiastic services. Thus began a whirlwind three-week effort that resulted in the filing of a brief on behalf of 30 lawyers and law professors on the due date—an effort that would not have succeeded without my two student volunteers.

And the brief was quite influential. It was cited, quoted and, in part, followed by Justice Stephen G. Breyer in the Supreme Court's majority opinion<sup>2</sup> and—without identifying the source of his scorn—savagely attacked by Justice Antonin Scalia in his dissent.<sup>3</sup> But before the oral argument and long before the decision, the thought occurred to me that this partnership with students might be an approach that could be institutionalized in a new clinic at Yale Law School. I long ago recognized the crying need for pro bono

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1. *Holland v. Florida*, 130 S. Ct. 2549 (2010).

2. *Id.* at 2564.

3. *Id.* at 2575.

professional responsibility counseling. And what better place to attempt to fill a very small portion of this crying need with an educational opportunity than a law school setting?

Accordingly, I approached Dean Robert Post with the idea, thinking it would take months of addressing bureaucratic red tape before a clinic could be launched. But much to my surprise, yet totally consistent with Yale Law School's freewheeling approach to legal education, the dean immediately approved the venture, a decision made easier, I am sure, by the fact that I sought no funding. So before I knew it, the Ethics Bureau at Yale was listed in the Yale Law School's Course Guide for the spring semester of 2011<sup>4</sup> and I started preparations for what I hoped would be a successful experiment. Now, on the basis of our short-term success, I write in the hope that others in the law school world will take the leap and start their own ethics bureaus. Heaven knows, the need for these services is significant. As you read this essay, keep two things in mind: we have operated for just one semester and yours truly has never run a clinic, let alone started one.

## I. Establishing the Clinic

### *A. Funding the Project*

As already noted, the dean's prompt approval of the Ethics Bureau probably was far easier because I asked for no funding. This was only possible because I am a partner at Drinker Biddle & Reath and the resources of my law firm, and in particular, my loyal assistant Bea Cucinotta, were available to provide the back office help that we desperately needed. Looking at the amount of work produced, I would think that, without this support, a part-time assistant,

4. The clinic was described as follows: Pro Bono Professional Responsibility Advice (20604). 3 units. Lawyers' need for ethics advice, consultation and opinions is not limited to those who can pay. Impecunious clients and the lawyers who serve them are in need of ethics counseling and legal opinions on a regular basis. For example, Yale law students provided essential help in preparing an amicus brief in *Holland v. Florida*, a Supreme Court case from the 2009 Term that resulted in a victory for the petitioner and an extensive citation to the amicus brief in the majority opinion. The Ethics Bureau provides these essential services for those who cannot retain paying counsel. The work of the Bureau will consist of three major components. First, the bureau will provide ethics counseling for pro bono organizations such as legal services offices and public defenders. Second, the bureau will prepare standard of care opinions relating to the conduct of lawyers who are needed in cases alleging ineffective assistance of counsel and other challenges to lawyer conduct, cases in which the clients are impecunious and otherwise cannot secure expert assistance. Third, from time to time, the Yale Ethics Bureau will provide assistance to amici curiae, typically bar associations or ethics professors, on questions of professional responsibility in cases in which such issues are front and center. It did so in a United States Supreme Court case, *Maples v. Allen*, argued in the 2010 Term, awaiting decision. The students working at the bureau will meet for class two hours per week and will be expected to put in approximately ten hours on bureau projects each week. The classroom work will not only explore the ethical minefield, but also consider the role of expert witnesses in the litigation process, its appropriateness and the procedural issues thereby raised. The course has no prerequisites. Enrollment limited to eight. Permission of the instructor required. L. Fox.

devoting one-third to one-half time, would be essential. I also think that, to do this right and on a long-term basis, it would be necessary to have a younger fellow or graduate student to help supervise the students.

### *B. Recruiting Business*

Like any other partner in a for-profit law firm, the thing that I worry about every day is whether my phone will ring, whether the last call was my last new client. That neurosis carried over to the launching of the Ethics Bureau. To ameliorate my concerns, I blanketed my friends in the public service community with news about my plans. I also appeared at a number of continuing legal education seminars for public interest lawyers, including the NAACP Legal Defense Fund's Airlie Center Capital Defense Seminar in August where I took three minutes out of my program for a paid political announcement.

I need not have worried. The Ethics Bureau got more than enough business in its first semester from a wide variety of sources and covering an even wider variety of issues. That splendid result seemed to fulfill that old saw that if you give away your services, there will be no end to the number of people who will demand them.

Notwithstanding that early success, I still worry about new business. I continue to promote the bureau any way I can. We received helpful coverage in the *ABA Journal* and, most recently, I returned to Airlie Center, pleased to identify a large number of Ethics Bureau clients in the audience. I urged others among this talented and committed group to consider professional responsibility issues when they address ineffective assistance of counsel claims and other matters that call for ethics analysis, evaluation and advocacy.

### *C. Recruiting Students*

I also held my breath. Amidst an abundance of intriguing clinic offerings at Yale Law School, I wondered whether any students would sign up for this new one. In addition, I thought long and hard about whether to require a course in professional responsibility as a prerequisite for participating in clinic work. I ultimately decided against a prerequisite. I ended up with seven students, two of whom had taken my course. The other five had never taken a course in professional responsibility. To respond to this fact, I made a significant portion of our two-hour weekly class sessions address key aspects of the standard ethics course.

### *D. Time Commitment*

The clinic offered the students three hours of course credit. Two of those credit hours arose from classroom meetings and the third from the required 10 hours of out-of-class work. My sense is that each of my students dedicated far more than the required minimum in out-of-classroom research and writing. As I assume is the case in other clinics, once the students became engaged in

the project, they stopped watching the clock, in several cases working over weekends and late into the night because of looming deadlines.

#### *E. Ethics Credit*

At Yale Law School, any professor is free to designate his or her course with an asterisk, meaning that it fulfills professional responsibility requirements. I eventually decided to provide ethics credit for participation in the clinic and it would not surprise me that the asterisk was what motivated, at least in part, five of my students to take the course.

In my view now, however, I do not think that providing ethics credit was appropriate. The five students who had not taken my course did not get the comprehensive and organized approach to the subject that I would hope every law school student receives before graduation. Rather, they addressed ethics issues in the random way they were presented by our clients, whose needs unsurprisingly did not arise in a way that would assure coverage of all the critical topics in professional responsibility.

This year I have no similar concerns. Five of the seven students in the clinic last year have signed up again, and the other two spaces in the clinic will be filled by students who took my professional responsibility course in the spring of 2011. Whether I will be lucky enough to have that future level of “repeat business” is anybody’s guess.

## **II. Representative Engagements**

This section will describe engagements the bureau handled this semester. But it is not a comprehensive description of every case. In some instances, confidentiality issues prevent me from discussing matters addressed. (It certainly would be inappropriate for the bureau’s supervising lawyer to breach confidentiality rules and obligations to promote the idea of an ethics clinic.) In others we have permission to describe the matter, but not the parties, lawyers, judges and courts involved. Finally, in other situations we have gotten permission to give considerably more detail.

#### *A. Contact with Represented Parties: Rule 4.2.*

We were asked to provide guidance on Rule 4.2 to a not-for-profit legal services organization. The agency had been bedeviled by repeated attempts by an adverse party to contact agency lawyers directly. We advised the client both about the proper interpretation of Rule 4.2, which limits a lawyer’s contact with a person represented by another lawyer in the matter at issue, and how to ameliorate the problem.<sup>5</sup>

5. Model Rules of Prof'l Conduct R. 4.2 (2004) provides: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

*B. Sexual Relationship between Judge and Defender.*

As we will see, sex became a theme for the bureau's work. In this situation we were asked to address the propriety of an arrangement in which a sitting judge, in an amorous relationship with a public defender, had all of that lawyer's cases assigned to the judge's courtroom. We addressed both the question of the conflict of interest—a conflict that is in some ways counter-intuitive—as well as remedial steps that must be taken to inform the former clients of this defense counsel. In the process we wrote an appropriate analysis of the problem as well as a potential editorial that could be used to shine a light on this situation.

*C. Limited Scope Representation.*

The judges of a federal district court asked our clinic to provide them with guidance on how the court might establish a limited scope help desk in their courthouse to be manned by volunteer lawyers who would assist litigants representing themselves on how to proceed. The goal, of course, was to determine to what extent lawyers could provide such pro se services while avoiding full-fledged or limited representation.

*D. Reimbursement Crisis.*

The federal courts play a supervisory role in funding of the defense of capital cases, requiring lawyers to petition for authorization to proceed and limiting the amount of reimbursement. The clinic was asked to provide an analysis of the judicial obligations thus created as well as to address questions related to the significantly disparate treatment that arises among different circuits in handling the reimbursement process.

*E. The Minister of Justice Function.*

The Ethics Bureau prepared an expert witness report in support of a motion to disqualify a prosecutor in a capital case. The case was about to be retried decades after a first trial and conviction—reversed for prosecutorial misconduct by the same prosecutor who planned to retry the case. After the prosecutor made multiple public statements that seemed to reflect a vendetta, our clinic explored the contours and ethical limits requiring prosecutors not simply to secure convictions, but to see that justice is done.

*F. Sex with Client's Wife.*

The Ethics Bureau prepared another expert witness report to address the not-as-unusual-as-you-might-think situation in which defense counsel was carrying on a clandestine affair with the defendant's wife, before, during and after his representation. In preparing its affidavit, the bureau addressed the conflict of interest created and developed an argument explaining why, under such aberrational circumstances, it is an unfair burden for a criminal defendant to have to demonstrate actual prejudicial effect to secure a new trial with an unconflicted lawyer.

*G. Ineffective Assistance of Counsel.*

The Ethics Bureau provided research to lawyers handling an ineffective assistance of counsel case that involved another critical conflict of interest, this one created by the defense lawyer's willingness to handle the case for no fee in return for publicity rights to the client's case. This was a clear violation of our rules and also one that would affect the quality of the defense, particularly, as the clinic noted, when the lawyer had no funds to move forward.

*H. Two Jail House Snitches: Lakemper v. Georgia.*<sup>6</sup>

The Ethics Bureau was asked to provide ethics advice and, thereafter, an expert witness affidavit, for Georgia Capital Defenders, which was confronted with a situation in which two clients of the office, charged with separate capital crimes, had turned on one another in a way that made each client's potential testimony relevant to any penalty phase of these capital cases. We counseled the Defenders office that it was required to withdraw from both representations because of the conflict of interest. When the court agreed reluctantly only to permit the Defenders office to withdraw from one of the representations, we provided an expert witness report explaining why that still left the Defenders office in an impossible conflict of interest situation because it would be required to discredit and cross-examine the former client.

*I. I'll Scratch Your Back; You Scratch Mine: Busby v. Thaler.*<sup>7</sup>

In this case the Ethics Bureau was asked to provide an expert report on an unusual situation in which two lawyers, A and B, became co-counsel for Client C. Prior to this engagement, Lawyer A had undertaken a habeas petition arising out of a different case on behalf of Client D in which Lawyer B had been counsel at trial. So he was placed in a position in which, on behalf of Client D, he needed to attack Lawyer B's conduct while partnering with Lawyer B on behalf of Client C. To compound matters, Lawyer B was then appointed to handle a habeas petition on behalf of Client E in which Lawyer A's conduct would be the subject of the habeas petition. In other words, lawyers working together for the benefit of one client were required in other cases to raise ineffective assistance of counsel claims against each other, creating an impossible conflict of interest. Our expert report asserted that both habeas clients were being ill-served because of the likelihood that Lawyers A and B would each pull punches in handling their respective habeas claims.

*J. Sullivan & Cromwell Abandons its Client: Maples v. Thomas.*<sup>8</sup>

The icing on our cake, if not the cake itself, was our opportunity to provide an amicus brief on behalf of 91 ethics professors and practitioners and the

6. Superior Court of Newton County, State of Georgia, Indictment No. 2006-CR-901-3.

7. United States District Court, Northern District of Texas, Fort Worth Division, Civil No. 4:09-CV-160-Y.

8. *Maples v. Thomas*, 132 S.Ct 912 (2012).

Ethics Bureau in an important Supreme Court case. Cory Maples was on death row after an Alabama conviction. Sullivan & Cromwell junior associates filed a state habeas case on Mr. Maples' behalf, then left the firm a year later but never withdrew from the case. No other Sullivan & Cromwell lawyer replaced them. As a result, when notice of the dismissal of the state habeas petition was sent to the Sullivan & Cromwell mailroom, the notice was returned to the court clerk with a note that they were "no longer with firm." No state appeal was filed. Consequently, Maples' federal habeas corpus petition was dismissed on the ground that he had defaulted on all of those claims by not appealing the state adjudication in a timely manner.

The Ethics Bureau's brief addressed the multiple breaches of fiduciary duty by Sullivan & Cromwell, urging the Supreme Court to find those ethical violations a basis for concluding that Maples was abandoned by his lawyers, thereby entitling him to relief. We all hold our breath as an October argument of this case approaches.

### **III. What Did The Students Learn?**

#### *A. Our Approach*

Before tackling this difficult topic, perhaps I should share the structure of our approach to clinic work. First a confession: I had practiced law for more than 40 years and been a partner at Drinker Biddle & Reath for 35 but had no experience with law school clinics. I had been a classroom teacher only since 1999. So at the start I simply thought of the clinic as an extension of my Drinker experience—a partner with seven very bright and eager associates but without the authority to ask them to work 60 hours a week, weekends, late nights and to meet any time, day or night; you get the contradiction. I was hesitant about supervising as many as seven but relaxed when I realized that all seven were unlikely to need as much supervision as two full time associates, a calculation that proved correct.

We met once per week for two hours (two academic 55-minute hours). Attendance was outstanding. And each of my students was an active participant in all of our activities. Even our moot court All-Star showed up for the first half of the clinic, the night of his grand performance as best oralist!

Each new inquiry was forwarded to all students days before it would first be discussed. In class we talked over whether the matter was worthy of our attention and whether there was any likelihood that a conflict of interest might be involved. In most cases, the importance of the matter was manifest. In a few we had a work-up done by a team of two to be brought back during the next week's class session. In the end, we accepted every matter we were asked to consider, a winning stretch I doubt will continue. This deprived us, however, of the opportunity to deal with the crunching triage decisions that I know many clinics face—a frustrating but pedagogically interesting dilemma that we had the good fortune to avoid.

Next, I asked for volunteers, in almost all cases two students, to draft an initial memorandum. One of the most important opportunities the clinic could offer was having the staff work collaboratively. To accomplish this, I allocated responsibility to two students asking them to work together to provide the group with a finished product. I did so because I considered teamwork essential for my students. In each case, I sought the traditional approach of a legal memorandum and often a review of the prior case record, followed by attempts to draft the final product. Those memoranda were then circulated to the entire group which took whatever class time was needed to make substantive and editorial suggestions to the team that had produced the drafts. For me, these in-class sessions, which similarly addressed drafts of the final work, were the highlights of the learning experience, my students exhibiting both a critical eye and splendid goodwill.

When it came to going from memorandum to the advocacy piece (required by some, but not all of the situations), I may have insinuated myself too much, acting exactly like I typically do on matters at my law firm and preparing the first draft of the brief, then letting the students edit my work. I think now that they would have been better served if I had stayed my hand (as I did when it came to the *Maples* brief), and let the students have the first crack at what would be the final product.

The next step was to send our work product off to the lawyer-client for review and comment. It was gratifying to learn in most cases that we had it right but as much learning occurred from clients' fair criticism. Sometimes we got the facts wrong. Sometimes (often my fault) the tone was too partisan. Uniformly, our product was met with gratitude from clients, not unlike my lawyer clients in private practice, who for reasons I do not understand, find professional responsibility terra incognita and are so thankful to have the opportunity to consult ethics geeks for whom this opaque topic is a specialty.

### *B. Advocacy vs. Objectivity*

One of the hardest leaps for law students to make is between the objective view of a matter fostered by close reading of judicial decisions and judicial attempts to "get it right" and fierce advocacy from a client's point of view. While I admired my students' objective, analytical, almost Olympian, approach and the conscientiousness from which it arose, I wrestled with them to feel comfortable ethically with the partisanship that is often necessary in advocacy writing. That, quite simply, is our role. It was even more interesting to encourage the students—as professional responsibility advocates—to be comfortable not telling the court about all of the warts that a given matter presented.

### *C. Role Differentiation*

We wrote memoranda of law, briefs on behalf of parties, an amicus brief and expert witness reports and affidavits. Each presented its own challenge and required answering different questions on both approach and tone. Though

I fear I did not spend enough time addressing these different roles, we did consider, for example, how writing a brief on behalf of a group of ethics professors for the United States Supreme Court would differ in approach from the petitioner's brief we were supporting. Similarly, we addressed the differences between the advocacy approach in briefs for trial court litigation and how an expert might cast the same arguments in a way that reflects "disinterested" support for similar propositions.

#### *D. Negotiating with Clients*

Though few of our lawyer clients had anything other than constructive suggestions for our work, the process of producing an amicus brief that won 91 signatures (mostly academics with a few academic wannabe practitioners thrown in) was a window for our clinic students into the art form that is legal advocacy—so many points of view, so many critics, so many suggestions, all well-intentioned and heartfelt, some non-negotiable, others merely friendly. The process of addressing this torrent (every helpful email circulated to all) was in large part supervised by Professor Susan Martyn of the University of Toledo,<sup>9</sup> with whom I have co-authored numerous books on legal matters. Her work provided our students with an instructive view of disparate, often mutually inconsistent views. Her diplomacy in handling the needs of all our clients, in the end losing precious few on principle, was equally instructive.

#### *E. Attorney Client Privilege, the Work Product Immunity and Confidentiality*

Among the key topics I address in my course on professional responsibility are privileges (rules of evidence) and confidentiality (the rule of professional conduct). I do so, in part, because the topic is important and, in part, because in my experience seasoned practicing lawyers do not get it right, interchanging phrases (even on privilege logs) and otherwise misunderstanding the significant differences and divergent obligations thereby created. I was, thus, disappointed when this topic never became the centerpiece of any of this semester's work, proof to me that it is highly unlikely a clinic that claims it teaches ethics sufficient to fulfill the ABA requirement,<sup>10</sup> can in fact accomplish

9. Susan and I have co-authored the following books: *Legal Tender: A Lawyer's Guide to Professional Dilemmas* (ABA 1995); *Traversing the Ethical Minefield* (Aspen, 1st ed. 2004, 2d ed. 2008); *Red Flags: Legal Ethics for Lawyers* (American Law Institute, 1st ed. 2005, 2d ed. 2010, sup. 2009); Susan R. Martyn, Lawrence J. Fox & W. Bradley Wendel, *The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes* (Aspen, 2006-2007 ed., 2007-2008 ed., 2008-2009 ed., 2009-2010 ed., 2010-2011 ed., 2011-2012 ed.); *Your Lawyer, A User's Guide* (Lexis Nexis 2006); *Raise the Bar: Real World Solutions for a Troubled Profession* (ABA 2007); *How to Deal with Your Lawyer: Answers to Commonly Asked Questions* (Oxford Univ. Press 2008); *The Ethics of Representing Organizations: Legal Fictions for Clients* (Oxford Univ. Press 2009); *A Century of Legal Ethics* (Lawrence J. Fox, Susan R. Martyn & Andrew S. Polis, eds., ABA 2009).
10. ABA Standards and Rules of Procedure for Approval of Law Schools Standard 303 (2011-2012) presently provides: "A law school shall offer a curriculum that is designed to produce graduates who have attained competency in the learning outcomes identified in Standard

that goal simply by addressing the professional responsibility matters that its clients present. In any event, our longest academic class session was devoted to this topic and I have great hope that none of these seven students will ever confuse confidentiality with the attorney-client privilege.

#### *F. Disappointment and Frustration*

The clinic spent a great deal of time working hard on two projects in which the conclusions were not really helpful to the clients. Though we tried our best, the work we delivered was less than inspiring. That, of course, in itself was a service. We certainly did not think our clients should pursue strategies or approaches that were unavailing. And the students, as a result, learned the lesson that, if you have arguments with merit, you probably do not want to tarnish what you consider winning arguments by trying out long shots (habeas cases being the exception that proves the rule). But, more importantly, I think it was crucial for students to learn the limits of advocacy, the art of the possible and not getting too down when we were unlikely to achieve our client's goals by pursuing a particular approach.

#### *G. The Pervasiveness of Ethics Issues*

I always start my professional responsibility classes by telling my students that the most important class law students will take is the course on the law governing lawyers. All the other courses make the students better lawyers for their clients. But professional responsibility teaches them about protecting themselves. Every day the practice of law will present them with ethical dilemmas and—far more often than they might anticipate—these issues will be difficult to resolve. By addressing so many ethical issues raised by our clients, the Ethics Bureau students learned this lesson in a way that my classroom lecturing never could accomplish.

### **IV. What I Learned from Teaching the Clinic for the First Time**

#### *A. It's All About Me*

One of the things that concerns me about the clinic is that a large part of our work involved requests for expert assistance in support of ineffective assistance of counsel claims, motions to disqualify or recuse, or petitions to withdraw. This meant that the work product of the clinic was a formal report or affidavit from the instructor. The work thus had the secondary effect of enhancing my own professional standing based on the brilliant efforts of my students. Such a result is probably a significant characteristic of any work that would be done by a clinic like this one. Whether this is appropriate and the cost incurred is outweighed by the benefits to students and clients is, of course, for others to decide. But I did not want the reader to think I am unmindful that these students are greatly assisting my own pro bono career.

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302 and which, in addition, requires substantial instruction in the history, goals, structure, values and responsibilities of the legal profession and its members.”

### *B. Client Contact*

One of the matters that concerned me was that my clinical students would not have the client contact that provides much of the benefit for students doing clinical work. Moreover, our clients would be other lawyers, which might not provide the same level of satisfaction that often comes from dealing directly with a client facing serious problems like loss of a home or deportation. This problem was partly ameliorated because the clients of our clients, by and large, were in real need, often facing capital punishment. Nonetheless, the clinic work did not provide the direct interaction one would get normally at an on-site clinic.

On the other hand, we did have some special opportunities. In one case the lawyers who were seeking our advice spent significant time with the group. In addition, my students enjoyed a special treat while drafting the *Maples* brief, when my ultimate guru, Anthony Amsterdam of New York University, joined us for a long substantive and strategic session over the telephone.

### *C. Team Work*

I believe strongly that one of the great benefits of clinical experience is the opportunity to work together—learning to allocate responsibility, cooperate and be accountable to another individual. These are all important learning goals. There were a number of matters, especially *Maples*, in which every student was assigned a role. And in no case did a student work individually, with at least two students assigned to every engagement we accepted. This worked out well and I had no sense that in any of these partnerships did a student fail to carry his or her weight.

### *D. The Capital Case Slant*

A review of our projects shows a heavy emphasis on capital cases. This is not surprising given the level of resources demanded by these cases. It is also a reflection of the fact that capital defense lawyers are increasingly more sensitive to professional responsibility issues and the need for significant assistance to address them. I do not think this emphasis had a deleterious effect on our program. The descriptions of the matters handled also show that the capital cases introduced us to a broad range of ethical issues.

The capital cases also taught the students a lesson that, much to my dismay, I have learned over the years. The rules of professional conduct are powerful obligations of our profession. Compliance does not bring rewards but violations of the rules subject a lawyer to discipline, malpractice claims and other sanctions. This represents a fine regulatory regime for controlling lawyer misconduct and protecting clients except in one critical category: those on death row. A lawyer lapses, a client suffers. Yet, for capital defendants, a malpractice claim or a referral to the disciplinary authorities is a hollow remedy. The only meaningful remedy for one of these defendants is to escape the effects of the lawyer's lapse through habeas relief. But ignoring this reality, the

Supreme Court has placed the burden on the client moldering on death row to prove that—but for the lawyer’s conflict—the client would not be on death row. Or worse yet, it has permanently stuck the death row inmate with the lawyer’s missed deadline for filing an appeal, even if the appeal would have been won. Two of the matters we investigated introduced our students to these aspects of this judicial travesty—a lesson in the injustice infecting the Supreme Court’s habeas jurisprudence that I know left an indelible and disquieting impression.

#### *E. The Role of Pro Bono*

One of the delights in supervising and teaching this clinic was the intersection between the clinic and the world of pro bono legal services. There was, of course, the fact that we were providing our services on that basis. If we had been advising law firm lawyers on a paying basis, the ethical conundra might have been just as challenging and the search for a solution equally intellectually satisfying. But the fact that our work was pro bono, and particularly the fact that so few pro bono resources are available in the professional responsibility area, made the work that much more rewarding.

I also used the pro bono legal services theme, as I do in my regular course, to open the clinic’s classroom instruction. I had the students grapple with what kind of mythical for-profit law firm we would want to be, whether we would take on pro bono matters. That raised these questions: How would we decide which matters to accept? How much pro bono work should we undertake? Should everyone in the firm be required to do pro bono work? Would we take on unpopular and controversial matters, and, if so, could one lawyer veto such engagements on the basis of conscience or principles? What would happen if a majority of our colleagues were opposed to taking on a new matter? And how much would pro bono “count” toward our firm’s billable hours requirements.

We also addressed in class the questions of whether, as a matter of professional responsibility, the ABA Model Rules should mandate pro bono and, if so, how many hours would we require? These other questions also arose: Should the requirement be an individual or collective mandate? Might we permit lawyers to buy out of their obligations and, if so, for how much? And, finally, what should count as pro bono work? The orchestra board? The Audubon Society? Needless to say, as fascinating as these topics are in my regular class, they took on an immediacy in the clinic context.

Last, because our clients were all lawyers (or judges), all working in public service positions for government agencies or not-for-profits, our work gave students a terrific window into that community: How it operates, who the clients are. It was a survey window unlikely to be duplicated on such a scale in other clinics.

### *F. Intake*

One of the matters I hoped to teach the students was the intake process. I envisioned discussions of priorities and merits, collectively deciding what to address with our limited resources. The bad news was we did not spend a lot of time on intake. We did discuss as a full group each new matter we considered, in some cases directly with the referring lawyer. We talked about, and even conducted preliminary research on, proposed engagements. But the really good news was that we were able to handle every opportunity that came along. It required some nights and a few weekends but each matter was challenging and worthy of our attention.

We also considered whether any new matter we considered could be a conflict of interest for any of my students or me. But pedagogically this process was a bust because the likelihood of a conflict arising, given the nature of the matters, the parties involved, the clinic members' status as students and my partnership at Drinker Biddle & Reath was remote. However, I did enter almost all of our engagements into the Drinker database, the exceptions being short-term matters where it was impossible that a conflict could exist.

### *G. Continuity*

In the beginning I saw this project as lasting just one semester. But within weeks, I decided that our goal should be to institutionalize the Ethics Bureau. This goal was satisfied when the students eagerly suggested that they might sign up for a second semester (a suggestion that has since become a reality).

But continuity has two dimensions. One, of course, is the problem every law school clinic faces, the fact that our clients' needs and judges' dockets do not conform to two 14-week semesters with time off for classes and exams. We were able to finish all of the engagements we took on in the semester, with only one exception: the *Maples* amicus brief slopped over past the exam period. That might happen again because of the special nature of the work we are doing. We are not handling the underlying cases or matters. We are simply providing counseling, brief writing, expert opinions and other self-contained pieces of the larger tapestry, matters that take weeks, not months, and tend not to return to us once the initial work is completed.

And what of summer, when students would not be on campus? Sadly, it did not occur to me that I might be able to hire law students to work with me when classes were not in session. And when I found out that it was possible, it was too late. So that is next year's solution. But for this year, I turned to the resources of my law firm—including two summer associates—to help with the few matters that trickled in while my clinic students were being summer associates somewhere else. Not every ethics clinic supervising lawyer would be so lucky. But my conclusion is that operating this kind of a clinic during the summer should not be a problem, even if there is not a 600-lawyer firm offering life-saving services.

### V. More Clinics

What of the future? That is the big question. One hope is that other schools will adopt similar clinics to fill the huge need, the motivation for this essay. My hope is that the Ethics Bureau at Yale will continue to receive the support of our dean and faculty. I think the chances of the clinic continuing will also be greatly enhanced if I can convince a younger lecturer or clinical professor to lend a hand, someone who eventually can succeed me when I am further into my dotage.

I have received a number of inquiries about replicating the Yale clinic. One thing is certain: there is plenty of demand for these services. While there are certainly downsides to the clinical experience here compared with more traditional legal services clinics, I think some of the upsides (the sophistication of the lawyers, clients and the difficult issues presented) more than made up for the deficits.

### Epilogue

Because of the long interim between the writing of this article and its publication, we have had the benefit of seeing the work of the clinic from that first semester come to fruition. Not surprisingly, one can conclude “it was the best of times and the worst of times.” Several of the matters ended with no relief for the underlying claims of our client’s client. But two matters brought truly gratifying relief.

In the first, the matter involving the client whose lawyer was carrying on an affair with the client’s wife, the Ohio court granted the client a new trial based on the conflict of interest without requiring a demonstration of actual prejudice. The conflict of interest was deemed serious enough that the court felt compelled to rectify what was a clear assault on client loyalty by the lawyer involved.

Most spectacularly and gratifyingly, the amicus brief that the Ethics Bureau filed in *Maples v. Thomas* yielded splendid pedagogical moments, as well as excellent results. In October 2011, on “First Tuesday,” the entire clinic attended the oral argument in the Supreme Court, courtesy of Justice Alito. None had ever attended a Supreme Court argument before, and seeing their work product become the grist for multiple questions, particularly from Justices Ginsburg and Kagan, was wonderful to behold.

That memorable event was topped on January 18, 2012 when the United States Supreme Court issued its opinion in this case, voting seven to two—with only Justices Thomas and Scalia dissenting, Justice Alito concurring—that Cory Maples was entitled to return to the point in the procedural morass of capital litigation where Sullivan & Cromwell had abandoned him, with an opportunity to have habeas review in federal court. Justice Ginsburg’s opinion not only followed the reasoning of the Ethics Bureau’s amicus brief, quoting it a few times, but in footnote 8 Justice Ginsburg cited to the brief and adopted

the Ethics Bureau's argument that Sullivan & Cromwell was operating under an impossible conflict of interest when it continued to represent Maples after the law firm itself had failed to meet the required deadlines. Amicus curiae practice does not get any better than this, and it will be hard to imagine these students having a more exciting or memorable litigation opportunity than this one, at least in the first few years of their practice.

From a broader perspective, the clinic has now operated for four full semesters and is on its way to becoming institutionalized. Students have remained enthusiastic, and many have spent more than one semester participating and encouraging others to do so. The range of engagements has remained quite broad, and the concentration of matters arising from capital litigation continues. In fact the students have sold newcomers on joining the clinic, calling it the Stealth Supreme Court-Capital Litigation Clinic.

The demand for our services outstrips our capacity now, and I have continued to encourage others to replicate the example we have established.<sup>11</sup> My hope remains that this article will go a long way toward accomplishing this latter goal.

11. As this article was in page proof, I learned that my great friend, Barbara Gillers, has just received approval to start the Ethics Bureau at NYU. Barbara's (and Stephen's) daughter, Gillian, has been a stalwart member of the Ethics Bureau at Yale.