



2008

The Ethical and Legal Basis for Student Practice in Clinical Education in the United States and Japan: A Comparative Analysis

Robert Rubinson

University of Baltimore School of Law, rrubinson@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac



Part of the [Legal Education Commons](#), and the [Legal History Commons](#)

Recommended Citation

The Ethical and Legal Basis for Student Practice in Clinical Education in the United States and Japan: A Comparative Analysis, 4 *Omiya Law Review* 97 (2008) (*Japanese Law Review*).

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

Omiya Law Review

No.4 : February 2008

Final Lecture

Public Law and Private Law: Application of Private Law in Administrative Legal Relations *Hiromasa MINAMI*

Articles

Criminal Sanctions for Insider Trading *Masakazu UEDA*

Some Problems With the Retrial of the *Yokohama Jiken*, a Case Concerning

Suppression of the Press in Wartime. (1) *Tatsuyuki SHINYA*

Japan's Bar Associations and Human Rights Protection
..... *Lawrence REPETA*

Antitrust Categorical Analysis for Horizontal Restraints: Focusing on the Rule of Reason Approach
..... *Koji SUMIDA*

The Ethical and Legal Basis for Student Practice in Clinical Education in the United States and Japan: A Comparative Analysis *Robert RUBINSON*

Research Note

Disclosure of Corporate Information Under Information Disclosure Laws: Should the Government Disclose Information Voluntarily Received From Corporations on the Condition That It Not Be Made Public? *Akiko UO*

Case Comment

Liability of Directors Related to Political Contributions: Kumagai Gumi Corporation Cases *Yoshihiro KITAZAWA*

Public Lecture

Open Government Laws in the United States *Alan B. MORRISON*
translated by Takashi KONDO

Miscellanea

Omiya Law School

4-333-13 Sakuragicho, Omiya-ku, Saitama-shi

Saitama 330-0854, Japan

**The Ethical and Legal Basis for Student Practice
in Clinical Education in the United States and Japan:
A Comparative Analysis**

Robert Rubinson

| | | |
|------|--|-----|
| I. | CLINICAL EDUCATION IN THE UNITED STATES..... | 99 |
| II. | CLINICS, ETHICS AND SUPERVISION IN THE UNITED STATES | 103 |
| III. | CLINICS, ETHICS AND SUPERVISION IN JAPAN..... | 109 |
| IV. | CONCLUSION..... | 111 |

The author gratefully acknowledges the support of the faculty and staff of Omiya Law School for inviting him to Japan and providing comments on this article.

Biographical Note: Professor Robert Rubinson is Professor of Law and Director of Clinical Education at the University of Baltimore School of Law. He has taught Professional Responsibility since 1998 and has authored articles and contributed to books on legal ethics. He acted as Reporter for the Maryland Court of Appeals Select Committee to Study the Ethics 2000 Amendments to the ABA Model Rules of Professional Responsibility. In that role, he was primarily responsible for drafting extensive amendments to the Maryland Lawyers' Rules of Professional Conduct. He has spoken to international audiences about matters relating to legal ethics and clinical education and has served as Chair of the Maryland State Bar Association's Section Council on Legal Education and Admissions to the Bar. He has presented at two Symposia on clinics in Japan in 2005 and 2007. A Japanese translation of the speech that Professor Rubinson delivered at the First All-Day Clinic Symposium held in Tokyo on March 18, 2005 is published in *The Dawn of a New Model for Legal Education*, (Omiya Law School, 2007), at 233.

INTRODUCTION

Clinical legal education is currently undergoing a surge of interest and development in Japan¹⁾. This raises numerous opportunities as well as difficulties. One of the most vexing issues concerns the scope of work a clinic student in Japan can do. This issue is particularly difficult given that in Japan there are currently no "student practice rules" so common in the United States²⁾.

The norms and rules governing what activities law students can perform in the United States might assist those interested in clinical education in Japan as they work through these issues. This article will attempt to do this. I will first offer

¹⁾See generally Peter A. Joy et al, *Building Clinical Legal Education Programs in a Country without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 Clin. L. Rev. 417 (2006). For a history of legal education in Japan and reforms that are currently underway, see Eri Osaka, *Debate Over the Concept of the Competent Lawyer in Japan: "What Skills and Attitudes Does Japanese Society Expect from Lawyers?"* INTERNAT'L J. Soc. L. 1 (2007).

²⁾See e.g., Maryland Rules Governing Admission to the Bar Rule 16.

a brief background of the history and current acceptance of clinical education in the United States and then survey American rules as a means of conceptualizing a framework for pursuing clinical education in Japan and defining the scope of work Japanese clinic students can perform.

I. CLINICAL EDUCATION IN THE UNITED STATES

Despite the current pervasiveness of legal education in the United States, this has not always been so. A brief overview follows about how this came about. This section will serve as a prologue to the more specific discussion that follows. Following this history, the article will briefly describe the current status of clinical education in the United States and how it has become an accepted — indeed celebrated — aspect of legal education among practitioners, judges, and many law schools.

This section presupposes little or no knowledge of clinical education in the United States. Readers who are familiar with the general history of American legal education may wish to proceed directly to section II.

A. American Clinical Education: A Brief History

The history of legal education in the United States, in some respects, mirrors recent developments in legal education in Japan, although these developments in the United States played out over almost two centuries³⁾.

Prior to American independence, there were no law schools. From the founding of the United States to roughly the middle of the nineteenth century, there was some organization of law schools, although attendance at these institutions was not necessary in order to practice law and apprenticeship in law practice was an important means to prepare for a career as a lawyer. While legal education became more accepted by roughly mid-century and virtually all states had established "bar examinations," these examinations bore little resemblance to the examinations offered today; they were informal and generally administered orally.

³⁾The history that follows is based on the account contained in Lisa Lerman & Philip Schrag, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW*, 584-89 (2005) and in Robert Stevens, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S* (1983).

Later in the nineteenth and early twentieth century, apprenticeship requirements became more widespread and the bar examination became more formalized. Finally, as the twentieth century wore on, within the span of a very few years law school at last became the primary means of entry into the profession. There was a sea change on this; in 1923, no state required attendance at law school as a prerequisite for admission to the bar; by 1941, virtually all states required attendance as prerequisite for admission.

Roughly at the same time that law school became a more entrenched and, in time, the exclusive means of access to the legal profession, the nature of legal education in the United States changed. In the latter part of the nineteenth century, Christopher Columbus Langdell, Dean of Harvard Law School, formulated the "case method" as the key to legal education⁴⁾. By focusing on appellate cases, this method submerged the experiential element of legal education. Langdellian pedagogy defined American legal education for over a century and, in many respects, continues to do so to this day.

This is not to say that there were not critics of the case method. In a famous critique, Jerome Frank in 1933 called for a "clinical law-school."⁵⁾ Frank disputed Langdell's conception that cases are "the exclusive repositories of the wisdom which law students must acquire to make them lawyers."⁶⁾ In some respects, Frank's critique harked back to an earlier time, when apprenticeships and "real experience" in law constituted the foundation for admission to the bar. Indeed, the inadequacies of the exclusive reliance on the case method slowly became recognized, with the result that roughly thirty years after Frank's critique, clinical legal education slowly infiltrated the academy⁷⁾. This recognition in many respects

⁴⁾Stevens, *supra* note 3, at 53.

⁵⁾Jerome Frank, *Why Not a Clinical Law School?*, 81 U.P.A. L. Rev. 907 (1933).

⁶⁾*Id.* at 907.

⁷⁾For an exhaustive bibliography on the history of clinical education and on different aspects of clinical pedagogy in the United States, see J. P. Oglivy, *Clinical Education: An Annotated Bibliography* (2005) (available at <http://faculty.cua.edu/ogilvy/Biblio05clr.htm>).

reached its culmination in the "MacCrate Report" issued by the American Bar Association in 1992⁸⁾. The MacCrate Report, at bottom, placed Langdellian "case method" into a much broader range of "skills" and "values" that furnish the basis for effective and appropriate legal education.

B. Clinical Legal Education in the United States: A Turn of the Century Status Report

Clinical education is now firmly entrenched as a crucial element of legal education in the United States. The importance of clinical education has been recognized by different groups across the legal profession.

One of the foremost proponents of clinical education in the United States is the American Bar Association ("ABA"). While usually recognized as an organization comprised of practitioners, the ABA is comprised of all legal professionals, including private attorneys, judges, prosecutors, and academics⁹⁾. The MacCrate Report was prepared under the auspices of the ABA. In addition, the ABA's current standards for law school accreditation include the following language:

A law school shall offer 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 ...¹⁰⁾

While the nature of the "real life practice experiences" provides some room for interpretation, ABA accreditation standards mandate experiential education for law students. Given that ABA accreditation of law schools is a crucial — and virtually always — required component to qualify graduates to sit for bar

⁸⁾Am. Bar Ass'n, Section of Legal Education and 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* (1992) (hereinafter the "MacCrate Report"). A full text of the Report can be found at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

⁹⁾Membership in the ABA is open to all segments of the legal profession in the United States, including attorneys in any area of practice (such as prosecutors and defense counsel), judges, and even special membership for law students and legal assistants. See <http://www.abanet.org/join/>.

¹⁰⁾2006-2007 ABA Standards for Approval of Law Schools.

examinations in the United States, this standard has great impact on what happens "on the ground" in law schools. This is especially so given periodic "site visits" that ABA committees pay to law schools to insure compliance with accreditation standards.

Like private attorneys, members of the judiciary also support clinical education. The very existence of student practice rules — which typically must be adopted under the aegis of state courts — demonstrates judicial support for clinical education in law school. Prominent jurists in the United States have also called for expanded opportunities for experiential learning in law schools¹¹⁾. A notable instance was an address by Warren Burger, then Chief Justice of the United States, made at a time before the flowering of clinical legal education: "The shortcomings of today's law graduate lies not in a decent knowledge of law but that he has little, if any, training in dealing with facts or people — the stuff of which cases are really made."¹²⁾ Perhaps a foundation for the widespread support and understanding of the value of clinical education among American judges is that in the United States all judges are lawyers, and it is not unusual for judges to move from the judiciary back to practice¹³⁾. Indeed, practice experience is often seen as the touchstone of effective judging¹⁴⁾. As former and potentially future practitioners, American judges understand the value of experiential legal education.

Ironically, perhaps the group that is most resistant to the value of clinical

¹¹⁾See, e.g., Harry T. Edwards, *Reflections On Law Review, Legal Education, Law Practice, and My Alma Mater*, 100 MICH. L. REV. 1999 (2002).

¹²⁾Chief Justice Warren Burger, U.S. Supreme Court, Address at the ABA Prayer Breakfast (Aug. 10, 1969), quoted in Keith E. Findlay, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 Wisc. Int'l L.J. 295, 305 (2006).

¹³⁾The Model Rules of Professional Conduct themselves recognize the frequency with which this happens by detailing conflicts of interest faced by a "former judge" when representing clients. MODEL RULES OF PROF'L CONDUCT R. 1.12.

¹⁴⁾For example, Thurgood Marshall gained fame as the lawyer who was the key architect behind the effort to combat racial segregation. These efforts culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954), for which Marshall acted as lead counsel for the plaintiffs. It is well understood that Marshall's jurisprudence as a Justice of the United States Supreme Court was, in many crucial ways, shaped by his experience as a lawyer. See Bob Woodward & Scott Armstrong, *THE BROTHERS*, 47-48 (1979).

education is law school academics whose experiences and credentials are often not based upon practice experience¹⁵. This has led to some internal struggles within law school faculty about the status and prominence given clinical education. Even so, over time the trend is distinctly in favor both of higher standards and more resources being directed to clinical legal education.

In summary, at the beginning of the twenty-first century, clinical education in the United States is widely recognized as a critical component of a well-rounded legal education.

II. CLINICS, ETHICS AND SUPERVISION IN THE UNITED STATES

Through many decades of development, "best practices" of clinical education in the United States now consist of a relatively seamless web of legal rules, pedagogical techniques, and ethics provisions crafted to fulfill the promise of sophisticated clinical teaching.

The keystone of clinical education in the United States is that by actually engaging in the practice of law, law students can gain unparalleled insight and learning opportunities unavailable in lecture classes¹⁶. The crux of successfully implementing this approach is the process of supervision. In this setting, clinic students, through "non-directive" questioning, are encouraged to systematically consider and assess the choices to be made in representation while actually representing clients, with all the uncertainty and challenges presented by "real cases."¹⁷ This not only promotes a consideration of complexity, but gives students "ownership" of cases, thus enabling an intense commitment to the success of what they

¹⁵Perhaps the most famous and widely cited exposition of this idea is in Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 94 (1992).

¹⁶There is abundant and ever-expanding literature on clinical education in the United States. For a recent text that addresses the norms and goals of American clinical legal education, see David R. Chavkin, *CLINICAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* (2002).

¹⁷For perhaps the most thoughtful treatment of supervision, see Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 1 (1993-1994). For a recent treatment of issues in supervision, see Jennifer A. Gundlach, "This Is a Courtroom, Not a Classroom": So What is the Role of the Clinical Supervisor?, 13 CLIN. L. REV. 279 (2006).

are doing. "Ownership," however, requires responsibility, and responsibility requires that students perform tasks that lawyers perform. Doing otherwise would subvert the premises of clinical education — "experiencing" practice and, through the experience, learning how to practice law. Sound clinical practice balances the students' sense of such ownership with responsible supervision by qualified lawyer-instructors.

The following explores the legal bases in American law that enables clinic students to undertake broad responsibilities as student attorneys.

A. Non-Lawyer Legal Assistants and the Practice of Law

It is accepted law in the United States that legal assistants (also sometimes called "paralegals") who are not admitted to the bar can engage in virtually any task that an attorney can. As explained below, the concept of legal assistants includes not only regular non-lawyer employees of law firms, but law students and others. There are two primary limitations to this principle: 1) admitted attorneys must supervise the work of legal assistants; and 2) legal assistants may not appear in formal proceedings unless there is an independent legal rule that permits them to do so¹⁸⁾. I will review the many legal bases for this principle.

a. Student Practice Rules

"Student practice rules" in many states authorize clinic students to practice law under the supervision of clinical teachers who are admitted to practice. For example, the student practice rule in Maryland notes that a "law student enrolled in a clinical program is eligible to engage in the practice of law provided that the supervising attorney (1) is satisfied that the student is competent to perform the duties assigned, (2) assumes responsibility for the quality of the student's work, (3) directs and assists the student to the extent necessary, in the supervising attorney's professional judgment, to ensure that the student's participation is effective on behalf of the client the student represents, and (4) accompanies the student

¹⁸⁾In fact, such exceptions are not unusual in the United States. Some 38 American agencies — including the Social Security Administration, which hears many thousands of cases, and the United States Patent Office — sometimes provide that litigants can be represented by non-attorneys.

when the student appears in court or before an administrative agency."¹⁹⁾

Student practice rules, while the most straightforward and explicit means of permitting clinic students to perform a broad range of legal tasks, are not the only legal basis for that proposition in American law. The following section explores others.

b. Ethical Guidelines Regarding Student Practice

Ethics rules play a critical role in providing formal recognition for the participation of non-lawyers, including law students, in law practice.

By far the most influential source is the ABA Model Rules of Professional Conduct ("Model Rules"). Individual jurisdictions are free to adopt or not adopt these rules, but most American jurisdictions — as of last count 44 — have substantially adopted the language of the Model Rules²⁰⁾. The Model Rules are divided into "black letter" rules and associated Comments. By the terms of Rules themselves, Comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."²¹⁾ That said, Comments are crucial in interpreting Rules and often are considered binding in practice if not in law.

A second crucial body of law relating to ethical norms and practices is the Restatement of the Law Governing Lawyers. This Restatement, like other "Restatements of Law" in the United States, is issued by a respected body called the "American Law Institute" which, like the ABA, is comprised of practitioners, judges, and academics²²⁾. As with the Model Rules, the Restatement is technically not binding, but also like the Model Rules, it is widely cited, respected, and represents a consensus regarding applicable law governing lawyers in the United

¹⁹⁾Rule 16. A full text of the Rule can be found at <http://michie.lexisnexis.com/maryland/1pext.dll?f=templates&fn=main-h.htm&cp=>

²⁰⁾Lisa G. Lerman and Phillip G. Schrag, *supra* n.3, at 34. There are exceptions, most prominently New York, which has retained at least in form the body of rules that preceded the ABA Model Rules confusingly called the Model Code. California has adopted its own unique body of rules. Both New York and California and the other jurisdictions that have not adopted the Model Rules, however, do not vary substantially in substance from the Model Rules.

²¹⁾MODEL RULES OF PROF'L CONDUCT SCOPE [14].

²²⁾The website for the American Law Institute is at <http://www.ali.org/>.

States.

These two bodies of rules governing the practice of law — the Model Rules and the Restatement of Law Governing Lawyers — both support and resonate with the goals of clinical education. For example, Model Rule 5.3 governs “Responsibilities Regarding Nonlawyer Assistants.” Even assuming the absence of a student practice rule, one could characterize law students as “nonlawyer assistants” and in accordance with Rule 5.3, “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” Indeed, Comment [1] of this Rule makes specific reference to “law student interns.”

The impact of Rule 5.3 is all the greater given that virtually all American law offices employ, in the words of the Rule, “paraprofessionals,” that is, paralegals. The scope of activities paralegals can perform, so long as supervised by attorneys, is very broad. This is an implication of Rule 5.3 and is settled law in practice and theory. The Restatement is explicit on this point and its language is worth quoting in full:

For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain nonlawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, *a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice.* Those activities are permissible and do not constitute unauthorized practice, *so long as the responsible lawyer or law firm provides appropriate supervision* and so long as the nonlawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law-practice aspect of the firm²³. (emphasis added)

This language insulates non-lawyers from the charge of engaging in the unauthorized practice of law as long as they work under the supervision of admitted attorneys. It suggests little limitation on what non-lawyers can do so long as the supervision condition is met.

²³Restatement of the Law Governing Lawyers §4, Comment g (emphasis added).

A crucial dimension that threads through Rule 5.3 and related rules is the primacy of preserving confidentiality as non-lawyers facilitate lawyers in practicing law. For example, a Comment to Rule 5.3 makes explicit reference to the obligation of supervising attorneys to provide "appropriate instruction and supervision concerning the ethical aspects of their employments, particularly regarding the obligation not to disclose information relating to the representation of a client."²⁴⁾

The final piece of this analysis, both implied and explicit in all of the authority I have presented, is that ultimate responsibility for the representation rests with the admitted attorney. This is true whether the non-lawyer is a "legal assistant" or a law student operating under the limited admission provisions of student practice rules.

The value added of formal student practice rules is the ability of law students to appear in court so long as their admitted supervisors are there as well.

c. The United States Supreme Court, Non-Lawyer Assistants and the Practice of Law

A final and especially significant piece of American law regarding the scope of what legal assistants can do has a constitutional dimension in American jurisprudence. In *Procurier v. Martinez*²⁵⁾, the United States Supreme Court was presented with a class action lawsuit brought by inmates challenging a "ban against the use of law students and paraprofessionals to conduct attorney-client interviews" without the presence of admitted attorneys²⁶⁾. The Court held that such a ban "constituted an unjustifiable restriction on the right of access to the courts" and thus a violation of the Due Process Clause of the Constitution²⁷⁾. Interestingly, the

²⁴⁾This comment refers to the American rule on confidentiality that imposes an obligation not to disclose "any information relating to representation." Model Rules of Prof'l Conduct R. 1.6(a). While there are, of course, exceptions to this Rule, the American rule, taken literally, is extraordinarily protective of client confidences.

²⁵⁾416 U.S. 396 (1974).

²⁶⁾*Id.* at 398.

²⁷⁾The applicable language, contained in the Fourteenth Amendment of the United States Constitution, is that no State "shall deprive any person of life, liberty or property, without due process of law." Analogous language in the Constitution of Japan is in Article 31: "No person shall be deprived of life or liberty, nor

opinion has language that expressly notes that its holding extends both to "law students working for attorneys" and law students who participate in "law school programs."²⁸⁾ In this case, the United States Supreme Court recognized — indeed assumed — the legitimacy of non-lawyers conducting attorney-client interviews on behalf of attorneys who are not present at the time of the interviews. It should also be noted that given that *Procurier* involves a lawsuit by inmates, it is a civil, not criminal, case, and thus its holding should not be understood as limited to criminal matters²⁹⁾.

There is further Supreme Court support for the ability of legal assistants to engage in a very broad range of work under the supervision of attorneys. In *Missouri v. Jenkins*³⁰⁾, prevailing plaintiffs in a school desegregation case sought recovery of attorneys' fees under a statute that so provided. In making their application, the plaintiffs sought compensation for the work of "paralegals, law clerks (generally law students working part time), and recent law graduates."³¹⁾ The Court held that a statute providing for reimbursement for "attorneys' fees" included reimbursement for the work of paralegals and law clerks. In reaching this conclusion, the Court noted as follows:

It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interroga-

shall any other criminal penalty be imposed, except according to procedure established by law."

²⁸⁾*Id.* at 421.

²⁹⁾One can argue that the Court's holding relies to a certain extent on the inability of inmates to otherwise obtain legal representation given the time and money expended in traveling to remote prisons. Nevertheless, the Court assumes that non-lawyers can and often do perform legal tasks, including client interviews. An article in Japanese that discusses the import of *Procurier* in clinical legal education is Takashi Takano, "Student Counsel": How Far Can They Go? — Legal Regulation of Student Practice in Criminal Justice Clinics," in *CLINICAL LEGAL EDUCATION IN LAW SCHOOL* (Shigeo Miyagawa, ed.) (2003).

³⁰⁾491 U.S. 274 (1989).

³¹⁾*Id.* at 277.

tories, and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence. Much such work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal³²⁾.

III. CLINICS, ETHICS AND SUPERVISION IN JAPAN

Clinics in Japan have made remarkable progress in the very brief time since their introduction as part of much larger reforms of legal education³³⁾. Despite this progress, it appears that the larger legal culture in Japan, which has operated under an accepted system for the education and admission of attorneys for many decades, has not yet had sufficient time to assimilate the norms and goals of clinical education. One central issue that has arisen is the status of law students in Japan and the degree they can participate in legal representation, particularly in the context of formal proceedings. Perhaps the most obvious difference between the United States and Japan in this regard is that Japan has not yet adopted student practice rules. Despite the absence of such express rules, however, the current state of legal practice in Japan does provide the same basic foundation for limited practice by law students as the United States.

Legal professionals in both countries carry the same day-to-day responsibility of providing legal representation to the best of their ability. In order to accomplish this, they must employ non-lawyers to assist them in their work. Therefore, it comes as no surprise that Japan's "Basic Regulations for Attorneys' Duties" provides the same kinds of guidelines concerning the use of non-lawyers as those reflected in the American counterparts cited above. Article 19 of those Rules reads as follows:

Article 19. Supervision of clerical staff

An attorney shall direct and supervise clerical staff, judicial apprentices or any other person whom the attorney has allowed to participate

³²⁾*Id.* at 288 n. 10. For an opinion that cites with approval this language in the context of state ethics rules, see *In re Opinion No. 24* of the Committee on the Unauthorized Practice of Law, 128 N.J. 114, 124 (1992).

³³⁾See generally, Joy et al, *supra* note 2.

in his or her duties to ensure that they do not act illegally or unlawfully with respect to the business they engage in, and do not reveal or utilize confidential information which they obtain in the course of the business in the law firm.

Article 19 is particularly pertinent on several fronts. First, like ABA Model Rule 5.3, the Article places the burden on the attorney to insure that those who facilitate his or her legal practice adhere to the law and ethical rules. Second, like Rule 5.3, Article 19 singles out confidentiality for special treatment in terms of an attorney's supervision of non-attorneys.

Third, and perhaps of most fundamental importance, just as in the ABA Rules, the Restatement and other sources of American law cited above, Article 19 contemplates a very broad range of participation by non-lawyers. In the words of Article 19, this encompasses "any . . . person whom the attorney has allowed to participate in his or her duties."³⁴ This formulation is very similar to the American authority cited above, in particular the comment to Restatement of the Law Governing Lawyers declaring that

... a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision. . . .³⁵

If, as is clear in the United States and seemingly clear in Japan, a licensed attorney holds responsibility for supervising non-lawyers and that the role of non-lawyer participation is to provide legal representation to clients, then both systems contemplate a broad role to be played by non-lawyer assistants. In the course of serving clients, whether the attorney takes advantage of the participation of law

³⁴I have argued elsewhere that a crucial aspect of ethical rules is the degree to which attorneys themselves "find facts" as to whether the rules come into play. Robert Rubinson, *Attorney Fact-Finding, Ethical Decision-Making and the Methodology of Law*, 45 ST. LOUIS UNIV. L.J. 1185 (2001). Article 19 makes this attorney "fact finding" power explicit by giving lawyers discretion to determine what is appropriate non-lawyer "participation" in the lawyer's "duties."

³⁵See *supra* note 25 and accompanying text (emphasis added).

students under the auspices of a legal clinic or relies for assistance solely on the employees of his law office should make no difference.

To the extent that law students work under the supervision of properly licensed Japanese lawyers in law school clinics, Article 19 of the "Basic Regulations" should apply to empower those attorneys to designate students as individuals who "participate in his or her duties." It would seem that this language should enable Japanese law clinics to pursue the advantages of clinical education in preparing law students for their future careers while providing expanded legal services to clients in need at the same time. By "allowing" Japanese clinic students to "participate" in the practice of law, students could engage in a range of activities that would facilitate the full range of benefits generated by clinical education.

As to confidentiality, Article 23 states that "[a]n attorney shall not, without good reason, reveal or utilize a client's confidential information that he or she obtained in the course of his or her practice." As noted above, Article 19 refers specifically to the duty of a lawyer to insure that those who the attorney has "allowed" to "participate . . . do not reveal or utilize confidential information." This rule is comparable to ABA Model Rule 1.6, which establishes a rule of confidentiality to govern American lawyers. Just as the American rule of confidentiality is applied to encompass the actions of non-lawyers working under attorney supervision, so it appears that the same structure exists in Japan. In light of this language, it would seem that any objection to an attorney sharing confidential information with clinic students would be unfounded. Indeed, the relevant "Basic Regulations" contemplate the sharing of confidential information. The Articles also do not differentiate between civil or criminal matters; the Articles discussed in this section appear in a section of the code entitled "Basic Ethics," and a subsequent Chapter — Chapter IV which applies to "Criminal Defense" — in no way modifies or limits the general application of the "Basic Ethics" provisions.

IV. CONCLUSION

Clinical education in the United States has, over many years, become a central component of legal education. It is widely recognized as crucial to the central mission of law school: to prepare students for the practice of law. A range

of legal principles — student practice rules, ethics rules, and constitutional law — facilitate the sophisticated clinical pedagogy that many American law school have implemented. Apart from the specifics of these rules, they represent an understanding in the United States that a broad reading of what non-lawyers — including law students — can do serves numerous interests: it enables the effective education of law students, it makes legal services available to more people by enabling attorneys to charge lower fees, and enhances the general efficiency of a law office. In the United States today, this understanding has become a norm — something that is not subject to serious debate.

Given how recently Japan's law schools and legal clinics were launched, one must expect that it will take time to develop a full range of express rules necessary to enable them to make the greatest possible contribution to Japanese society. The very good news in Japan is that the structure of Japanese ethical rules already permits the implementation of clinical education. There is thus an ethical basis to both promote and implement clinics in Japan.

Japan has made striking progress in just a few short years towards launching law schools where there had been no tradition of such specialized institutions before. It is inevitable that the larger legal culture will have a mixed reaction to such a wholesale change. Nevertheless, the fact remains that the inherent value of clinical education carries enormous appeal and will likely generate its own momentum. This is illustrated through the history of initial wariness yet ultimate acceptance of clinical education in the United States. American law demonstrates that broad acceptance of a central role for law students in legal representation can itself become an entrenched norm in legal culture and one that well serves law students, the profession, and the public at large.