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Marjorie Cohn of Thomas Jefferson School of Law says Elena Kagen cannot fill Justice John Paul Stevens' mighty shoes. **PAGE 5**

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VOL. 123 NO. 92 THURSDAY, MAY 13, 2010

Toyota Lawyers Will Have to Wait One More Day

Key Ruling on Steering Assignments Postponed; Blank Lines Where Names Should Be

By Ciaran McEvoy
Daily Journal Staff Writer

SANTA ANA — Plaintiff lawyers vying for a coveted seat on committees guiding the mass tort against Toyota Motor Corp. snatched up copies of U.S. District Judge James V. Selna's tentative order Wednesday afternoon, only to find themselves sorely disappointed moments later.

"The Court makes the appointments listed below," the judge wrote in his 10-page order regarding the multi-district litigation over sudden acceleration defects in the company's automobiles.

But as the attorneys breezed through the 10-page document, they reached the intended paragraph only to find, in place of names, blank lines.

The lawyers, who flew in from around the country to discuss the pending litigation, will have to wait until today's hearing to find out who will lead the litigation's three committees.

The ruling wasn't a total disappointment. Selna dealt with one major issue that had come up recently, saying he didn't see any apparent conflict in attorneys handling more than one type of client suing Toyota.

"The court recognizes the fact there are a lot of issues that will be common," Marc Seltzer of Susman Godfrey in Los Angeles, said about the ruling.

Selna also outlined the committees' structure – which is smaller than what some of the lawyers had proposed. *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, ML 10-2151 (C.D. Cal.)

"The court is concerned that at some point size impedes the ability to move forward in a timely and efficient manner," the judge wrote.

Selna also agreed to Toyota's choices of Cari K. Dawson and Lisa M. Gilford of Alston + Bird to lead the defense against economic loss claims and Vincent Galvin Jr. and Joel H. Smith of Bowman & Brooke to head defending the personal injury and wrongful death claims against the automaker.

On the plaintiffs' side, Selna's tentative ruling calls for five unnamed attorneys to serve on the personal injury/wrongful death committee, with two of them leading the group. Seven lawyers will work on the economic loss committee, with two leading consumer cases assisted by three other attorneys, while one will chair non-consumer cases – such as car dealership plaintiffs – assisted by another non-consumer attorney.

A "core discovery committee" comprised of lawyers on both committees will hold no more than eight attorneys. Liaison counsel between this committee and those involved in state court litigation against Toyota will be appointed as well as "one or more counsel who shall have specific duties limited to a particular factual or legal area."

In his tentative ruling, Selna said it was "speculative" and "premature" to suggest that a conflict of interest exists between plaintiffs' lawyers representing both personal injury and economic loss clients as well as consumer and non-consumer plaintiffs, as some have suggested.

Federal officials have said approximately 2,000 reports of sudden unintended acceleration in Toyota vehicles have occurred since 2000, along with approximately 800 accidents and 19 deaths.

More than 50 attorneys converged on the Westin South Coast Plaza in Costa Mesa Wednesday for an all-day conference on legal issues facing the Toyota MDL, discussing everything from discovery issues to media relations. The dramatic highlight may have been when Louisiana lawyer Daniel E. Becnel, Jr., who had sought a leadership role in the litigation, went on a tirade about how the economic loss cases were losers.

Otherwise, the conference was domi-

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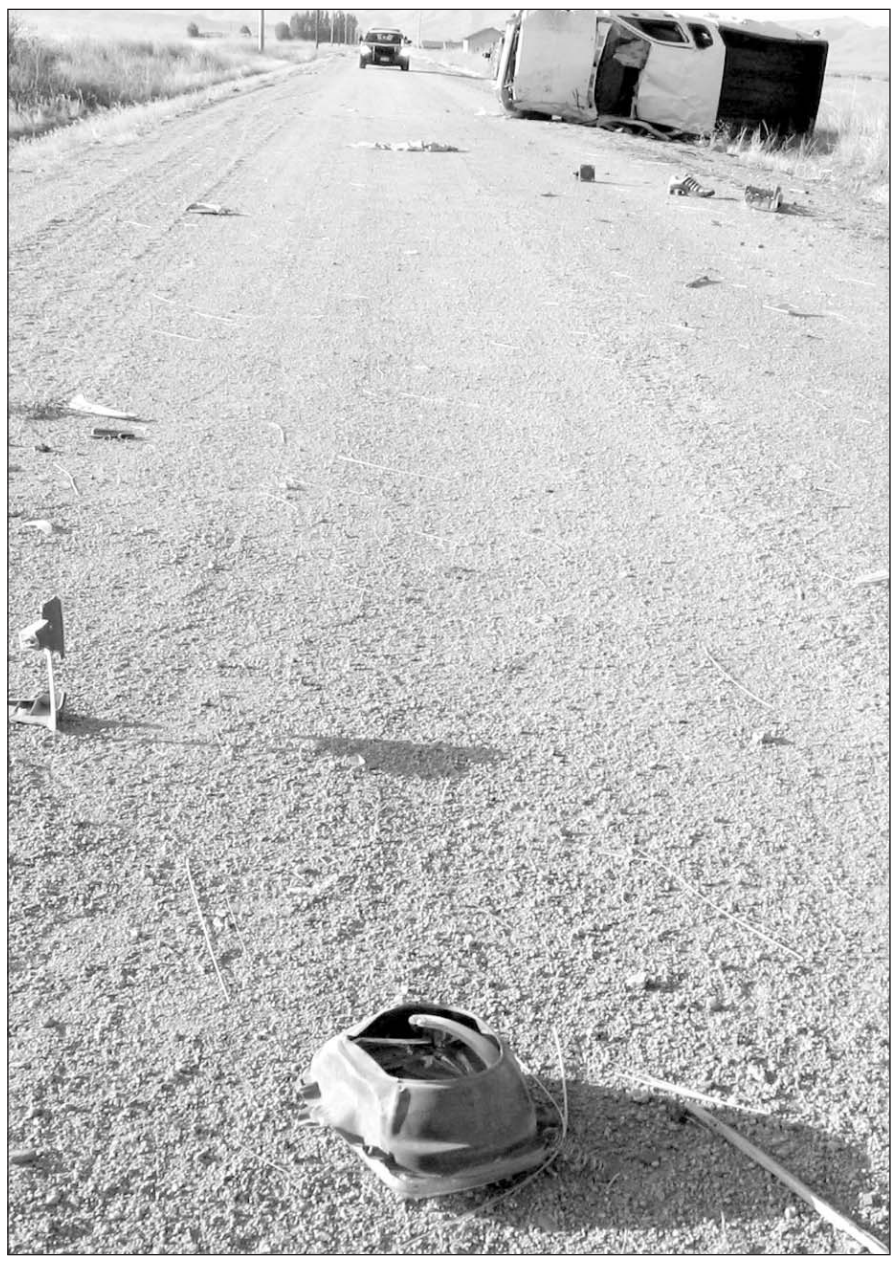
'This case is not going to be a cakewalk.'
JOHN R. CLIMACO
CLIMACO, LEFKOWITZ, PECA, WILCOX & GAROFOLI



Associated Press
The scene of a fatal 2007 Toyota accident in Idaho involving allegations of faulty steering equipment. The victim's family is suing Toyota, claiming it waited nearly a year after discovering the problem to issue a recall.

Orrick Dumps Partner Profit As Measure Of Performance

By Jill Redhage
Daily Journal Staff Writer

SAN FRANCISCO — San Francisco-based Orrick, Herrington & Sutcliffe announced Wednesday it will no longer be using profits per equity partner as a metric by which to judge its performance. The firm plans to stop reporting those results both internally and externally.

"We don't think that income per equity partner is the right way to measure the economic performance of a law firm," said Orrick's Chairman and CEO Ralph Baxter Jr. "We recognized that internally it was doing more harm than good, and we realized that externally it was doing harm."

Baxter said he doesn't believe that clients begrudge law firm partners making millions.

"At all the great law firms in the world, the equity partners earn a lot of money, and there's nothing wrong with that. But the apparent contest to see who can make the most money per fully variable partner for its own sake is not healthy. We don't want to say to the world that's our objective. Our objective is to practice law," Baxter said.

In 2009, Orrick's profits per equity partner rose 3.4 percent to $1.36 million, after sliding 21 percent the year before. The firm ranked as the 37th most profitable in

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MGM May Yet Live to Roar Another Day

By Jean-Luc Renault
Daily Journal Staff Writer

LOS ANGELES — Movie studio Metro-Goldwyn-Mayer, weighed down with nearly $4 billion in debt left over from a highly leveraged buyout six years ago, could get temporary relief this week if creditors take the expected step of granting the company an extension on a loan payment due Saturday.

People close to the situation, who asked to remain anonymous because the talks over a payment extension were confidential, said they expected the lenders to grant an extension on the studio's forbearance period and anticipated an announcement about the delay as early as Thursday.

The studio, represented in extension negotiations by Gibson, Dunn & Crutcher partner Brian Kilb, sought to delay the loan payment of an undisclosed amount to its roughly 140 creditors until the end of June.

An extension, which would be the fifth the studio has negotiated with creditors since November, would give MGM breathing room while it continues to work with creditors and bankruptcy lawyers on restructuring its crushing debt.

MGM is working with Skadden, Arps, Slate, Meagher & Flom and Klee, Tuchin, Bogdanoff & Stern on developing a potential pre-packaged Chapter 11 plan, but has

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GUEST COLUMN

Next week, the Louisiana Legislature will consider a bill to cripple the state's law school clinics in perhaps the most brazen attack nationally on clinics, writes Jeff Selbin.

By Jeffrey Selbin

Reeling from yet another disaster lapping at its shores, my home state of Louisiana is courting further self-inflicted harm. Next week, the Louisiana Senate's Commerce, Consumer Protection and International Affairs Committee will consider a bill to cripple the state's law school clinics and reduce access to justice for some of the state's poorest and most vulnerable residents. This frontal assault on law school clinics is the latest skirmish in a long-running battle between the state Legislature and Tulane's Environmental Clinic, and perhaps the most brazen attack nationally on clinics by powerful corporate interests trying to tip the scales of justice in their favor.

Introduced by Sen. Robert Adley with the backing of the Louisiana Chemical Association, Senate Bill 549 would impose draconian restrictions on the activities of clinics at the state's four accredited law schools. Adley has couched the bill in general terms, allegedly concerned about lawsuits against the government: "Don't take tax money and then sue the same people you're taking money from." Louisiana Chemical Association president Dan Borne, on the other hand, is more direct about law school clinics and the real purpose of the legislation: "We're going to tell legislators all over the state, if they want to play hardball by trying to kneecap industry in Baton Rouge, then we should play hardball and kneecap them with their state appropriations."

Under the bill, law school clinics at universities receiving state funds — regardless of whether the funds directly support the clinics — are prohibited from: filing a petition, motion or suit against a government agency; filing suit against an individual, business or government agency seeking monetary damages; and raising constitutional challenges in state or federal court (except under limited circumstances). While enumerating discrete areas of law in which clinics can continue to operate, the proposed restrictions would render impossible most forms of legal representation. The proposed law also subjects law school clinics to on-going oversight by two legislative committees, and

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DAILY APPELLATE REPORT

CIVIL LAW

Attorneys: Disclosure of attorney's communications with client and notes relating to defendant does not constitute blanket waiver of attorney-client and work product privileges. *Hernandez v. Tanninen,* U.S.C.A. 9th, DAR p. 6856

Attorneys: Counsel's reliance on opposing counsel's oral agreement for extension is excusable neglect to avoid default in failure to file such agreement. *Ron Burns Construction Co. Inc. v. Moore,* C.A. 4th/2, DAR p. 6845

Real Property: Party who knowingly purchased property that was subject to periodic water intrusion cannot recover for inverse condemnation. *Ridgewater Associates LLC v. Dublin San Ramon Services District,* C.A. 1st/3, DAR p. 6841

CRIMINAL LAW

Criminal Law and Procedure: Prisoner is eligible for parole where there is no evidence he poses current risk of dangerousness if released. *In re Calderon,* C.A. 1st/2, DAR p. 6859

Criminal Law and Procedure: Amendment to Section 4019 cannot be retroactively applied to prisoners seeking more custody credit. *People v. Hopkins,* C.A. 6th, DAR p. 6851

Summaries and full texts appear in insert

BRIEFLY

Governor Arnold Schwarzenegger appointed several judges late Wednesday afternoon, including two new judges to Southern California trial courts. Daphne S. Scott, a deputy district attorney with the Orange County District Attorney's Office since 2007, will fill a vacancy on the bench in Orange County, the governor's office announced Wednesday. Daniel A. Ottolia, a sole practitioner, has been appointed to Riverside County Superior Court.

The California Supreme Court agreed Wednesday to review a case that will determine when defendants who stave off Americans With Disabilities Act lawsuits are entitled to attorney fees. The 1st District Court of Appeal ruled in February that a San Francisco grocery store owner was entitled to $118,000 after fending off an ADA suit, even though the suit wasn't considered frivolous. The case is *Jankey v. Song Koo Lee, S180890*.

California-based partners with Jones Day represented German software company SAP AG in a $5.8 billion acquisition of database software company Sybase Inc. that was announced Wednesday afternoon. San Francisco-based mergers and acquisitions attorneys with Shearman & Sterling, in a team led by Michael Kennedy and Michael Dorf, advised Dublin-based Sybase.

A federal jury has convicted a Macau, China, resident of conspiring to obtain sensitive U.S. military technology. According to San Diego U.S. Attorney Karen Hewitt, in 2006, Chi Tong Kuok contacted a company in the United Kingdom, trying to obtain components related to a data controller manufactured and sold by Carlsbad-based defense contractor Viasat Inc., and used by the U.S. and NATO militaries to route communications data to and from tactical radios. The U.K. company referred Kuok, 42, who is a citizen of Portugal although Macau became a special administrative region of China in 1999, to an undercover agent with U.S. Immigration and Customs Enforcement, who negotiated for more than two years with Kuok.

MORE NEWS

Rising Star

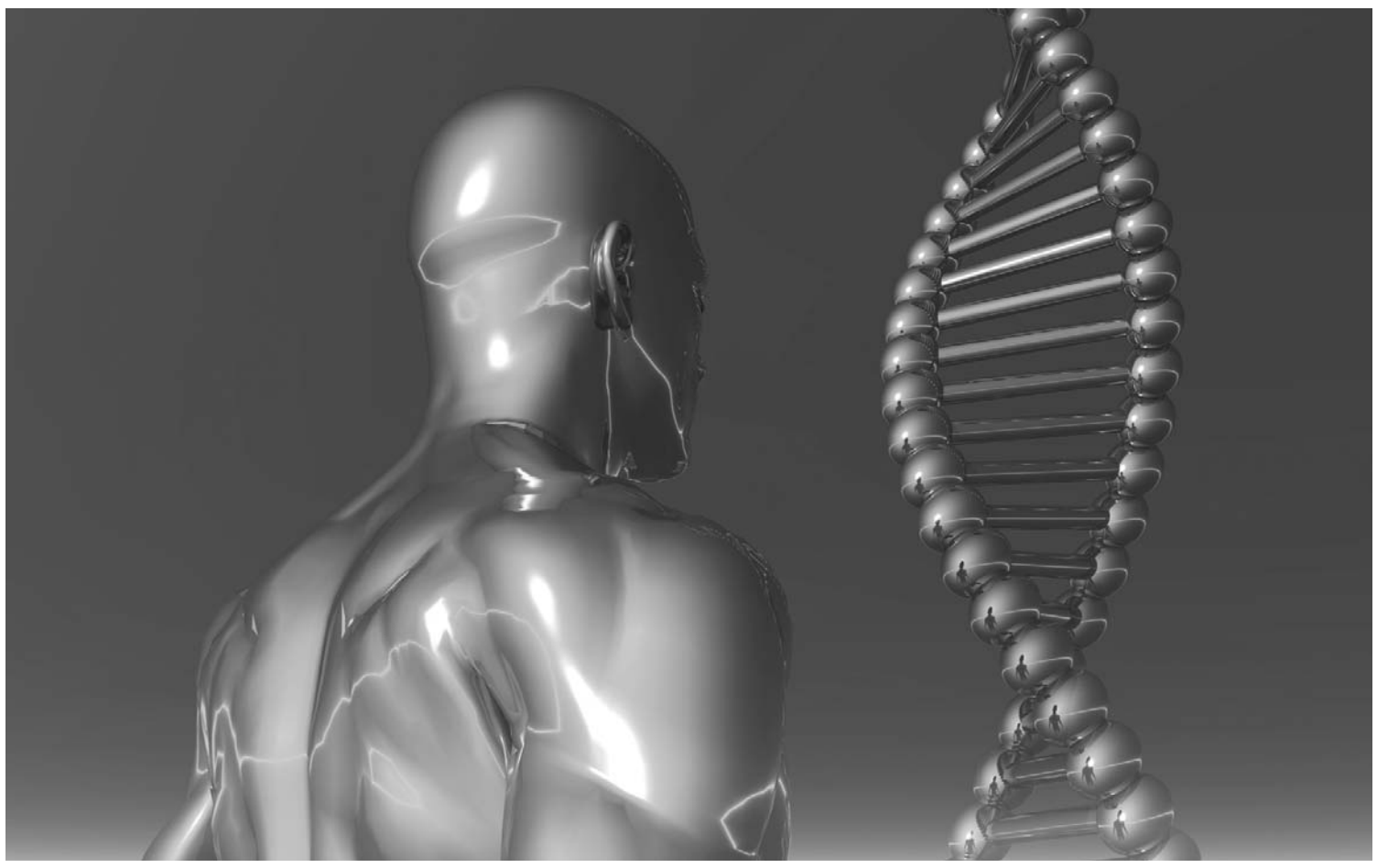
Daniel Nishigaya, who once worked as an aide to O.J. Simpson's criminal defense team, spent 14 years as a prosecutor before taking his seat on the Santa Clara County Superior Court bench. **PAGE 2**

Movers & Dealmakers

Please see the Daily Journal's new column, a weekly wrap up of law firm moves and real estate related transactions. **PAGE 4**

Genes are Unpatentable, New York Court Concludes

By Tamir Damari



Genes, as products of nature, are not protectable under patent law, ruled a New York federal court, in the case of Association for Molecular Pathology v. USPTO. The court, in a 152 page opinion, concluded that seven patents on two genes linked to cancer were invalid.

Patients groups, scientists and the American Civil Liberties Union challenged seven patents issued by the U.S. Patent and Trademark Office (USPTO) to Myriad Genetics and the University of Utah Research Foundation (collectively "Myriad") for the so-called "BRCA genes." These genes have been identified as linked to breast and ovarian cancer and thus have significant value for medical research purposes. Broadly speaking, the patents fell into two categories: "composition of matter claims" for isolated DNA containing BRCA gene sequences; and "method claims" for comparing BRCA gene sequences to identify the presence of mutations correlating with a predisposition to cancer. The plaintiffs alleged that Myriad's patents hindered the ability of cancer patients to receive the highest-quality breast cancer genetic testing and impeded the development of improvements to BRCA genetic testing. Additionally, the plaintiffs maintained that gene patents generally impede research aimed at identifying the role of particular genes in medical conditions.

Tamir Damari is an associate in the Washington, DC office of Nossaman. He has extensive litigation experience, successfully representing a wide range of clients in complex commercial, intellectual property (including trademark, patent and copyright), real estate and employment disputes. He can be reached at tdamari@nossaman.com.

The trial court rendered summary judgment in favor of plaintiffs, determining that both isolated human genes and the comparison of their sequences were unpatentable subject matter under the Patent Act (35 U.S.C. Section 101). The court began by citing to two well-established principles regarding the scope of patent protection: "scientific principles and laws of nature...have existed throughout time...and, as a consequence, ought not to be the subject of exclusive rights to any one person"; and "products of nature" are not patentable.

Turning specifically to the composition patents, the court relied upon precedent holding that "products of nature do not constitute patentable subject matter *absent a change that results in the creation of a fundamentally new product*," and that "purification of a natural compound, without more, is insufficient to render a product of nature patentable." Applying these principles, the court held that isolated DNA was not sufficiently distinct from native DNA found within human cells to render the former within the scope of patentable subject matter. The court rejected Myriad's argument that isolated DNA should be treated identically to other biochemical compounds for the purpose of assessing patentability (i.e., by examining its chemical composition). Rather, the court held that DNA is unique from other chemical compounds, given its dual role as both a chemical compound and a carrier of biological information. As such, "DNA...therefore serves as the physical embodiment of a law of nature — those that define the construction of the human body." According to the court, when isolated DNA is assessed within this conceptual framework, the differences between native and isolated DNA were legally immaterial, since in both forms the information-coding sequences of the DNA were identical.

The court also concluded that Myriad's method patents were invalid, based upon the principle that "abstract intellectual concepts are not patentable." Specifically, the court held that methods of "comparing" or "analyzing" gene sequences were not patentable, absent the identification of a specific process of comparison or analysis. According to the court, Myriad's method patents failed to identify a specific process of comparison or analysis, and were therefore not protectable under the Patent Act.

The *Molecular Pathology* case has significant implications. About 20 percent of human genes have patents associated with them (4,382 of the 23,688 identified). A total of 53,664 DNA-related patents have been granted by the USPTO. Multibillion-dollar industries have been built atop the intellectual property rights these patents grant. According to Wikipedia, four of the top 10 biotechnology companies in the U.S. are headquartered in California.

As more and more correlations have been discovered between individual genes and diseases with hereditary components (such as cancer), a burgeoning market for genetic testing has developed, in order to identify and treat at-risk individuals. Many companies and laboratories have therefore invested in developing predictive or diagnostic tests for diseases. Under the current law, when a business or individual is granted a patent for an individual gene, the intellectual property rights associated with the patent extend to the use of genetic tests to determine gene carriers. In other words, the patent owner has the de facto right to control the market for any diagnostic tests associated with the patented gene.

The *Molecular Pathology* decision unsettles the market for the development of drugs based on owning the rights to certain genes. While the ruling is non-binding as to patents other than those at issue, if other courts follow the lead of the Southern District of New York, the validity of over 4,000 patents on human genes could potentially be called into question. Proponents of the ruling maintain that a wholesale bar on human gene patents will reduce health care costs and increase patient freedom. By contrast, those in the biotech industry contend that such a bar will undermine the viability of the market for predictive and diagnostic genetic testing, slowing the pace of medical innovation and ultimately harming patients. Absent a reversal by the U.S. Court of Appeals, the *Molecular Pathology* holding will invariably be utilized by parties seeking to invalidate DNA patents, and its reasoning is likely to be adopted by other trial courts. The question of whether isolated DNA is patentable is unlikely to be resolved any time soon.

Louisiana Targets Law School Clinics

Continued from page 1

a violation of the law will result in the forfeiture of all state funding to the university for the entire fiscal year.

The immediate impact of SB 549 would be devastating. As the Deans of Tulane and Loyola Law Schools wrote to members of the state senate, "While perhaps aimed at one clinic, the bill sweeps much further and would put nearly all the law clinics in the state out of business, whether they are funded through public money or private dollars.... It would deal a grave blow to our ability to offer a sound curriculum to our students...[and] is a serious threat to legal education at our schools." Through the proposed bans on filing actions against a government agency or making state constitutional challenges in state or federal court, at least four of Tulane's six clinics — none of which is funded directly by the state — would be forced to close. According to a Loyola spokesperson, all seven of its clinics would be dramatically impacted. Another seven law school clinics at the Southern University Law Center — a historically black institution opened in 1947 to train African-American lawyers — would likewise be subjected to the restrictions. In response to the legislation, LSU Law Center Chancellor Jack Weiss observed that "Law clinics work best when law schools are allowed to decide how their clinics can best train students and best serve clients."

Even if some law school clinics survive SB 549, the longer-term impact on the profession would be deeply troubling. As the U.S. Supreme Court found with respect to certain congressional restrictions on government-funded legal services lawyers, interference with legal advocacy — especially where constitutional questions are at stake — violates both the First Amendment and the Separation of Powers doctrine. That is, whether funded directly or indirectly by government, law school clinics and their students must have the same fundamental relationship to clients as other lawyers and the same ability to raise and defend legal claims. In addition, the bill would directly regulate the practice of law through legislative committee, a matter reserved to the Supreme Court by the Louisiana Constitution. As the Society of American Law Teachers has noted in opposing SB 549, "Legislative oversight of lawyer activities is an unacceptable government intrusion into the necessary and confidential lawyer-client relationship and an expansion of government regulation of the rights of private citizens."

Finally, low-income individuals and community groups in Louisiana would suffer dearly if law school clinics are hamstrung or closed. In the wake of industry-led efforts to limit clinic representation more than a decade ago, Louisiana adopted the most restrictive student practice rule in the country. Clinic students may not represent individual clients whose annual income exceeds 200 percent of the federal poverty guidelines, community organizations unless they can demonstrate that a majority of their members meet such income guidelines, or clients of any kind if the clinic initiated contact for the purpose of representation. In other words, law school clinics in Louisiana are already limited to representing the state's poorest clients and community organizations who seek their assistance.

The pressing legal needs of four in five low-income Americans currently go unmet, and access to justice is out of reach for far too many people in Louisiana. Thousands more each year might go without legal assistance if SB 549 becomes law. And as the state grapples with the unfolding disaster in the Gulf of Mexico, do we really want to further insulate industry from compliance with state and federal environmental laws? Third-year LSU law student Sarah Cable recently wondered aloud what corporations have to fear from law students: "At first blush, it seems like a way for corporations to prevent themselves from getting sued. If you're not doing something wrong, then why are you worried?"

Though attempts to restrict or silence law school clinics and their clients go back several decades, the recent legislative attack on the environmental clinic in Maryland is instructive here. The organized bar, bench and academy — and individual lawyers, judges and law professors — can influence the outcome of these battles. By standing with law school clinics in Maryland, the legal profession succeeded in protecting them from the harshest consequences of corporate-backed government interference. Consistent with our professional responsibility to ensure access to justice, we should rise to the challenge in Louisiana and any other jurisdiction where the economically powerful and politically connected attempt to silence the voices of the defenseless or the oppressed.

Jeff Selbin is a Clinical Professor of Law at Berkeley Law. He is the faculty director of the East Bay Community Law Center, which is part of the law school's clinical program.