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Forum Juridicum

INDIGENT REPRESENTATION BY LAW STUDENTS

[*Editor's Note:* This article is a condensation of a student proposal and argument to the Louisiana Supreme Court supporting a proposed rule change to admit law students to limited practice in the courts of Louisiana.]

Introduction

The concept of clinical education is certainly not new, since one existing clinic traces its origins back to 1908,¹ and Harvard Law School has had a program of student representation in civil cases since 1914 and in criminal cases since the 1940s.² However, recent decisions by the U.S. Supreme Court³ have provided an impetus to the formation of many new clinics across the country. At this writing twenty-three states allow some form of student practice.⁴ Proposals to permit law students to practice have been stimulated by the Office of Economic Opportunity Legal Services Program, the Council of Legal Education in Professional Responsibility (formerly called the National Council of Legal Clinics) and the National Legal Aid and Defender Association. At the Mid-Winter meeting of the American Bar Association on January 27, 28, 1969, the House of Delegates *unanimously* adopted the Model Rule Relative to Legal Assistance by Law Students.

1. *National Council of Legal Clinics, EDUCATION FOR PROFESSIONAL RESPONSIBILITY IN THE LAW SCHOOL* 1 (1962).

2. Wolf, *D. C. Law Students in the Courtroom*, D. C. BAR J. 2 (November-February, 1969).

3. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *In re Gault*, 387 U.S. 1 (1967).

4. COLORADO REV. STAT. § 12-1-19 (1963), REV. CR. P. R. 54 (1965); Connecticut, de facto (by informal rule of the Connecticut Supreme Court, Yale law students who are members of the Legal Aid Society may represent indigents in courts of limited jurisdiction.) *Status of State Positions Allowing Law Students to Appear in Court on Behalf of Indigent Clients* 7 (August, 1967); FLORIDA CR. P. 2 (1968); GEORGIA CODE ANN. § 9-401.1 (1967); ILLINOIS N.D. ILL. GEN. R. 41 (1966) (U.S. Dist. Ct.), ILLINOIS SUP. CT. R. 711 (1969); INDIANA RULE A. D. 2.1 (1969); IOWA SUP. CT. R. 120 (1967); MASSACHUSETTS SUP. JUD. CT. GEN. R. 11 (1967); MICHIGAN SUP. CT. RULE 921 (1965); MINNESOTA SUP. CT. RULE 1 (1967); § 93-6704, Repl. vol. 7, REVISED CODES OF MONTANA (1947); NEBRASKA REV. STAT. § 7.101.01 (Supp. 1967); NEW JERSEY SUP. CT. R. 1:12-8A(c) (1964); NEW MEXICO STAT. ANN. § 18-1-26 (1957); NEW YORK JUDICIARY LAW §§ 478, 484 (1967); OHIO SUP. CT. R. XVII (A) (1969); OKLAHOMA SUP. CT. R. S.C.E.D. 2109 (1967); PENNSYLVANIA SUP. CT. R. 12½ (1965); So. CAROLINA CODE OF LAWS § 56-102 (1962); TENNESSEE SUP. CT. R. 37 § 21 (1967); Texas, de facto (with the permission of trial judges, law students at the University of Texas make court appearances under the supervision of the director of the Legal Aid Clinic.) *Status of State Positions Allowing Law Students to Appear in Court on Behalf of Indigent Clients* 35 (August, 1967); WYOMING BAR R. 18 (1957); WASHINGTON D.C. D.D.C.R. 2 (1968).

Many noted scholars of the bench and bar see the clinical concept as an ideal answer to the two great problems that are facing the legal profession today: (1) that of turning out young attorneys adequately equipped to cope with the complex legal and social issues of the day and (2) that of providing competent legal services to all persons hailed into court who are too poor to hire a lawyer.

The Problems With Respect to Legal Education

There is an increasing awareness that something is wrong with the third year of law school.⁵ This transition year is probably the most critical period in a young attorney's educational process, yet law schools seem to have difficulty making the year both interesting and challenging.⁶ Schools often fail to provide the proper nexus between academic pursuits and professional livelihood. In 1960, the Harvard Law School's Committee on Legal Education found "lack of drive, effort, and even sustained attention to course work by too many third year students [because of] the feeling that the third year is just more of the same diet offered in the second year."⁷

Much of the present difficulty stems largely from outmoded teaching techniques. Ninety years ago Dean Christopher Columbus Langdell instituted the "case-method" of instruction at Harvard. According to Langdell, the library was the sole laboratory of the law school. In following years, all the university law schools followed the Harvard example and became library law schools. In many law schools the residual effects of Langdellian methods still persist—aloofness from experience in dealing with people, paucity of first-hand knowledge of courts and lawyers.

Even with the additional use of the seminar method, the emphasis on legal education is still on the acquisition of knowledge rather than on its application and use. Hence, many legal scholars will agree that these academic methods—if used as the sole educational tools—are outmoded. They constitute a flat, two-dimensional system of legal thought which is far removed

5. Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL ED. 1 (1964).

6. Sacks, *Education for Professional Responsibility: The National Council on Legal Clinics*, 46 A.B.A.J. 1110 (1960).

7. *Harvard Law School*, REPORT OF THE COMMITTEE ON LEGAL EDUCATION 42 (1960), cited in Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL ED. 1, 2 (1964).

from the social realities and responsibilities which modern lawyers must face.⁸

Dean E. Blythe Stason of Michigan Law School has found that ". . . law graduates lack essential practice skills."⁹ In order to develop those skills, there are two areas in which it is believed that clinical education can be beneficial. The first area is the marshalling, screening, and evaluating of facts. The second area is trial advocacy.

Under the case-method, facts are definite and certain, whereas the starting point of an adversary system is the collection and evaluation of facts. Not only must the raw data be compiled, but it must be put into proper form so as to be admissible as evidence in courts.¹⁰ In the words of the Chief Justice of the United States Supreme Court, Hon. Warren E. Burger, "The short-coming of today's graduate lies not in a deficient knowledge of law, but in little if any training in *facts*—the stuff of which cases are made. . . . Langdell . . . taught students to sort out, classify and analyze legal principles to be applied to *agreed* facts, but never really prepared them for raw facts and real problems."¹¹ Inextricably intertwined with the fact-finding process is investigation. "Interviewing of witnesses and, in criminal cases, defendants, increases the skill of the student investigation in ferreting out the important and relevant facts and discarding the unessential. Interviewing entails the use of judgment in assessing the credibility, both real and apparent, of the future witness or defendant."¹²

With the educational aspects of fact-marshalling, a clinical student would learn invaluable aspects of trial advocacy. Not only would a student be taught the mechanics of trying a case,

8. The late Jerome Frank, one of the foremost critics of purely theoretical legal education, felt that "most law schools omit the contacts, the face-to-face relations, with flesh and blood human beings, including witnesses, clients, jurors, trial judges, administrators, and members of legislative committees. Those personal contacts are the center of a lawyer's practice. Without an understanding of them, legal learning is a bloodless, fleshless skeleton. To put it differently, the legal rules and principles are pallid, and devitalized, except in the context of personal relations." Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 26 (1951); see also Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952).

9. Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1328 (1947).

10. Cleary, *Law Students in Criminal Law Practice*, 16 DE PAUL L. REV. 1 (1966).

11. THE REPORTER OF PHI ALPHA DELTA 3 (October 1969).

12. Cleary, *LAW STUDENTS IN CRIMINAL LAW PRACTICE*, 16 DE PAUL L. REV. 1, 10 (1966).

but he would be instructed in the talents and techniques necessary to try a case *well*. Placed in the setting of the law school and directed by an experienced instructor, a law student could develop trial expertise most effectively. "[M]embers of the bar and bench lack the time and ability to impart the fundamental critical and juristic skills that are the special dispensation of the academicians."¹³ Moreover, the law school is the ideal place to teach such skills because students comprise a "captive audience" that is not burdened with the day-to-day economic and housekeeping problems of law office practice.

Many advocates of clinical education have appropriately compared clinical training to the training that medical students receive. Chief Justice Burger exclaimed:

"What would we lawyers and judges—yes, and Law Professors—have to say if the evidence in a malpractice suit against a young doctor showed that he put out his shingle and began to deliver babies and remove gall bladders without ever observing such operations or assisting with them or taking a case history or making a diagnosis . . .

"Yet today in a vast number of courtrooms good cases are being bungled by inadequately trained lawyers and needy people suffer because lawyers are licensed with very few exceptions without the slightest inquiry into capacity to perform the practical functions of a counselor or an advocate."¹⁴

The Problem of Indigent Representation

The sixth amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In the historic *Gideon*¹⁵ decision the United States Supreme Court hammered this constitutional safeguard into the realm of legal reality. Other decisions by the U.S. Supreme Court have indicated that the right to counsel may be expanded to nearly all types of judicial proceedings.¹⁶ This principle was enacted into statute in 1964 in the Federal Criminal Justice Act.¹⁷ Louisiana has always

13. Anderson, *Gideon: A Challenging Opportunity for School and Bar*, 9 VILL. L. REV. 619, 620 (1964).

14. THE REPORTER OF PHI ALPHA DELTA 3 (October 1969).

15. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

16. See, e.g., *In re Gault*, 387 U.S. 1 (1967).

17. 18 U.S.C. § 3006(A)(b) (1964).

provided for counsel in felony cases, but not in misdemeanors.¹⁸ The Fifth Circuit Court of Appeals has declared that the sixth amendment's guarantee of counsel applies to misdemeanors which can entail imprisonment for more than a year and a day.¹⁹

Although few can doubt the constitutional and theoretical merit of providing every man hailed into court with counsel, it is becoming increasingly evident that tremendous strains have been imposed on the practicing bar to provide such representation.

The publication of the judicial administrator of Louisiana showed that 84,008 new criminal cases were filed in the entire state for the judicial year ending September 30, 1965. That figure includes traffic cases in parishes outside Orleans as well as juvenile court cases involving criminal offenses.²⁰ A more accurate statistical picture would show that approximately 9,500 felony and misdemeanor cases were filed in the state for the same year.²¹ Depending upon the district, it is estimated that between 30% to 80% of those accused are indigent.²² In Orleans Parish about 50% of all criminal cases involve indigents.²³

The only parish in the state with a public defender system is Orleans Parish, with the Legal Aid Bureau, a private defense system supported by the United Fund. All other parishes assign counsel on a case-by-case basis as the only method of indigent representation.

Orleans Parish had 4,800 new cases filed in 1965. The Legal Aid Bureau handled 1,008 cases involving 708 individuals.²⁴ Private attorneys handled at least 650 felonies, 40 capital cases, and 250 misdemeanors for indigents on an appointment basis in 1965.²⁵ Assuming that these figures are representative, approx-

18. LA. R.S. 15:141 (1950).

19. McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); see also Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968).

20. New Orleans Criminal Courts Bar Association, *Compensation of Indigents' Attorneys 2* (1966), an unpublished work [hereinafter cited as *Indigents' Attorneys*].

21. *Indigents' Attorneys 2*.

22. 1 L. SILVERSTEIN, *DEFENSE OF THE POOR IN AMERICAN STATE COURTS* 289 (1965).

23. *Indigents' Attorneys 2*.

24. *Annual Report of the New Orleans Legal Aid Bureau* (September 30, 1965) as cited in *Indigents' Attorneys 3*.

25. *Indigents' Attorneys 3*.

imately 2,000 to 2,500 cases are handled annually by lawyers on an appointment basis in parishes outside Orleans.²⁶

A study by the American Bar Foundation in 1962 (the Silverstein study) pointed out that only a small percentage of attorneys handle criminal cases.²⁷ For example, in Orleans Parish only 2% to 3% of the city's lawyers practice criminal law.²⁸ In most cases, attorneys who have had little or no experience in the specialized field of criminal law have unselfishly donated their time and services. However, the temporary allocation of practicing civil attorneys to handle the vast problems of indigent criminal representation seems to be a rather superficial solution and has not escaped criticism.²⁹ Although the assigned counsel system has produced a rough form of justice, the writer believes that involuntariness constitutes an inherent weakness in the present system.

A former associate justice of the United States Supreme Court, Tom C. Clark, suggested a possible solution to the dual problems of adequate legal training and indigent representation. He stated:

"There can be no question that we have fallen down in the area of legal services to all people, regardless of their station in life. Such services are as much a matter of legal right as those specifically enumerated in our basic law, and we must provide innovation to secure them to all segments of every community. First and foremost, we must improve both the public and private programs for defense of indigents charged with crime. In this connection, I urge the law schools to organize defender programs that will bring the third year law student in touch with criminal law in action. Several

26. *Id.*

27. 1 L. SILVERSTEIN, DEFENSE OF THE POOR IN AMERICAN STATE COURTS 286 (1965).

28. *Indigents' Attorneys* 5.

29. For example, the New Orleans Bar Association stated in a special report: "We assert that every member of the profession has the right to select the branches of the law to which he wishes to dedicate himself without being molested by judicial appointment to unwillingly perform an undesired task. Even the lawyer experienced in trial work in the civil courts should enjoy the freedom to decline appointment to service in a field for which he has no taste, or aptitude, or no experience The method . . . for appointment of lawyers is not scientific. It is not conducive to justice. It is coercive, unworthy of the judicial office, and humiliating to lawyers who exercise their prerogative not to practice in the criminal courts." *New Orleans Bar Association Special Committee Report Regarding the Impact of the Gideon Decision* 5.

states have now provided by legislation or court ruling that such students, when certified by the Dean acting under the direct supervision of licensed counsel, may participate in criminal cases. We must do something now, for the time is late—almost too late—to adequately develop the dedicated core necessary to preserve the art of courtroom advocacy. The tribe of trial lawyers is fast diminishing. Trial judges tell me that the lack of knowledge in trial tactics in members of the Bar is appalling. It is the duty of the law schools to correct this."³⁰

The Concept of Clinical Programs as Envisaged for Louisiana

Salient Features of Clinical Operation

Before the proposed rule is analyzed it is appropriate to emphasize the salient features of most clinical programs.

1. The clinical programs are proposed only as a service to those persons properly adjudged as indigents. Hence, there can be no acceptance of any cases that are in any way fee-generating.
2. To ensure the educational value of the programs, it would be the strict policy that all work would be closely supervised by the coordinating attorney who would serve as the attorney of record and assume personal professional responsibility in all cases.
3. The client must always freely consent to student representation. He may never be compelled to accept such representation against his will.
4. Participation would be limited to students having completed three semesters (or the functional equivalent) of law work. This requirement is designed to ensure that clinical students will have completed enough of their formal legal training to have a firm grasp of the concepts of legal methodology and to have gained knowledge of the responsibility and system of ethics demanded of the members of the legal profession.
5. The proposed program is not one in which students try cases for the sake of trying cases. It is a program of legal *representation* in which students are to represent their

30. Clark, *Problems of Change*, 1968 UTAH L. REV. 347.

clients as any lawyer would—by settlement where settlement is indicated and by competent advice, fact investigation, and if necessary, advocacy in court.

6. It would be the responsibility of the supervising attorney to choose cases that offer the most educational value for the student participants.

Salient Features of the Proposed Rule³¹

Section 2 of the proposed rule provides that an eligible law student may appear in any court or before any administra-

31. The full text of the proposed rules reads:

"RULES OF THE SUPREME COURT OF LOUISIANA.

"RULE XIV. REQUIREMENTS FOR ADMISSION TO THE BAR

"The rules as set forth in Article XII of the Articles of Incorporation of the Louisiana State Bar Association, which were adopted as rules of this court on March 12, 1941, and amendments thereto, shall govern all admissions to the bar, provided, however, that nothing contained therein shall be interpreted to prohibit any of the activities set out in Rule XIV A of this rule.

"RULE XIV A. THE LIMITED PARTICIPATION OF LAW STUDENTS IN TRIAL WORK

"Section 1. It is the primary responsibility of the bench and bar to provide competent legal services for all persons, regardless of their ability to pay. As a means of providing assistance to lawyers who represent indigent clients, and at the same time to encourage law schools to improve the quality of legal education by providing clinical instruction in trial work of varying kinds, the following rule is adopted.

"Section 2. Any eligible law student as hereinafter defined may appear in any court or before any administrative tribunal in this State on behalf of any indigent person with the written approval and consent of an attorney of law approved in the manner hereinafter provided, in the following matters:

"(a) Any civil matter. In such cases the supervising attorney is not required to be personally present in court.

"(b) Any criminal matter in which the defendant does not have the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising attorney is not required to be present in court.

"(c) Any criminal matter in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising attorney must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

"Section 3. Any eligible law student may also appear in any criminal matter on behalf of the State with the written approval of the prosecuting attorney or his authorized representative and of the supervising lawyer.

"Section 4. In each case the written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

"Section 5. The activities by law students authorized by this rule shall be undertaken only by law students who satisfy the requirements listed below. Law students to be eligible:

"(a) Shall be duly enrolled in a law school located in this State which is approved by the American Bar Association.

tive tribunal in this State on behalf of any indigent person in any civil or criminal matter. In criminal matters in which the defendant has the constitutional or statutory right to counsel, the supervising attorney must be personally present throughout the proceedings. This section was taken directly from the A.B.A. Model Rule. Although the allowable range of cases that a law student may handle may seem to be rather broad, it must be remembered that the primary purpose of clinical programs is educational. Therefore the coordinating attorney needs to have some degree of flexibility in order to be able to choose cases of the greatest educational value. It must also be remembered that

"(b) Shall have received credit from one of the four approved State law schools (i.e., Louisiana State University Law School, Loyola Law School, Southern University Law School, Tulane University Law School), for full time law school enrollment of at least three semesters or its equivalent.

"(c) Shall undertake the activities authorized herein only in the course of work for any one or more of the following: 1) A law school program; 2) A legal aid society, legal services program or a federally funded legal aid program; 3) A prosecutor or district attorney's office; 4) A program to assist any attorney appointed by the court to represent an indigent person; 5) An office of the public defender.

"(e) Shall be under the immediate direction of a member of the Louisiana State Bar Association who shall act as the supervising attorney.

"(f) Shall neither ask for nor receive any compensation or remuneration of any kind for his services, but this shall not prevent an organization or program mentioned in subsection 4(d) of this section, from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

"(g) Shall take the following oath: 'I, _____, do solemnly swear that I have read and am familiar with the Canons of Ethics as set forth in Article 14 of the Rules of the Louisiana State Bar Association, found in Louisiana Revised Statutes, Title 37, and the Code of Professional Responsibility of the American Bar Association, and I understand that I am bound by the precepts therein contained as fully as if I were admitted to the practice of law in Louisiana; and that I further accept the privileges granted to me as well as the responsibilities which will devolve upon me, so that I may be more useful through my clinical education in the service of justice.'

"Section 6. The certification of a student by the law school dean shall remain in effect until the expiration of twenty-four months after it is given, or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier. Such certification may be withdrawn by the dean at any time by mailing a notice to that effect to the Clerk of this Court, or it may be terminated by this court at any time.

"Section 7. The member of the bar under whose supervision an eligible law student does any of the things permitted by this rule shall be a lawyer whose service as a supervising lawyer for this program is approved by the dean of the law school in which the law student is enrolled. He shall assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work. In addition, he shall assist the student in his preparation to the extent that he considers it necessary.

"Section 8. Nothing contained in this rule shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of this rule."

the only cases handled will be those of indigents. Hence, absolutely no fee-generating cases would be involved. By stipulating that the supervising attorney must be present where the defendant has a right to counsel, the question of whether student representation in criminal cases is constitutionally adequate is avoided.

Section 3 provides that with consent an eligible law student may appear in any criminal matter on behalf of the state. This provision was designed to allow the clinics to offer the broadest possible range of cases in order to further the rule's primary educational objectives.

Section 5(c) states that students can undertake the authorized activities only in the course of work for a law school program, a legal aid society, legal services program or a federally funded legal aid program, a prosecutor or district attorney's office, a program to assist any court-appointed attorney, or an office of the public defender. Here again, the rule is broadly worded so clinical programs can be of maximum educational benefit and maximum benefit to indigent clients and the members of the bar.

Sections 5(d) and 7 provide for the immediate direction of students by a supervising attorney, and assumption of personal professional responsibility by that attorney. Although Section 2 stipulates that the attorney must personally be present in court only when there is a constitutional right to counsel, student work is always closely supervised. In many programs supervision by critique is used to develop trial acumen and advocacy skills. For example, in the Boston-Roxbury Defender Project, after the trial the supervisor and the attorney meet to review the case, assessing the strengths and weaknesses of the student's performance.³² Any program's degree of ultimate success depends largely on the supervising attorney's competence, enthusiasm, and interest in the student's work.

Section 5(e) provides that the law student cannot be compensated by the indigent client. However, establishment of clinical programs would not preclude a student-clerk from receiving compensation for part-time employment in a law office.

In order to retain complete control over student conduct,

32. Oaks, *Law Student Use by C.J.A. Counsel*, 14 *STUDENT L. J.* 3 (1968).

Section 6 provides that certification may be withdrawn at any time.

Section 8 permits a law student to engage in such activities as preparation of pleadings, briefs, and petitions. Law student-clerks have traditionally done such things in private law offices and the rule is certainly not designed to inhibit any of this legitimate activity.

General Explanation of Clinical Operations

If the proposed student practice rule change is approved, the primary responsibilities for implementation of the rule will fall on the administrative officials of the individual law schools. What type of program the individual administrations establish would be largely within their discretion. However, in order to demonstrate how such programs actually operate, two model programs will be examined.

The University of Minnesota Legal Aid Clinic handles both criminal and civil cases. In criminal indigent representation, the students take referrals from the bench. Following the referral, it is the student's initial responsibility to ascertain the accused's financial eligibility. If the accused is eligible, the student then conducts a thorough interview to determine the facts concerning the charge. This information is then conveyed to the supervising attorney who represents the accused at the arraignment. Each participating senior law student is given the opportunity to select one of the cases he has interviewed and conduct the trial. The remainder of the cases are referred to the State Public Defender's Office. At trial, the student conducts the trial from a first chair position with the supervising attorney sitting second chair.

The mainstay of the Minnesota clinic's operation consists of civil cases from the clinic's campus interview office. This office is staffed entirely by second-year law students and is open to all members of the campus community who meet the indigency requirements. If the junior law student determines that the client meets the financial requirements and has a legal problem within the jurisdiction of the clinic, the client is assigned a conference date when actual advice is given. In the interim period between the interview and the conference, the junior law student researches the law bearing on the problem and prepares a

memorandum setting forth the facts of the case, the legal issues involved, his analysis of the applicable law, and his conclusions and recommendations. The supervising attorney then reviews the memorandum, making only necessary changes concerning the proposed advice to be given to the client.

The counselling conference usually lasts from ten to twenty minutes and the time allocated is usually sufficient to advise the client adequately. Although the junior law student conducts this conference, the supervising attorney, at the conclusion of the conference, makes certain that the client understands the counselling and is satisfied with the services rendered. If correspondence or other documents are involved, the junior law student is responsible for their drafting. However, all such documents must be approved by the supervising attorney. If litigation becomes imminent, a third-year student is assigned to the case in addition to the second-year student. The case then becomes a partnership operation with the junior student working up the necessary memoranda and trial papers, and the senior student making the court appearance under proper supervision.³³

The Boston-Roxbury Defender Project puts a great deal more emphasis on meshing seminar work and clinical programs. During the second semester of the second year, an informal course in district court practice and procedure is given to interested students. The course is taught by members of the court, probation officers, clerks and other officials who will be working with the students in the criminal project. Following this, thirty students are selected by a faculty board to participate in the clinic during their senior year. All participants are required to enroll in a course entitled "Advanced Problems in Clinical Procedure." In addition, several field trips to local institutions are taken during the senior year.

With respect to the actual handling of cases, the method resembles the method employed in the Minnesota clinic. At arraignment, the court (rather than the student) determines whether the defendant is indigent. If the accused is indigent and the case is a misdemeanor, it may be assigned to the law school defender project. The assigned cases are in turn assigned to the students by the supervising professor. In light of educational consideration, allowing the coordinator to assign the case

33. University of Minnesota, *1967-68 Legal Aid Clinic Evaluation Report* (March 1, 1968).

seems to be a better system than letting the individual student choose his own case (as in the Minnesota project). Ostensibly, the supervisor will be better qualified to choose cases having the highest educational potential.

Working in teams of two, the students examine complaints and other pleadings, research the law, and conduct investigations which include the interviewing of witnesses. Once the case is prepared, students meet with the professor to prepare the trial strategy.

At trial, the students present all necessary pleas and motions and otherwise fully conduct the trial themselves. The supervising attorney is at the counsel table at all times, and is permitted to intervene if he feels it is appropriate.

If the defendant is found guilty, the students present matters pertaining to a proper disposition of the case. Following disposition, if there is a question of appeal, the professor consults with the client; together they reach a decision.

Immediately after trial, the supervising professor conducts a critique with the students. Once a month the students and professor meet to discuss any matter that might be of concern to either.³⁴

It is hoped that the foregoing models can serve as points of departure in formulating plans for implementation of the student practice rule in Louisiana.

Questions and Answers With Respect to Clinical Operation

a. Does Student Practice Constitute Unauthorized Practice of Law?

This is a question that often arises when one is first introduced to the concepts of clinical education. However, the answer is obvious—if the program is approved by the Supreme Court of Louisiana in accordance with judicially prescribed procedures, there can be no question of lack of authorization. The courts, the legislature, and the local bar associations should recognize that clinical work by law students, including advice to clients and actual trial of cases, does not involve the unauthorized practice of law so long as the program's primary purposes are education of law students and service to the community. These goals

34. Spangenberg, *Legal Services for the Poor*, 1965 U. ILL. L. FORUM 63.

would be guaranteed by providing that students work under the supervision of members of the bar, with law schools accepting responsibility for adequacy of supervision, and that the program serves a charitable or public purpose.

b. *Fear of Losing Fee-Paying Clients*

Although protection of fees is important, it should be subordinate to the principle that legal services should be available to all—even those who cannot pay for them. Moreover, clinical services are only available to those who are financially unable to obtain an attorney. Once a standard of indigency is established, the bar can take measures to see that it is adequately enforced. If a case should arise that involved an indigent-plaintiff claim that could involve remuneration, it would be the manifest duty of the supervising attorney to refer the client to an appropriate member of the practicing bar.

c. *Is the Indigent Client Being Shortchanged by an Inexperienced Law Student?*

It would undoubtedly be best if there were enough experienced lawyers for all clients. Students, however, unlike many lawyers, are willing to work intensely on even the most trivial cases. "What the student lacks in experience he gains in enthusiasm," says Irving Younger, a professor of criminal law at New York University. "He will take a \$50 case and treat it like the biggest antitrust suit of all time."³⁵ Certain fears may be justified if students are allowed to leap into the work without the safeguards of careful selection, education, and training.

Quite accurately, Abraham Lincoln felt that a lawyer's time is money. When a lawyer must depend on the sale of his time to provide the growing necessities of life for himself and his family, he cannot afford to do the same amount of research and investigation for an indigent as he would be able to do for a client who could pay him well. The law student, on the other hand, is not yet overburdened with these problems and has more time to devote to indigent representation.

A significant number of indigent defendants go without any representation whatsoever.³⁶ When free defense counsel can be

35. N.Y. Times, April 7, 1968, at 72, col. 1.

36. Judge J. Skelly Wright stated that "great good can come from properly supervised student participation in the representation of persons

procured, it is not likely to be an experienced lawyer. Rather it is more common that the men just admitted to the bar will be called upon to defend such a case. It is submitted that the young attorney is not necessarily more qualified to represent indigents than well-trained and well-supervised law students.

Conclusions

The concept of clinical training offers vast opportunities for the acquisition of sophisticated knowledge of the legal process that would far surpass anything offered by the law schools of this state. A clinical program would provide a forum in which a student could synthesize his theoretical experience in a context in which theory and practice are constantly interlaced. Moreover, it seems clear that if the learning experience is real, students have more interest in the subject matter and are better motivated to learn. Reality would result in learning at a deeper level and in better retention of the substantive law.

Students would properly begin to see cases at their inception rather than only at their end. The tremendously important process of marshalling, selecting, and evaluating facts would find its proper place in the academic curriculum. Moreover, students would have an opportunity to learn the basic skills of interviewing within a legalistic framework leading to the finished product. A student would begin to learn the art of judging credibility and "getting the true story."

Through the creation of the client-attorney relationship the student would become fully aware of his responsibilities in representing a client. He would gain valuable insights into the entire system of legal representation including client advisement and the art of negotiation and settlement. Clinical training should also be greatly beneficial in the development of professional identity—the process by which a student begins to conceive himself as an attorney. In the broader context, clinical education should teach the law student to think creatively and constructively as well as analytically.

charged with petty crimes. A good many such persons now go through the criminal process without any representation at all The value of providing some legal representation to indigent defendants, who now go unrepresented, seems to be a strong reason for experimentation with enlarging the role of student legal aid." Wright, *Law School Training in Criminal Law: A Judge's Viewpoint*, 3 AM. CRIM. L. Q. 166, 171 (1965).

The post-law school "sink or swim" method has long been used to teach the difficult subject of trial advocacy. However, with the increasing complexity of our legal system and the responsibilities of a modern lawyer, it is becoming increasingly evident that the law school is the proper place to teach basic trial skills. "Members of the bench and bar lack the time and the ability to impart the fundamental critical and juristic skills that are the special dispensation of the academician."³⁷

In time, it is believed that the proposed clinical programs will bridge the artificial gap between the schools and the profession and enhance the law schools' position as an integral part of the law community.

As for indigent representation, personal participation in the administration of criminal justice on the part of the students should engender a firm dedication to the concept of "equal justice under the law." By acceptance of their proper portion of the responsibility for indigent representation, the law schools could do much to relieve the burden of assigned counsel and ease the shortchanges in manpower of the Legal Aid Offices, which are suffering under strenuous caseloads. Students will rapidly come to realize the lawyer's professional responsibility to insure that adequate legal services are provided for the indigent, the unpopular, and indeed every individual or group who needs them.

Such programs would thoroughly prepare students in the administration of justice and would equip them to lead in the initiation and acceptance of reforms. Clinical work would certainly have a formidable long-range effect on the number of lawyers interested in, and qualified for, criminal defense. Through the student's contact with his client, the police, the city attorneys, the judges, the clerks, the bailiffs, and the bondsmen, he would gain tremendous insights into the problems and procedures of criminal law.

J. Arthur Smith, III

37. Anderson, *Gideon: A Challenging Opportunity for School and Bar*, 9 VILL. L. REV. 619, 620 (1964).