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A Federal Litigation Program: For Students, Inmates And The Legal Profession

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Abstract

Across the country, efforts have been made by the federal judiciary, the American Bar Association, and law schools to improve the quality of advocacy in the federal courts.

KEYWORDS: Federal Litigation, Students, Inmates

A Federal Litigation Program: For Students, Inmates and the Legal Profession

I. INTRODUCTION

Across the country, efforts have been made by the federal judiciary, the American Bar Association, and law schools to improve the quality of advocacy in the federal courts. One of the proposed measures would require a special examination for admission to the bar,[1] but another bar exam alone will not create competent attorneys. The development of quality advocates should begin in the law schools. The traditional Langdellian[2] case study method has been under attack for several years.[3] Recent institutions of clinical programs point out the transition taking place in the law school curricula. Emphasis has been placed on practical experience in an effort to develop and refine advocacy skills. Although advocacy programs on the state court level are widespread, programs in the federal courts are still in the early stages of development. In keeping with current educational philosophies,[4] Nova Univer-

1. REPORT AND TENTATIVE RECOMMENDATIONS OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES Sept. 21, 22, 1978 at 10, 11. [hereinafter cited as RECOMMENDATIONS OF THE COMMITTEE (1978)].

2. Christopher Columbus Langdell, as Dean of Harvard University Law School, introduced the case study method of instruction in 1870. Prior to that time, students served as apprentices to experienced attorneys and studied comprehensive treatises setting forth substantive law. Gee and Jackson, *Bridging the Gap: Legal Education and Lawyer Competency,* 4 B.Y.U.L. Rev. 695, 722-726, 733-734 (1977)[hereinafter cited as Gee and Jackson.]

3. "The case method has been criticized almost from the start but the criticism generally relates not to what it is, but to what it omits." Grossman, *Clinical Legal Education: History and Diagnosis,* 26 J. LEGAL EDUC. 162, 165 (1974). For a good discussion of the criticism of the case method see: Berryhill, *Clinical Education - A Gold Dancer?* 13 U. RICH. L. REV. 69 (1978).

4. "Indeed, it can be asserted that the single most significant event to occur in legal education during the 1970's has been the growth and development of clinical legal education programs in this country." *The Survey and Directory of Clinical Legal Education,* Council on Professional Responsibility in Legal Education (June 1, 1979) at ii

sity Center for the Study of Law recently participated in an experimental federal litigation program in the Southern District of Florida. The program involved seven students who litigated a civil rights suit filed *pro se*[5] by an inmate.

The first section of this paper discusses the ways a federal litigation program could fulfill the obligations of the legal profession: first, by enhancing the quality of advocacy through student practice; second, by responding to the Canons in the Code of Professional Responsibility; and third, by providing legal services to prisoners. The second section of this article, proposes a model for a federal litigation program. The focus is on course requirements, supervision, funding and implementation. In the final section, the writers relate details of their participation in a federal civil rights suit and thereby seek to demonstrate that a program can be designed to offer students experience in federal court litigation.

II. WHY A FEDERAL COURT LITIGATION PROGRAM IS NEEDED

A. *The Need to Improve the Quality of Advocacy*

Perhaps the most vexing issue facing the legal profession today is the competency of trial attorneys. This issue prompted the Chief Justice of the United States, Warren E. Burger, to say, "No single project, no program, no enterprise of the legal profession or the ABA is of greater importance or will be of longer-lasting value than to proceed promptly to remedy the incompetency problem."[6]

First hand experience with defense attorneys has caused a very able trial judge to "describe some of the counsel coming before the courts as 'walking violations of the Sixth Amendment.' "[7] The Chief Judge for the United States Court of Appeals for the District of Columbia, David L. Bazelon, gave the following examples of these "walking violations" which he saw every week:

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citing Gee and Jackson at 881.

5. "For himself in his own behalf, in person." BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

6. Address by Chief Justice Burger, ABA Midyear Meeting (1977).

7. Bazelon, *The Defective Assistance of Council,* 42 U. CIN. L. REV. 1, 2 (1973).

> Defense counsel did not know that the court kept records of prior convictions; Defense counsel advised the judge that he could take only a few minutes for summation because he had to move his car by five o'clock; Defense counsel invited the jury to draw an inference from the fact that there were no witnesses to corroborate his client's alibi defense;
> Defense counsel told the jury he had done the best job he could "with what I have had to work with;" Defense counsel based his case on an 1895 decision; when the judge asked for a later precedent, the attorney said that he couldn't find a Shepard's citator.[8]

A major step towards alleviating the incompetency problem began in September of 1976. Chief Justice Warren Burger, acting in his capacity as Chairman of the Judicial Conference of the United States, created the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts.[9] Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota was appointed chairman.[10] Judge Devitt created a Subcommittee on Procedures and Methods chaired by Judge James Lawrence King.[11] The subcommittee requested that the Federal Judicial Center undertake research into the quality of advocacy in the federal courts.[12] Questionnaires were sent out to all district judges in the spring of 1977.[13] The first question asked was, "Do you believe that there is, overall, a serious problem of inadequate trial advocacy by lawyers with cases in your court?"[14] Of the three hundred sixty six judges who expressed an opinion in response to this question, forty one percent stated that they believed there is a serious problem.[15]

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8. *Id.* at 2-3.

9. THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS, A REPORT TO THE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS (1978) at xiii [hereinafter cited as REPORT OF THE JUDICIAL CONFERENCE (1978).]

10. *Id.* at xiii. The committee is commonly referred to as the Devitt Committee. *Id.* at xiv.

11. *Id.* at xiii.

12. *Id.*

13. The purpose behind the questionnaire was to elicit opinions from the judges about the quality of advocacy in their courts. *Id.* at 3.

14. *Id.* at 14.

15. The study was based on 1,969 performances by attorneys who appeared in

The study also provided information depicted in graphic form which outlined the relation between the trial performance rating and the number of district court trials conducted by the attorney in the last ten years. The results showed that lawyers who had between zero to two cases were rated as inadequate in thirty percent of the trials and no better than adequate in twenty-five percent.[16] This graph seems to indicate, as one might expect, that there is a direct correlation between trial litigation experience and competency.[17] It should come as no surprise to members of the legal profession that practical experience is necessary to acquire competency in trial skills just as it is in all other areas of endeavor such as medicine, sports, or the arts.

The survey also attempted to discern which areas of advocacy skills needed the most improvement. The conclusions of the judges who responded was that the greatest need arises in the area of "planning and management of litigation."[18] In addition, the most needed areas of improvement in legal knowledge were in the Federal Rules of Evidence and in Federal Rules of Procedure.[19] The conclusions of this study indicated a need to improve the quality of advocacy in the United States District Courts which can best be achieved by "assuring minimum uni-

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848 trials before district court judges. It should be noted, that 89 judges did not respond to the questionnaire, 2 said they had no opinion, and 19 responded to the questionnaire but not to this particular question. *Id.* at 13, 15.

16. The statistics revealed that the 30 per cent rate for inadequate performance dropped dramatically to 12.9 per cent for those attorneys who had practical experience in just 3-5 trials. *Id.* at 42.

17. The attorneys who appeared in 31 or more cases were found to be inadequate in 8.9 per cent of their performances. Moreover, 24.4 per cent of their performances were found to be first rate and 35.6 per cent were rated as very good. By contrast, of those attorneys who conducted between 0-2 trials, 5 per cent were found to be first rate and 20 per cent were considered very good. *Id.* at 42.

18. *Id.* at 46.

Planning and management of litigation included skill and judgment in:

a. Developing a strategy for the conduct of a case.
b. Recognizing and reacting to critical issues as they arise.
c. The use of discovery.
d. The use of pretrial conferences.
e. Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate.

Id. at 45.

19. *Id.* at 51.

form national standards of competency for admission to practice."[20] The Devitt Committee recommended that admission to the Federal Trial Bar be conditioned on good standing in the state court and: 1) successful completion of an examination on federal practice and procedure and 2) four trial experiences as an associate or under the supervision of a bar member.[21] The committee's recommendations have been met with some opposition, however, and adoption is not certain.[22]

In an attempt to improve the training and competence of law students, the Devitt Committee also called for the adoption of a Model Rule for Student Practice before the federal courts.[23] An investigation of various student practice programs found that when well planned, organized, and supervised, they are highly useful "in the delivery of legal services and as vehicles for training trial advocates."[24] Recently compiled statistics bear out the necessity for the adoption of a rule for student practice in federal courts. The Law School Admission Council of Princeton, New Jersey sent questionnaires to four thousand graduates of six law schools and received one thousand six hundred answers.[25] Of the forty-seven and four-tenths percent who work in trial and litigation, nearly one in five (nineteen and six-tenths percent) said

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20. RECOMMENDATIONS OF THE COMMITTEE (1978) at 8, 9.

21. SUPPLEMENT A, REPORT OF THE SUBCOMMITTEE ON REMEDIES TO THE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS. Aug. 1978 at 1. [hereinafter cited as SUBCOMMITTEE ON REMEDIES (1978)]. The committee recommended that at least two of these trials involve actual participation by the individual seeking admission to the federal bar. The committee also recommended that the examination not be required of persons admitted to the bar before the effective date of the new rules.

22. *See, e.g.*, Otorowski, *Some Fundamental Problems with the Devitt Committee Report*, 65 A.B.A.J. 713 (1979).

23. RECOMMENDATIONS OF THE COMMITTEE (1978) at 25. The Model Rule was drafted by the Subcommittee on Rules for Limited Admission to Practice of Law Students, a subcommittee of the Devitt Committee. The full committee then recommended the adoption of the Rule by the District Courts in its report to the Judicial Conference of the United States. *Id.* at 24. It should also be noted, that the subcommittee recommended that student practice in trials should count toward the four trial experiences requirement. SUBCOMMITTEE ON REMEDIES (1978) at 34.

24. SUBCOMMITTEE ON REMEDIES (1978) at 46.

25. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 267. The six law schools surveyed were: Boston College, George Washington, Michigan, New York University, San Francisco, and Texas. *Id.* at 267.

their training was not useful.[26] The survey reported that forty-four percent of the attorneys believed their law school education had not helped in their ability to draft legal documents; seventy-seven and one-half percent said that their training had not helped them in their ability to interview witnesses; fifty-seven and nine-tenths percent said their courses failed to aid them to investigate facts, and sixty-eight and six-tenths percent said that they had not been adequately trained to counsel clients.[27]

The dichotomy between the academic approach to the study of law and its effect on those students who become trial litigators must be bridged if the goal of improving the quality of trial advocacy is to be met. Therefore, the time has come to reform law school education so that it will conform to the changing needs of society. One suggestion made by Chief Justice Burger is that the third year of law school be expanded to a full twelve month program comparable to a medical internship.[28] The Chief Justice, drawing from the medical profession, justified the need for such a program saying:

> Just as hospitals almost universally do not allow a first year medical student graduate to perform surgery without some demonstration of skill, why should we allow a first year law school graduate to represent a client in court when that client has significant rights and property at stake?[29]

There is a growing concensus among members of the federal judiciary that law school education must be improved. This is evidenced by the recent call of the United States Judicial Conference endorsing a plan "aimed at pressuring the nation's law schools into placing more emphasis on teaching trial skills."[30] Law school internship programs could provide a useful forum in which trial skills might be built. In addition to developing more competent trial attorneys, these programs could also help fulfill the legal profession's obligation to provide assis-

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26. *Id.* at 270.
27. *Id.* at 273.
28. THE THIRD BRANCH, BULLETIN OF THE FEDERAL COURTS, Vol. 10, No. 6 at 4.
29. Burger, *Annual Report on the State of the Judiciary,* 1 AM. J. TRIAL AD. 215, 222.
30. The Ft. Lauderdale Sun-Sentinel, August 21, 1979.

tance to a large segment of society who are unable to afford the services of private counsel.

B. *Obligation of the Legal Profession to Provide Legal Assistance*

At the foundation of our legal system is the responsibility of the legal profession to provide services to those who need them. Canon Two of the Code of Professional Responsibility states: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."[31] The responsibility of accepting court appointments or donating time and services to the disadvantaged rests with the individual lawyer. Efforts of this nature, however, are often not enough to meet the need,[32] therefore, it is incumbent upon the profession to continue to support and develop legal assistance programs.[33]

The Code of Professional Responsibility makes clear that the availability of legal services should not be conditioned on the popularity or unpopularity of the client or the cause.[34]

> [T]he process of adjudication is surrounded by safeguards evolved from centuries of experience . . . All of this goes for not if the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him. His chance to have his day in court loses much of its meaning if his case is handicapped from the outset by the very kind of prejudgment our rules of evidence and procedure are designed to

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31. ABA CANONS OF PROFESSIONAL ETHICS, No. 2.

32. *See* for example, the discussion on prisoner need for legal assistance in section C, *infra*.

33. The organized bar has been instrumental in fulfilling the aspirational suggestions contained in the Code of Professional Responsibility by developing free legal clinics, legal aid societies and related programs. ABA CANONS OF PROFESSIONAL ETHICS, EC 2-25.

34. ABA CANONS OF PROFESSIONAL ETHICS, EC 2-27, EC 2-29. Students who participate in a program designed to help prison inmates, particularly in the area of civil rights, should be prepared for a certain degree of resentment or adverse community reaction because the client has been convicted of a particularly heinous crime or from prison administrators who may well be defendants in a law suit. *See* Jacob and Sharma, *Justice After Trial: Prisoner's Need for Legal Services in the Criminal Correction Process*, 18 KAN. L. REV. 493, 620 (1970).

prevent.[35]

The concept of a fair trial in American jurisprudence assumes an adversary presentation to an impartial tribunal.[36] The availability of an advocate for every client with a meritorious claim, regardless of its popularity in the community is necessary to fulfill the ethical obligation of the profession and insure the vitality of the judicial system. This ethical obligation, however, does not stop at the practitioner.[37] Law students, teachers and administrators should, therefore, aid the profession in the delivery of legal services. Perhaps those persons most in need of, yet most deprived of legal services are incarcerated prisoners.

C. *Prisoner Need for Legal Assistance*

The total number of prisoner petitions filed in the United States District Courts for the twelve month period ending June 30, 1978 reached 21,924.[38] This represents a 907.1 percent increase over the number of prisoner petitions filed in 1960.[39] In 1978 alone, the number of petitions increased 12.2 percent over the preceeding year.[40] In light of recent Supreme Court decisions extending the availability of the courts to prisoners,[41] it is unlikely that the number of prisoner filings will decrease.

Civil rights actions and habeas corpus petitions comprise the overwhelming majority of inmate filings.[42] Although states are required to

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35. *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1216 (1958).

36. ABA CANONS OF PROFESSIONAL ETHICS, EC 7-19.

37. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 336 (1974). 60 A.B.A.J. 859 (1974). The opinion makes clear that the Code of Professional Responsibility is applicable to the conduct of a lawyer at a time when the lawyer is not engaged in the performance of his professional duties.

38. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C. March 9-10, 1978 and Sept. 21-22, 1978, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1978 (Table 26) [hereinafter cited as ANNUAL REPORT].

39. *Id.* at Table 27.

40. *Id.* at 197.

41. *See* the discussion on prisoners' right of access to the courts in section D this text, *infra.*

42. ANNUAL REPORT at Table 26. The number of civil rights cases filed by in-

provide some form of legal assistance to inmates,[43] neither civil rights actions nor habeas corpus actions require the appointment of an attorney in every case.[44] Consequently, most[45] prisoner litigants must proceed *pro se*. "The typical *pro se* litigant is indigent, formally untutored in the law and often uneducated."[46] In a survey conducted by the United States Department of Justice, it was found that of the inmates incarcerated in state correctional facilities, only one percent have completed four years or more of college.[47] Moreover, sixty-one percent have not completed high school and twenty-six percent have completed eighth grade or less.[48] The low level of educational attainment coupled with the lack of legal assistance has had a marked effect on the success of prisoner litigants proceeding *pro se*.[49] In light of the foregoing statis-

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mates totaled 10,366 of which 9,730 were petitions by state prisoners. This represents 44.4 per cent of the total petitions filed. Habeas corpus petitions totaled 8,763. *Id.* at 197.

43. *See, e.g.*, the discussion on prisoner right of access to the courts in section D, *infra*.

44. *See, e.g., Ross* in note 61.

45. Exact statistics are not available. A recent survey has suggested that at least 85 per cent of the cases filed were without the services of an attorney. Of the districts surveyed, 21.6 per cent represents the maximum amount of cases filed by attorneys. *See* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979). For a further treatment on this subject *see* Alpert and Miller, *Legal Delivery Systems to Prisoners: A Preliminary Evaluation*, 4 JUST. SYS. J. 9 (1978-79).

46. Zeigler and Herman, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 159 (1972).

47. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1978, U.S. DEPARTMENT OF JUSTICE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE (Table 6.27) [hereinafter cited as SOURCEBOOK 1978].

48. *Id. See also* CENSUS OF PRISONERS IN STATE CORRECTIONAL FACILITIES 1973, NATIONAL PRISONER STATISTICS SPECIAL REPORT Dec. 1976, U.S. DEPARTMENT OF JUSTICE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE at 7 which provides data of state inmates throughout the country. It was found that the median number of years of schooling completed was about 10.5.

49. Turner, *supra* note 45 at 624, 625. Turner's article included a survey of 664 cases. The survey found that *pro se* litigants had little or no discovery. Those few who did conduct discovery had difficulty in obtaining answers to interrogatories, requests for admissions or the production of documents. Of the cases studied, only 18 had either an evidentiary hearing or a trial.

tics, it seems apparent that prisoners cannot obtain "meaningful access to the courts" without assistance from the legal community.

D. *Prisoners' Right of Access to the Courts*

The development of civil rights for prisoners has led to the abandonment of the archaic notion that those who are incarcerated not only forfeit their liberty, but are, "for the time being, slaves of the state."[50] Today, however, there is still a noted reluctance to accord the same degree of constitutional protection to incarcerated citizens as is enjoyed by those outside penal institutions."[51] One area of particular importance to those who are incarcerated is the availability of a forum in which to redress their grievances.

Beginning with *Ex parte Hull*[52] in 1941, the United States Supreme Court recognized the prisoner's right to be free from impairment by the state when seeking access to the courts. It was soon apparent, however, that the court's decision in *Hull* required expansion. Subsequent Supreme Court decisions sought to insure that inmate access to the court was meaningful. Cases such as *Burns v. Ohio*[53] and *Smith v. Bennett*[54] struck down state procedures which "effectively foreclosed access"[55] to the courts by requiring indigent prisoners to pay docket and filing fees.

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50. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (Ct. App. 1871).

51. *See,* Turk, *Access to the Federal Courts by State Prisoners in Civil Rights Actions,* 64 VA. L. REV. 1349, 1358 (1978).

52. 312 U.S. 546 (1941). A prisoner attempted to file a petition for a writ of habeas corpus to the United States Supreme Court. A prison rule which required all legal documents to be submitted to the institutional welfare office prevented him from filing. The Supreme Court struck down this regulation holding that "the State and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. at 349.

53. 360 U.S. 252 (1959). The petitioner attempted to proceed *in forma pauperis* and applied for leave to appeal his conviction for burglary to the Ohio Supreme Court. The Court denied the request because he could not pay the docket and filing fees. On appeal, the United States Supreme Court reversed, holding that Ohio's decision had violated the due process and equal protection clauses of the Fourteenth Amendment.

54. 365 U.S. 708 (1961). The United States Supreme Court struck down an Iowa law which required the payment of filing fees by an indigent prisoner before a habeas corpus application would be docketed.

55. 360 U.S. 252, 257.

In the years following *Burns* and *Smith*, the courts continued to limit regulations that hampered the prisoner's ability to obtain effective access. The prevailing theme of these decisions was that "the duty of the state is merely negative; it may not act in such a manner as to interfere with the individual exercise of such federal rights."[56] For example, the state may not prohibit inmates from assisting other prisoners in preparing petitions for post-conviction relief,[57] nor may law students and legal paraprofessionals be banned from conducting attorney-client interviews with inmates.[58] The courts, however, applying a test of reasonableness, have upheld some restrictive regulations and policies imposed by the state.[59] The burden was placed on the prison authorities to justify the regulations by showing evidence of adequate alternatives.[60]

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56. Bounds v. Smith, 430 U.S. 817, 834 (1977).

57. Johnson v. Avery, 393 U.S. 483 (1969). The petitioner here, was serving a life sentence in the Tennessee State Penitentiary. He was transferred to the maximum security building in the prison for violation of a prison regulation which prohibited an inmate from assisting others in legal matters. In a "motion for law books and a typewriter," he sought relief from his confinement in the maximum security building. The district court treated the motion as a petition for a writ of habeas corpus and, after a hearing, ordered him released and restored to the status of an ordinary prisoner. The sixth circuit reversed but on appeal to the Supreme Court the district court's decision was upheld. The Supreme Court ruled that: unless and until the State provides some reasonable alternative to assist inmates in the preparation of post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners. 393 U.S. at 490.

58. Procunier v. Martinez, 416 U.S. 396 (1973). *See also* Soster v. McGinnis, 442 F.2d 178 (2nd Cir. 1971). It was improper for state prison warden to delete material from prisoner correspondence to his attorney. Novak v. Beto, 453 F.2d 661 (5th Cir. 1971). Texas prison regulation banning inmate assistance in the preparation of legal materials was held unconstitutional even though the State contended that reasonable alternatives were in existence. Souza v. Travisono, 498 F.2d 1120 (1st Cir. 1974). Court struck down state policy which prohibited law students from assisting inmates. Haymes v. Montanye, 547 F.2d 188 (2nd Cir. 1976). Writ writer who was prevented from giving assistance to inmates had standing to vindicate the right of prisoners to petition the courts.

59. *See,* Soster v. McGinnis, 442 F.2d 178 (2nd Cir. 1971), upholding prison regulation which prohibited prisoners from sharing law books and requiring the books to be acquired through prison officials. Collins v. Haga, 373 F. Supp. 923 (W.D. Va. 1974). State not required to provide inmate with access to law library when two attorneys were available to assist prisoners.

60. *See,* Novak v. Beto, 453 F.2d 661 (5th Cir. 1971); Corpus v. Estelle, 551

Historically, there have been few areas in which states have had an affirmative duty to expend resources so that prisoners could gain meaningful access to the courts. This has occurred in criminal and habeas corpus actions which assert a federal right that is constitutional in nature.[61] The scope of the state's obligation was expanded in *Gilmore v. Lynch*[62] and crystallized in *Bounds v. Smith*.[63] In *Gilmore* the court struck down a regulation which restricted the prison law library to specified materials. Prison officials were required to either expand their library collection or "adopt some new method of satisfying the legal needs of its charges."[64] In *Bounds*, the United States Supreme Court established beyond doubt "that prisoners have a constitutional right of access to the courts."[65] Moreover, *Bounds* places an affirmative obligation upon the state "to insure that inmate access to the courts is adequate, effective and meaningful."[66] This is a fundamental, constitutional right which "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[67]

F.2d 68 (5th Cir. 1977).

61. *See,* Griffin v. Illinois, 351 U.S.12 (1956). State must provide trial records to indigent inmates. Douglas v. California, 372 U.S. 353 (1963). Counsel must be appointed for indigent inmates seeking to appeal their convictions. Long v. District Court, 385 U.S. 192 (1966). State must provide transcript of post-conviction proceedings. Roberts v. La Valle, 389 U.S. 40 (1967). State must provide preliminary hearing transcript. Gardner v. California, 393 U.S. 367 (1969). State must provide habeas corpus transcript. One of the few cases in which the State did not have an affirmative burden was Ross v. Moffitt, 417 U.S. 600 (1974) which held that counsel does not have to be appointed for discretionary appeals.

62. 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd. per curium*, Younger v. Gilmore, 404 U.S. 15 (1971).

63. 430 U.S. 817.

64. 404 U.S. at 112.

65. 430 U.S. at 821. Here, state prison inmates of North Carolina filed civil rights suits alleging that the state, "by failing to provide them with adequate legal library facilities, was denying them reasonable access to the courts and equal protection as guaranteed by the First and Fourteenth Amendments." The district court, relying on Gilmore, held for the prisoners. This decision was affirmed on appeal to the Fourth Circuit and the Supreme Court.

66. *Id.* at 822.

67. *Id.* at 828. The court suggested several alternatives which are available to the state. These include:

The implication of *Bounds* is that adequate law libraries are synonomous with "meaningful access" and, therefore, some courts have ended their analysis once the question of adequacy has been resolved. For example, in *O'Bryan v. County of Saginaw, Mich.*,[68] the court rejected the proposed contents of a prison library because it contained "nothing to assist prisoners in preparing legal papers to challenge the conditions of their confinement. . . ."[69] Accordingly, the court ordered the addition of titles eighteen, twenty-eight and forty-two of the United States Code and a manual on prisoner's civil rights litigation.[70] In *Fluhr v. Roberts*[71] however, the court found the library in *O'Bryan* "overly meager" and required the inclusion of numerous additional volumes.[72]

Even though libraries have been made "adequate" by the addition of proper lawbooks, an inmate's right of access may still be effectively foreclosed. Some problems such as restrictive library regulations, improper supervision and intimidation are readily susceptible to administrative remedy.[73] However, ignorance and illiteracy[74] among the inmate population raises the question of whether law libraries along can ever provide meaningful access. Some courts have recognized this problem and fashioned remedies which prohibit the states from denying an inmate the right to seek legal assistance. Thus, jailhouse lawyers or the assistance of other prisoners cannot be barred by the state until some

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the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or informal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices.

430 U.S. at 831.

68. 437 F. Supp. 582 (E.D. Mich. N.D. 1977).

69. *Id.* at 601.

70. *Id.*

71. 460 F. Supp. 536 (W.D. Ken. 1978).

72. *Id.* at 537-538.

73. In Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978), and Wolfish v. Levi, 573 F.2d 118 (2nd Cir. 1978), library hours were extended as a means of ensuring "meaningful access" to the courts. In Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Penn. 1978), the court held that vandalism of law books could be controlled by proper supervision.

74. *See* the discussion on prisoner need for legal assistance in section C, *supra.*

other reasonable form of assistance is made available.[75] These solutions, however, are wholly inadequate because the law is an intricate and complex subject. It has been suggested "that one untrained in the law, though wise and sensible, is severely handicapped in attempting to provide legal assistance."[76]

The states obligation to provide inmates with "adequate, effective, and meaningful" access under *Bounds* cannot be satisfied by providing anything less than assistance from individuals trained in the law. Thus, in *Hooks v. Wainwright*,[77] the State of Florida was compelled to take over the financial support of a prison assistance program which had previously been federally funded. *Battle v. Anderson*[78] has taken the *Hooks* rationale further by requiring the State of Oklahoma to implement and fund an inmate legal assistance program.[79] Law schools developing federal litigation programs may want to utilize this line of cases to compel the states to provide administrative and financial assistance.

III. PROPOSAL FOR A FEDERAL TRIAL LITIGATION PROGRAM

The Model Rule for Student Practice in federal courts serves as the foundation upon which law schools can construct federal litigation programs.[80] The guidelines set forth in the Rule include requirements

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75. *Cf.* Rudolph v. Locke, 594 F.2d 1076 (5th Cir. 1979) and Graham v. Hutto, 437 F. Supp. 118 (E.D. Va. 1977).

76. Wetmore v. Fields, 458 F. Supp. 1131 at 1146-1147 n.7 (W.D. Wisc. 1978).

77. 578 F.2d 1102 (5th Cir. 1978). Hooks was a civil rights action brought by inmates of Florida's correctional institutions who claimed that they were receiving insufficient legal books and services to meet the "constitutional mandate of effective inmate access to courts." *See also,* Wade v. Kane, 448 F. Supp. 678 (E.D. Penn. 1978) where the court held that the closing of an in-prison law clinic was violative of a prisoner's constitutional rights under Bounds.

78. 457 F. Supp. 719 (E.D. Okla. 1978). This was an evidentiary hearing to determine if Oklahoma prison officials were complying with prison orders in an inmate action challenging the conditions of their confinement. One of the issues before the court was the adequacy of a prison law library. Despite the "presence of a minimally adequate library," the court found that it was insufficient to provide "meaningful access."

79. *Id.* at 739.

80. *See* note 23 *supra.*

for students, supervisors, and programs.[81] Under the Rule, the student practitioner is required to have completed at least three semesters of legal studies, or the equivalent; have knowledge of the Federal Rules of Civil and Criminal Procedure, Evidence, and the Code of Professional Responsibility; be certified by the dean of the law school as being of good character and sufficient legal ability; and be certified by the court.[82]

Supervisors are of central importance as the success of the program depends upon their guidance. The Rule requires that a supervisor must have faculty status and be certified by the dean and the court. The supervisor must also be admitted to practice in the court in which the students are certified; be present with the student at all times when conducting court business; and co-sign all pleadings or documents filed with the court. The committee also suggested a limit of ten students per faculty supervisor.[83] There are certain intangible characteristics desirable in developing a profile of a supervising attorney. It is essential for the supervisor to be a skilled litigator. This is necessary because the ultimate responsibility for ensuring competent representation of the inmates devolves upon the supervisor. While it is hoped that the students will provide competent representation, the supervisor must be prepared to step in, if necessary, to protect the client's interests.

What makes an individual a skilled litigator is a question upon which reasonable minds may differ. Law schools, therefore, should be left free to develop their own criteria. There are, however, several factors which should be taken into consideration. For example, there is some empirical data which suggests that there is a correlation between litigation, experience and competency.[84] Moreover, it may be desirable

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81. SUPPLEMENT C, FINAL REPORT OF THE SUBCOMMITTEE ON RULES FOR LIMITED ADMISSION TO PRACTICE OF LAW STUDENT TO THE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS, February, 1978 at 1, 2 [hereinafter cited as SUPPLEMENT C].

82. *Id.* at 5. In addition, the committee commented that high academic standing is not *sine qua non* to the program but that interest, motivation and supervision are more determinative of the student practitioner's success than grades. *Id.* at 6.

83. *Id.* at 10, 11. The supervisor must also assume personal professional responsibility for the students' guidance and be responsible for supplementing the students' work when necessary to serve the client's interests.

84. *See* notes 16 and 17, *supra.*

or even essential that the supervisor have considerable familiarity with the federal courts since many facets of the federal judiciary system differ or do not exist in the state courts.[85] The supervisor must also possess the ability to inculcate the student with the requisite skills of trial advocacy. This is a difficult quality to identify and one upon which opinions may be desparate. Again, law schools should be left free to fashion their own criteria. A federal litigation program, however, will require the supervisor to devote an inordinate amount of time and effort. Dedication and enthusiasm may prove to be essential traits. Law schools should also develop a system for weeding out supervisors who prove to be ineffective. One method which should be utilized is an annual evaluation by both students and faculty. The evaluation should focus upon the supervisor's skill as a litigator as well as the supervisor's ability to develop these skills in the student.

Implementation of a federal litigation program necessarily raises many questions. Who selects the cases, what criteria guide the selection, and what type of restrictions should be placed on selection? Few restrictions exist in the Model Rule which permits student representation of any client including federal, state, or local government bodies in any criminal, civil, or administrative matter. The rule requires that a written letter of consent from the client be obtained in order for the student to appear on his behalf.[86] It also requires that the program be certified by the court, conducted to avoid schedule conflicts with the court, and to maintain malpractice insurance.[87] While the student may not accept payment for services, the program may receive compensation from sources other than the client.[88] Variations and modifications of the Rule are expected and depend primarily upon the particular needs of the program and the jurisdiction in which it lies. For example,

85. Issues such as standing, ripeness, mootness, the abstention doctrines, as well as statutorily imposed jurisdictional questions are but a few of the problems which may be encountered. In addition, the supervisor must have a working knowledge of the Federal Rules of Civil Procedure, Appellate Procedure, and Evidence.

86. SUPPLEMENT C at 17.

87. *Id.* at 7. Malpractice insurance covering law school clinical programs has been made available by Lloyds of London. *See* Jacob and Sharma, *supra* note 34, at 619, 620.

88. *Id.* at 7. For example, compensation is authorized under certain circumstances by the Criminal Justice Act and 42 U.S.C. § 1988.

student requirements may be expanded to include orientation classes[89] and specific areas of study related to the litigation anticipated.[90]

Thus far, twenty-five district courts and three circuit courts of appeal have adopted the Model Rule.[91] Other restrictions, such as the extent to which students are allowed to participate is governed by the particular form of the local rule, and the discretion of the presiding judge.[92] While many courts permit students to practice before the bench, some do not.[93] It is, therefore, incumbent upon the American Bar Association, law schools, students, and other members of the legal profession to push for the adoption of the Model Rule and aid in its implementation.[94]

The Model Rule, however, does not address the questions of who selects the cases and what criteria guide the selection. Practical considerations dictate that the litigation program rather than the courts should select the cases. The federal courts should not have to assume the administrative burden which case selection could create. Moreover, it is inappropriate for judges to rule on the potential merits of a prisoner's complaint particularly in *pro se* actions where inmates may have legitimate grievances but lack the legal training and expertise to prop-

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89. An orientation clinic may require the students to observe several trials in federal court to familiarize them with the manner in which federal litigation is conducted. Also, if the program is concerned with inmate assistance, an indoctrination to prison administrative rules and regulations and an introduction to the inner workings of the enforcement agencies may be advisable.

90. In prisoner litigation, for example, a civil rights course on habeas corpus and § 1983 actions should be made a prerequisite to student participation in the program.

91. THE SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION, THE COUNSEL ON PROFESSIONAL RESPONSIBILITY IN LEGAL EDUCATION, June 1, 1979, Table 7 at 113 and the explanation thereof at xix.

92. SUPPLEMENT C at 15.

93. *Id.* at Appendix D

94. The Model Rule may be implemented through a variety of suggested alternatives. The Two Year law school would reduce the traditional three year course of study and devote what would be the third year, to clinical study. The Two Year Plus law school would award a J.M. degree after two years with the following year involving specialty training in a "lawyer school" operated by the bar. The Two-One-One model provides that after two years of formal instruction, one year be spent in practice with an additional year of formal instruction to follow. Another alternative, Specialized Tracking, would allow the student to concentrate on one of two areas of law within a three year format. For an in depth discussion and analysis *see* Gee and Jackson *supra* note 2, at 843-857.

erly articulate their problem. Judges should not have to act as their advocates in these situations. This function should be left to the litigation program where inmate interviews could determine whether there is merit to the case.

The criteria which the litigation program utilizes in making case selection must conform to the lawyer's ethical duties to client and court. Thus, while the probable educational value of the case may be taken into consideration, it should never be the sole criterion. The determinative factor in case selection must be merit, for to do otherwise would violate the Code of Professional Responsibility.[95] Each litigation program should be free to determine the priority which is assigned to cases. The size and resources of the program may influence case selection. Impact cases which attack systemic problems may require large expenditures of time and funds with the litigation lasting many years. A smaller program may wish to avoid these problems and place priority in cases which have both merit and educational value. Hopefully, litigation programs will progress to the point where they are capable of handling a complete client service and all inmates with a meritorious claim will be able to obtain legal assistance.

A federal litigation program could be initiated by utilizing prisoner *pro se* complaints already on the court dockets.[96] Ultimately, litigation programs should include the writing and filing of complaints for prisoners. This would provide experience for the student at early stages in the legal process including counseling, factual research, and drafting pleadings. In addition, the litigation program might reduce the overloaded court dockets[97] by weeding out frivolous complaints.[98]

Law schools cannot rely on the federal courts to compel the states

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95. ABA CANONS OF PROFESSIONAL ETHICS, No. 7-4.

96. *See, e.g.*, Zeigler and Herman *supra* note 46. The article suggests that *pro se* litigants account for nearly 20 per cent of the caseload handled annually by the federal courts.

97. ANNUAL REPORT Table 5 at 105.

98. In Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978) the court noted that a South Carolina Law School clinical program had a "dramatical statistical effect in the reduction of meritless prisoner cases . . . ." *Id.* at 1155 n.5. One of the most interesting prisoner *pro se* complaints relates the story of an inmate who alleged that he was being controlled by Martians who were using rays on him. The district court judge wanted to placate the prisoner so he enjoined the Martians from further use of the rays. Zeigler and Herman *supra* note 46, at 165 n. 17.

to fund federal litigation programs under the *Bounds-Hooks-Battle* line of cases. Funding, therefore, may be sought from a variety of sources. Congress has earmarked one million dollars for the funding of clinical legal education programs.[99] Bar organizations, the Federal Law Enforcement Assistance Administrations, and the Criminal Justice Act,[100] provide additional sources. Funding is an important factor in the success of advocacy programs. The law student-professor ratio causes a higher expenditure per student. If more academic credit was given for participation in the programs, a greater percentage of tuition money could logically be allotted to them. Graduates with more experience in trial work who demonstrate a high degree of competence are worth the costs of the proposed programs. In addition, some statutes provide for the prevailing party to be awarded attorney fees.[101] These fees could be used to defray the cost of a litigation program.

IV. FEDERAL TRIAL LITIGATION: THE NOVA EXPERIMENT

In the fall of 1978, a small group of Nova University law students were given a unique opportunity to participate in a civil rights trial in the United States District Court for the Southern District of Florida before the Honorable James Lawrence King.[102] Professor Tobias Simon[103] designed and supervised the program in which seven students[104]

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99. SUPPLEMENT C at 26. The funds are available through the Department of Health, Education and Welfare with a limitation of $75,000 per grant.

100. *Id.* at 24.

101. *See* note 88 *supra.*

102. Judge King was Chairman of the Subcommittee on Procedures and Standards, part of the Devitt Committee. This subcommittee urged the Federal Judicial Center to research the issue of trial advocacy. The Model Rule was ultimately drafted and adopted as a result of the research.

103. B.A., 1949 Hofstra University; J.D., 1952 Harvard Law School; Member of the Florida Bar Association and in private practice in Miami since 1952; Member of the Florida Advisory Committee to the United States Civil Rights Commission 1966-68; Co-author with Florida Supreme Court Chief Justice Arthur J. England Jr., *Florida Appellate Remedies* (D & S. Publishers, 1979); Adjunct professor of law, Florida State University 1974-76, Nova University 1978-79.

104. The group was originally comprised of the following second and third year law students: Carolyn Bingham, Dwight Evans, Randy Freedman, Howard Lundy, Thomas J. Ross II, Marc Silverman, and Dianne Stephanis (the designated group

represented Jesse Tafero, an indigent plaintiff. The experience reflects some of the more difficult problems which a federal litigation program is likely to face. Students must be prepared to deal with animosity because of the unpopularity of the client or cause. There are logistical problems of getting law students to prisons which are often located in remote areas. There are also security problems which arise in getting a group of students into prison so that they can interview a client.

The Nova experiment encountered one of the most unpopular situations envisioned in a federal litigation program. Mr. Tafero was a convicted murdered awaiting execution on death row in Florida State Prison when Professor Simon and the students were appointed counsel.[105] The case originated in August, 1976 when Mr. Tafero filed a *pro se* complaint alleging that he was unconstitutionally deprived of his civil rights subsequent to his arrest and incarceration.[106] He sought $20,000 from each defendant, all officers and employees of the Broward County Sheriff's Department. While a certain amount of animosity might be expected, the difficulties encountered were relatively minor.[107] More importantly, Mr. Tafero's status did not affect the group's right to interview their client. The authorities were cooperative in allowing students into prison despite potential security problems. The five hour trip to Florida State Prison proved to be the most difficult aspect.

Normally, any federal litigation program will, as its inherent goal, introduce students to a variety of legal and procedural questions. In

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leader).

105. In the spring of 1976, Mr. Tafero was convicted of murdering a Florida Highway Patrolman and a Canadian Constable. *See* State v. Tafero, No. 76-1275 CF 10 (17th Cir. Ct. Fla.).

106. The students ascertained that five distinct matters were at issue: First, Mr. Tafero alleged that incident to his arrest, booking and interrogation he was threatened, physically abused, and kept in constant fear for his life. Second, Mr. Tafero alleged that two days after the first incident, he was forcibly removed from his cell, stripped, assaulted and beaten. The third and fourth incidents contained allegations that police officers struck Mr. Tafero with a flashlight and a television antenna. Finally, Mr. Tafero alleged that he was bound and shackled to the bars of his cell for two hours and a gag placed over his mouth when he complained about the procedure for using the showers.

107. The students found that in discussing the case, many people were outspoken in their beliefs, saying that a "cop-killer," could not be believed or, assuming the incidents were true, that "he deserved it." In addition, many people had the mistaken idea that a favorable verdict would allow Mr. Tafero to go free.

Tafero for example, the students focused on providing the factual allegations of the complaint.[108] The theory of recovery arose, as it does in many prisoner suits,[109] under 42 U.S.C. § 1983.[110] The students had to develop proof of an action by any person acting under color of law which causes a deprivation of constitutionally secured rights.[111] It was therefore essential to the establishment of a prima facie case[112] that Mr. Tafero testify because there were no other witnesses who could corroborate all of the allegations in the complaint.[113] The problem, however, was Mr. Tafero's incarceration in prison. To secure his presence, a Writ of Habeas Corpus Ad Testificandum[114] was drafted asking for the production of the plaintiff for trial and outlining the necessity of his testimony. Although the writ was granted, defense counsel subsequently filed a Motion for Proper Security Measures at Time of Trial requesting that the plaintiff be bound and shackled. Oral argument was

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108. Before the students entered the case, a special magistrate's report was furnished to Mr. Tafero which contained various police documents. Departmental memos provided a wealth of information which could be utilized at trial. In one memo, for example, one of the defendants denied that any beating or assault took place but did admit that Mr. Tafero was stripped so that his clothes could be tested by the lab for bloodstains. The report stated that when Mr. Tafero refused to comply with a request for his clothes, the officer, along with others, aided in their removal. In another memo, a different defendant denied any wrongdoing stating that Mr. Tafero was handcuffed because he was banging the cell walls and screaming. The memo also stated that a shirt was tied across Mr. Tafero's mouth for two minutes because he spat upon an officer.

109. *See* note 42 *supra.*

110. 42 U.S.C. 1983 (1978) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

111. *See* note 49 supra.

112. For the classic discussion on the elements of 42 U.S.C. § 1983, *see* Monroe v. Pape, 365 U.S. 167 (1961). A prima facie case had to be established in Tafero in order to withstand a motion for a directed verdict under Rule 50 FED. R. CIV. P.

113. There was one witness, a former cellmate of the plaintiff, who could testify on behalf of Mr. Tafero, but this pertained to only one incident.

114. "At common law, the writ, meaning 'you have the body to testify,' used to bring up a prisoner detained in a jail or prison to give evidence before the court." BLACK'S LAW DICTIONARY (5th ed. 1979). A writ was also drafted for Mr. Tafero's cellmate (*see* note 113, *supra*) who is serving a life sentence in the Florida State Prison.

heard and Judge King denied the motion.[115] These problems will undoubtedly be encountered by other litigation programs. The fact that Mr. Tafero was permitted to appear in court despite his conviction for murder, indicates that such obstacles can be overcome.

The *Tafero* trial exposed the students to many of the tools utilized by the practicing attorney. Trial tactics for example, were developed based upon interviews with witnesses, depositions, interrogatories, and pretrial discovery. Potential problems had to be anticipated and researched.[116] The students also learned the mechanical aspects of practicing law such as the issuance of a subpoena duces tecum[117] and how to subpoena a witness. When the trial commenced, the students were free to handle every aspect of Mr. Tafero's case. They argued several motions *in limine*,[118] submitted *voir dire*[119] questions to the judge,[120] impaneled the jury, and gave opening statements before the court recessed for the day. On the second day of the trial, it came to the attention of

115. Prior to the hearing, the students practiced oral argument emphasizing the point that if the motion was granted, the physical restraints on the plaintiff would have a prejudicial effect on the jury.

116. One of the problems anticipated was a hearsay question as to whether several attorneys who had contact with Mr. Tafero at varying times after each of the alleged incidents, could testify as to what he said to them. Rule 802 FED. R. EVID. states, "hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Under Rule 801(c) FED. R. EVID. hearsay is defined as ". . . a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The students hoped to have the statements admitted into evidence under Rule 803(1), (2), or (3) FED. R. EVID. which makes a hearsay statement admissible when used to describe a present sense impression, excited utterance, or a then existing mental, emotional or physical condition.

117. Pursuant to Rule 30(b) and 45(b) FED. R. CIV. P. a subpoena duces tecum may be issued to compel non-parties to provide material necessary to the case.

118. "A written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements." BLACK'S LAW DICTIONARY 914 (5th ed. 1979).

119. "To speak the truth. This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to." *Id.* at 1412.

120. The students' experience with the Tafero trial made them realize that people had many prejudices and misconceptions. Questions were developed to minimize these problems. For example, the jurors were asked whether they understood that this was a civil suit and that it would not affect Mr. Tafero's criminal conviction.

the court that the defendants' attorney intended to cross-examine the plaintiff about facts surrounding the murders for which he was convicted.[121] Mr. Tafero's convictions were on appeal and since he did not take the witness stand at his criminal trial, he did not wish to testify to facts in this case that could be used against him if he was subsequently granted a new trial. After hearing oral arguments on this issue, Judge King ruled that the questioning had to be permitted to ensure a fair presentation of the issue. As a result of this ruling, the plaintiff chose to take a voluntary dismissal without prejudice pursuant to Rule 41(a)(2) Fed. R. Civ. P.[122] thereby preserving his right to refile the complaint after the disposition of his criminal appeal.

Although the case never went to the jury, the Nova experiment in federal trial litigation provided invaluable experience for the students. Every individual in the group had to prepare memoranda of law to accompany their motions to the court.[123] This procedure develops writing skills which are essential to the trial practitioner. There were also many hours of preparation which, though never utilized at trial, helped develop the students' litigation skills. There were simulation sessions, for example, in direct and cross-examination which required the group to construct their line of questions and develop trial tactics. This preparation, coupled with the groups trial experience instilled a tremendous sense of self-confidence in the students, and a real understanding of the time, energy, and dedication needed to develop the skills of trial

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121. Because of the importance of the issue, Professor Simon argued against permitting this line of questioning stating that such testimony was irrelevant and inflamatory. He informed the court that Mr. Tafero would invoke the Fifth Amendment privilege against self-incrimination.

122. Rule 41(a)(2) FED. R. CIV. P. provides:

> By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independant adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

123. Rule 10(A) of the local rules of the District Court for the Southern District of Florida requires that a written memorandum of law citing supporting authorities accompany every motion. Rule 10(C) of the local rules requires each party opposing the motion to file a reply memorandum within five days after service of the motion.

advocacy.

V. CONCLUSION

The participation of law students in federal trial litigation is an idea whose time has come. The development of prisoner access cases coupled with inmate need for legal assistance places a tremendous burden upon the legal profession. Individual efforts by practicing members of the bar have not been sufficient to meet the needs of prisoners. The ethical obligation of the legal profession, therefore, mandates the development of alternative delivery systems to remedy this problem. This obligation is of particular importance in prisoner suits where the cause or the client may prove to be unpopular. Moreover, litigation programs are an ideal proving ground for the training of students in skills necessary for competent advocacy. The expectations may be high for a program that has not been tested, but no other objectives could be of greater service to our legal system than the attainment of these goals.

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