

# *Nova Law Review*

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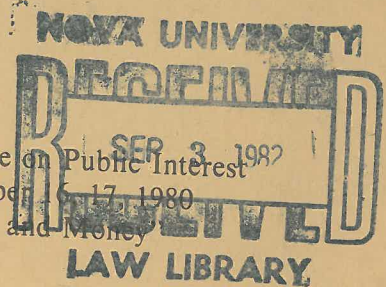
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## Nova Law Review Full issue

VOLUME 4  
SUPPLEMENT  
SPRING 1980

## NOVA LAW JOURNAL



Addresses Before the Conference on Public Interest  
Practice in Florida, November 17, 1980  
"Practicing Law for Love and Money"

A Visionary Opinion

*The Honorable Arthur J. England Jr.*

The old lawyer said: "I look out for my paying clients."

The young lawyer responded: "But good lawyers must also do  
some free public service."

*Chesterfield Smith*

The Private Bar and the Public Lawyer:  
An Essential Partnership

*Dan J. Bradley*

Defining the Unauthorized Practice of Law:  
Some New Ways of Looking at an Old Question

*Alan Morrison*

*The Nova Experiment*

A Federal Litigation Program:

For Students, Inmates and the Legal Profession



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Supplement  
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## Introduction

**BRUCE S. ROGOW\***

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We initially conceived the Nova Conference on Public Interest Practice in Florida as an educational and a supportive meeting. It was to provide an opportunity for public interest lawyers to learn new developments in the law and, perhaps more importantly, the Conference was to encourage new members of the Bar to become engaged in public interest practice.

I am not sure how much substantive law anyone took away from the Conference, although the opportunity was provided. I am not sure how many new entrants were recruited into the field, although we tried to encourage them with wonderful tales of success and attorney's fees under the Civil Rights Attorney's Fee Act.

I am sure that those already engaged in public interest practice in Florida left feeling invigorated and ready to pursue new frontiers. There was a spirit of community among the participants which reflected the closeness which has developed among a small number of Florida lawyers who have, for the past fifteen years, made Florida public interest practice a growth industry.

Some of the people whose views are on the next few pages are among that group. Tobias Simon, supervisor of the Nova Experimental Federal Litigation Program, was the founder, in 1966, of a federally funded legal services program in Miami which spawned a host of important law reform cases and which created another program, Florida Rural Legal Services, the state's largest legal services program. Dan Bradley, now President of the Legal Services Corporation, began his

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\* Professor of Law, Nova University Law Center. Professor Rogow began his public interest practice in Mississippi in 1965 and 1966, representing civil rights workers. He returned to Florida (he is a graduate of the University of Florida College of Law) and was Assistant Director of Legal Services of Greater Miami until 1972. From 1972 to 1975 he taught at the University of Miami and came to Nova when the Law School opened in 1975. During the past decade, Professor Rogow has argued over 75 public interest cases in various state and federal appellate courts, including six cases in the Supreme Court of the United States.

public interest practice in Florida Rural Legal Services.

Chesterfield Smith has for years served as a pillar of reassurance for all of us who have felt ostracized in our roles as public interest advocates. When we felt no sympathy or understanding from the organized bar, there was Chesterfield, ABA President elect, ABA President, ABA former President, taking up our cause, attending American Civil Liberties Union dinner, lending his name to fairness.

This is a good state for the public interest practitioner. People like Chesterfield, Toby, Dan, and a long list of other Florida lawyers have kindled an ongoing commitment to legal progress, although some pockets of legal provincialism remain. But on balance, one must recognize the increasing quality of our state trial and appellate judges, and the fact that more and more, these appointments are coming from the ranks of people who have shown a commitment to the poor, to minorities, to the aged and the handicapped.

Alan Morrisson's remarks, and Chief Justice England's Isaac Asimov-like opinion, look to the days of deregulation and free-market competition for legal services. Their ideas are thought provoking and the time they describe may come, but for the thousands of people in Florida who are too poor to afford a lawyer, or too handicapped by physical, emotional or societal barriers, the words of Dan Bradley and Chesterfield offer more solace.

So read the views of our friends and come to your own conclusions. We at Nova look forward to a future in which our graduates will play a vital role in shaping public interest practice in the next century, whatever form that practice takes.

## A Visionary Opinion\*

**THE HONORABLE ARTHUR J. ENGLAND JR.**

*Chief Justice*

*The Supreme Court of Florida*

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### IN THE SUPREME COURT OF FLORIDA

IN THE MATTER OF  
THE PETITION OF MORE  
THAN TWENTY-FIVE ATTORNEYS  
TO PARTIALLY DE-INTEGRATE  
THE FLORIDA BAR

#### PER CURIAM

By petition filed pursuant to Article XIII of the Integration Rule, more than twenty-five members in good standing of The Florida Bar asked the Court to partially de-integrate the bar—that is, to eliminate the compulsory membership requirement first imposed by the Court in 1949 for persons eligible to practice civil law in Florida. The petition is both supported and opposed by persons, groups and governmental units too numerous to list. The arguments arrayed by both sides are carefully developed, well documented and artfully expressed, and because these efforts have greatly facilitated the very sensitive task we are now called upon to perform, it seems appropriate to summarize the majority positions asserted.

The petitioning attorneys' basic premise for this proceeding is that regulation of the civil side of the legal profession by the Court is no longer necessary or desirable, in light of the limited number of bar members practicing civil matters and the narrow range of matters which require any form of legal representation. This premise is

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\* Presented before the Conference on Public Interest Practice in Florida; "Practicing Law for Love and Money," Nova University Center for the Study of Law, November 17, 1979.

historically based, reflecting evolutionary developments in the practice of law not only in Florida but throughout many industrialized societies.

Those opposing the petition also take a historical view, basically contending that there are good reasons why attorneys have been, and should continue to be, governed by the Court in civil matters, no matter how few there are or what legal representation they provide.

It is not essential that we recount here the early history of the legal profession as it developed in Great Britain and in the United States. We accept as accurate respondents' showing that the profession was, in form and substance, regulated by the courts as to civil matters even from earliest times, when a small number of lawyers delivered a relatively narrow class of legal services to a limited group of clients. Nor is it essential to restate the original reasons, still valid today, which underlay that regulatory interest by the judiciary. On the other hand, to understand petitioners' argument it is necessary to recount several Florida milestones affecting the delivery of legal services since 1949.

As mentioned, the profession was "integrated" in 1949, requiring membership in the bar for all who would practice law in the state. From an initial statewide membership of 2,700 paying annual dues of \$25 per person or \$67,500 in the aggregate, the organized bar grew to a membership in 1979 of 25,681, paying annual dues of \$125 per person or \$3,210,125 in the aggregate. (The year 1979 was selected because the 1970s were significant ones, as will be shown.) Legal services performed by the bar on the civil side during this period included, principally, tort (including personal injury) litigation, compensation for workers' injuries, real property transactions, and family matters, such as marriage dissolution, child custody and the like.

Legal services in these areas of law had historically been available only to the affluent. A relatively recent set of pressures altered that, however, to compel increasing availability of civil legal services to poorer persons. In the 1960s, legal aid organizations and public interest law firms emerged as vehicles to provide personalized civil representation to the poor and to broaden constitutional rights through attacks on those laws which, it was believed, disadvantaged poor persons generally. Governmental entry into the delivery of legal services to the poor, through such organizations as the Office of Economic Opportunity, the Legal Services Corporation, Florida Legal Services, Inc., and Florida Rural Legal Services, Inc., was a hallmark

of the 1970s.

Before and during the 1970s, other means for providing civil legal assistance on a broad basis had evolved in Florida. These included: (i) contingent legal fees for personal injury claims and for prevailing parties in claims of deceptive and unfair trade practices, (ii) a comprehensive compensation scheme for work-related injuries, (iii) prepaid legal insurance plans, (iv) summary court procedures for relatively small civil claims, and (v) neighborhood justice centers for the resolution of minor disputes. Outside Florida, other means were being devised toward the same end, such as California's 1979 legislation requiring arbitration as a prerequisite to a court proceeding for all civil claims under \$1,500. These mechanisms, of course, were the first primitive manifestations of an emerging awareness that courts were virtually inaccessible to the poor, and that, among citizens and residents of America, access to civil justice was vastly disparate.

A serious access to justice movement began in the 1980s, leading inevitably to the now-familiar displacement of non-traditional legal services. Open advertising by lawyers drove down the costs of providing certain legal services in the early 1980s, although this feature of the access movement was not widely used in Florida and inevitably lost momentum when mounting inflation forced even the law clinics to raise their fees. In 1981 this Court directed that all Florida attorneys, as a requisite to the annual renewal of their bar memberships, be open and available to members of the public for one half hour of free consultative services each month. This innovation, which was inspired by the 1979 Report of Great Britain's Royal Commission began with a voucher system for minimal compensation from funds generated by interest on lawyers' trust accounts. Like so many other tentative steps toward affordable justice which were geared to compensate attorneys for the delivery of legal services, however, this methodology eventually gave way to the record-less, non-compensable, hour-per-week "open office" plan which the bar ultimately asked us to approve.

In 1982, this Court determined that, in order to serve the public interest better, Florida law professors should be paid from bar dues income to provide consultation in certain fragmented but repetitive administrative matters such as welfare claims, disability controversies, and state employment and hiring disputes. The now familiar "public service consultation provision" eventually became a standard feature of law faculty contracts, thus providing full and free representation in a



broad range of administrative and non-administrative legal matters, without any demonstration of indigency or hardship.

By 1983, the access movement turned from the growing costs of underwriting legal services to less costly alternatives. In that year the Court relaxed the definition of the "practice of law" to approve the establishment of "socio-legals"—persons receiving a one-year, combined training course offered by the graduate and law facilities at Florida institutions—to make available lower cost, unregulated counselling services in matrimonial and juvenile matters. One year later, the Florida Legislature partially de-judicialized dissolution of marriage, following the British model from the early 1970s, to allow court-approved consent filings which required no legal representations. After another four years, as we know, this tentative step gave way to the procedure which had long been in existence in Japan, by which matrimonial dissolutions took the same form as marriages and required only a simple, non-judicial filing with the registry of vital statistics. This last step, of course, is now recognized as having been an important feature of the so-called "first wave of de-legalization."

A second major feature of the emerging first wave was the elimination of the need for legal representation in tort and workmen's injury matters. This came about as a result of the adoption in 1988 of Florida's comprehensive injury compensation system, modelled after the one adopted in 1974 in New Zealand. Under this system, all injuries, without regard to fault or relationship to job, became compensable by the state through wage loss supplements obtained simply by filing a claim with the state's division of income assurance.

A third feature of the first wave, made possible primarily by technological advances, came about as a result of the 1989 statute on land transfers, under which the state's computerized land registry allowed instantaneous and reliable title transfers without the need for legal representation.

Parallel developments, arising principally from technological improvements and from the 1970s movement toward lay representation on professional regulatory boards, combined to bring about the so-called "second wave of de-legalization." Only the three principal developments of the second wave need be identified here.

First, in 1985, the Court put non-lawyer members on the Florida Board of Bar Examiners and on the bar's Board of Governors. This step was followed in 1991 by the Court's adoption of election

procedures for the bar similar to those enacted by the legislature for other regulated professions. Under these procedures, the division of elections simply conducts open local elections for members of the Board of Governors, without any proportionality requirement for attorney members.

Second, in 1987, the Court took initial steps toward computerized jury selection procedures. This led, quickly and inevitably, to the present system under which persons throughout the state perform jury service from their homes through interconnected, video transmitter/receivers in the form of small boxes connected by court personnel to juror's home television sets for trial purposes.

The third feature of the so-called second wave is now sometimes called the "appearance of justice," or the "demystification" wave, of the access to justice movement. It began, of course, in 1979, when this Court opened Florida's courtrooms to the electronic media and displayed to citizens nationwide the realities of the operation of the judicial branch of government.

The cumulative consequence of the second wave, as we now know, led rather rapidly to further inexpensive, convenient and workable legal fusions (too numerous to mention here), from which evolved an expanding relaxation of historical "practice of law" doctrines.

These historical highlights provide the backdrop for petitioners' argument to the Court today that we should inaugurate a "third wave" of the access to justice movement—bodily asserted to be the final or "free access" wave—by deregulating the civil bar and by allowing attorneys at law to compete freely with other business people and professionals in providing civil justice in the few areas of human relations which still require a law license. Petitioners recognize that there are areas on the civil side of the law in which attorneys may continue to assist the courts in the performance of their responsibilities—setting policy through class actions, passing on the constitutionality of statutes, resolving contract impairment problems, and the like—but they argue that the small number of practitioners available or needed for these matters can operate under the direct supervision of the courts before whom they practice, as when our country was formed, without the more elaborate trappings of a compulsory, organized bar association.

The mere recitation of developments in the law since the 1960s illustrates amply the serious and difficult nature of petitioners' cause. It

is precisely because of the gravity and difficulty of this matter that we have unanimously decided not to act at this time, but rather to refer this question to The Florida Bar for further analysis. We turned to the bar in 1979, through our *Furman* decision, to devise new ways to expand the delivery of legal service to the disadvantaged. In 1980, the bar demonstrated to the legislature that general Court supervision over a representative governing board for Florida's attorneys had been over the years both an effective and a responsive regulatory scheme which should be preserved. We are confident that the public interest will best be served if we again turn to the organized bar to reconsider the entire subject of the delivery of human services to the less affluent, and to advise the Court, not later than January 1, 1999, whether an integrated civil bar is any longer necessary or desirable.

It is so ordered.

Filed July 1, 1998

ALL JUSTICES CONCUR.

The old lawyer said:

“I look out for my paying clients.”

The young lawyer responded:

“But good lawyers must also  
do some free public service.”

**CHESTERFIELD SMITH\***

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Does an ethical lawyer have an obligation to give some portion of professional time for free public service? Is a lawyer required to render free professional service with the same professional dedication as is owed to a lawyer's paying client? Is it time for an evolutionary progress in lawyer ethics by now imposing peer pressure on those who unreasonably ignore that lofty obligation of lawyers? Should those lawyers who after notice and hearing repeatedly refuse to assume their part of that professional obligation henceforth be chastised by the organized Bar? I would answer each question with a qualified “Yes”.

Many individual lawyers do not discharge, in any substantial way, what I perceive to be an existing professional obligation to improve the law, to enhance the administration of justice, and to make better the services of the legal profession. The grandiose legend often voiced at Bar meetings that local lawyers, as needed, will roll up their sleeves and give unselfishly of their time to do that which lawyers ought to do, unfortunately, is a mere fantasy.

A good lawyer, as a member of a learned profession, quite clearly should cultivate knowledge of the law beyond its use for paying clients, and a good lawyer should employ that added knowledge in the betterment of the law. Indubitably, that truism long has been a part of lawyering. Indeed, a good lawyer almost by definition must be continually mindful of current deficiencies in the administration of justice and without personal reward continually work for better courts, more qual-

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\* Past President, American Bar Association. Presented before the Conference on Public Interest Practice in Florida; “Practicing Law for Love and Money,” Nova University Center for the study of Law, Ft. Lauderdale, Fla., November 16, 1979.

ified judges, and fairer and more expeditious legal procedure. A good lawyer must, too, be cognizant that many people still cannot afford adequate legal assistance and that the good lawyer should now, as in the past, devote professional time in their behalf. Today a good lawyer must be equally aware that there are many other areas which cry out in equally loud voices for the lawyer's distinctive talents, places where societal legal requirements presently are not fully met.

The fact that some good lawyers have provided legal services to the poor at no compensation, as in legal aid, or for reduced compensation, as in government sponsored legal service programs, cannot validly be used by the mass of lawyers not so participating as a shield against the rendering of free public service themselves. The indigent client, while significant, is only a part of the problem; a part in which the government recently, and quite properly, has assumed a far greater responsibility than the legal profession.

Working free part-time is admittedly not the best way to achieve lasting economic success, even if such free work be labeled "public service." Many magnificent lawyers over the years have rendered to the public substantial service without receiving pecuniary compensation. But we must acknowledge that not all, or even most, have. Thus, it seems to me suitable, proper, seemly, and timely, that the organized legal profession formally recognize that each lawyer presently has an obligation for some free public service which, if unreasonably ignored, warrants professional sanctions.

Heretofore it perhaps has been professionally acceptable for some lawyers to serve only paying clients. But, if that is so, a new professional standard is aborning. The substantial recognition which has been afforded in years past to those lawyers who have ground away at their clients' demands day after day and year after year, tending to the store, never leaving the office, minding what has been traditionally styled "their own business" is undergoing substantial change. No longer can the old lawyer, or the young, look out only for paying clients. No longer can the legal profession merit public approbation under a random and haphazard standard that lets some lawyers do good and some do not so good. The fact that some lawyers still majestically do what good lawyers of a different day and time did as a complete discharge of their professional engagements cannot exonerate today's lawyers from providing free public service. Lawyers who work with no compensation or with substantially reduced compensation in order to mitigate the

problems of the indigent are, and always will be, rendering valuable public service. Even so, the entire legal profession has a duty to do those essential, but now often neglected, societal activities best performed by lawyers which do not result in pecuniary benefit.

The parameters of lawyer free public service henceforth must be as broad and flexible as the minds of those who will discharge that responsibility. That obligation extends to fulfilling essential legal needs of all Americans, rich or poor, young or old, male or female, black or white, happy or sad, gracious or surly, individuals or groups, all people whoever or for whatever reasons. If that obligation is to be met, each lawyer must help.

A lawyer's contribution to the public interest through free public service can never be judged by what was achieved or by the monetary value of the service contributed. In all events, that priceless and unique measure of professional devotion, contributed time, must be a prime factor in the determination of whether a lawyer fully has discharged those obligations of free public service. Each lawyer must perform that individual duty, no one else can. Financial contributions, no matter how extensive, cannot discharge the individual lawyer's professional obligation for free public service. The legal profession is not an elitist one in which the economically successful can buy amnesty for not doing what all lawyers are obligated to do. Indeed, if the law truly is to remain the very special and unique profession that it historically has been, those obligations must be non-transferable.

A major difficulty in lawyers contributing to the public free professional service is in striking the proper balance between that professional time devoted for public service and that professional time needed for the economic necessities which face all professional people. Up to now, those many lawyers who long have acknowledged some responsibility for free public service, both individually and collectively, have had no organizational guidance as to the type or extent of activities that will discharge that obligation.

The collective responsibility of lawyers must be translated into a defined professional duty such that each lawyer, individually, can render a share of the needed free public service. If that ethical demand is plainly enunciated, without equivocation or ambivalence, the decisional process now universally utilized by the organized Bar in establishing ethical boundaries will, in time, evolve definite guidelines for its application. Through trial and error and through experimentation, law-

yers ultimately can develop a revised code of professional responsibility which incorporates the who, how, what, and when of the free public service that society should receive in exchange for its grant of the exclusive privilege to practice law.

There are, of course, inherent difficulties in an adjudication of professional performance involving such subjective considerations as work habits, job requirements, organization and self-discipline, intelligence, employment restraints, public responsibilities, integrity, personal character, and professional know-how. However, perplexity in enforcement has never prevented the organized Bar from adopting ever stricter standards.

Certainly, lawyers have individual characteristics and practice demands which will prevent them from being "equal" in all professional contributions. Lawyers, of necessity, must be judged on their subscriptions to free public service with a full recognition of their differing circumstances. In some cases, those free public service activities might embrace extensive work within the organized Bar itself, such as disciplinary activities or law reform. In others, it might mean working with a public interest law firm, rendering legal services to those who are unable to obtain those services through the normal means of delivery, or representing charitable organizations. To some lawyers, perhaps free public service might well involve maintaining and enhancing the legal competence of other lawyers, working to improve the availability and delivery of legal services, helping with civil rights law or poverty law, working as a defender of those charged with crime who are unable to secure competent counsel, or representing diffused interests in adversary proceedings involving the public at large. Almost certainly, ethical recognition of public service must encompass at least a modicum of activity designed to improve, through constitutional or statutory revision, the justice system as a unit. Many legitimate legal interests in fields such as the environment, welfare, consumer protection, civil liberties, privacy, and the poor remain either not represented or under-represented before legislatures, executive agencies, and courts.

The best way to measure the individual free public service required of a lawyer will vary from area to area and perhaps between different branches of the law. Additionally, there will be multiple areas of free public service other than those few that I have suggested, which as alternatives or supplements, are better suited to both society and the legal profession. Only a lawyer's peer group should determine whether

various activities reported to the organized Bar as having been performed by a particular lawyer on a recurring and substantial basis are among those things which freely should have been contributed to the public weal. In all such determinations, diversity and experimentation must be fostered and supported. There is no single approach. Through variety, through trial and error, and through evolution, the organized Bar best can gain a proper understanding of the ways in which individual lawyers most meaningfully may render generous public service.

Society long ago made a determination that a fiercely independent and unshackled legal profession is essential to our system of government and to the individual rights of its citizens. It placed lawyers in a posture to be both free and independent by establishing a monopoly for those who practice law. In granting to lawyers that privilege, the nurturing of certain skills utilized extensively in the practice of law—such as advocacy, counseling, negotiating and drafting—were chilled and perhaps denied to non-lawyer members of society. The grant of monopolistic privileges by society to a limited number of people to render specialized professional services always creates an obligation to make available to society those special skills nurtured by that monopoly.

The legal profession can best perform if its mores, customs, standards and offices are self-determined. If a legal monopoly is a viable societal institution, lawyers, in order to support that monopoly and to preserve self-regulation, must fill those essential public needs which will not otherwise be met, including the rendering of those distinct services which the monopoly itself makes lawyers peculiarly qualified to perform.

Some ethical restructuring should occur soon. Otherwise, the multiple ways in which lawyers presently render professional services will perhaps be curtailed. Lawyers' patrons—the populace as a whole—may already be near a conclusion that their interest will be best served if other professionals, or para-professionals, share in at least some of the work which traditionally has been performed only by lawyers.

While lawyers do owe other individual lawyers courtesy and integrity in their dealings, lawyers owe individual lawyers who are professionally unworthy absolutely nothing. The organized Bar is not an exclusive club and its members cannot be mutually protective. Those who do their professional part can no longer preserve those who do not. The organized legal profession is not and cannot be merely a trade guild. It must be an organization of learned professionals banded together more



effectively to serve the public as a whole. Those who do not do, as lawyers, what they ought to do, harm those lawyers who do what they ought to do, and they should no longer be tolerated.

The ethical progression by the organized Bar which I here suggest is obtainable. In my own time, I have seen disciplinary measures for particular ethical violations evolve from clucking disapproval to disbarment. Initially, in my experiences as a Bar official, I joined with others in refusing to discipline lawyers for negligence. The professional incompetence of a member of the Bar was not even discussed then as grounds for disciplinary sanctions. Indeed, it was rationalized that to do so would be contrary to the Supreme Court order certifying that lawyer as competent. All of that has changed, for me and for the organized Bar. In most jurisdictions, repeated or gross negligence by a lawyer now warrants the severest censure. No longer does the profession allow marginal lawyers to repeatedly accept legal matters which they cannot competently and proficiently handle.

What is now needed is, in essence, a contribution of free public service. Each lawyer, for the first time, must be required to contribute in a definite, prescribed, and recurring amount, as fixed from time to time by the lawyer's peers, an amount somewhat in the nature of tithing professional time but not to exceed one-tenth. Such a commitment by the legal profession, while substantial, inevitably would result in distributing the ever-burgeoning burden of free public legal service more equitably among all members of the profession. That required free public service can be provided by the highly diversified legal profession in the multiple forms referred to above. But quite obviously, the overall obligation must be shared by each individual lawyer if the job is to be well done.

My thesis is a simple one: If the legitimate aspirations of society in creating the profession of lawyer are to be realized, the title "lawyer" must denote to all people integrity, unity, courage, specialized competence, and unselfish involvement in essential public service. It does not now.

The public should know that each lawyer is interested in more than making money, in more than personal aggrandizement, in more than achieving public recognition. They should know that the least of lawyers is interested in serving well the public good, in filling the partial void in special skills created in society long ago when the lawyer, by governmental edict, was given the monopoly for legal services. They

should know that the Bar, as a quasi-public institution is stalwart and not supine, that it is willing to eliminate from its ranks those lawyers who do not do their part.

The ethical codes of lawyers, being aspirational standards of professional performance at the top and being disciplinary rules governing lawyer conduct at the bottom, have developed by usage to require ever more of those persons who wear the legal mantle—and so they should. Lawyers always should, indeed they must, as they traditionally have, live nobly in the law.

## The Private Bar and the Public Lawyer: An Essential Partnership

**DAN J. BRADLEY\***

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Historically, the leadership and momentum for making legal services available to the poor came from the organized bar. Public interest law emerged with the first legal aid society in New York City in 1876, and its development was fostered in the mid-1960's by the creation of the first publicly funded effort under the auspices of the Offices of Economic Opportunity Legal Services Program. It is now the Legal Services Corporation that is the movement's successor.

Today, fifteen years after the publicly funded poverty law movement began, there are over 6,000 full-time lawyers and more than 2,000 paralegals working in about 1,000 LSC funded legal services offices in every state, the District of Columbia, Micronesia, Puerto Rico and the Virgin Islands. Currently, the Corporation's congressional appropriation is \$300 million; a substantial increase from the \$88 million when the Corporation began operations in fiscal year 1976, after having been frozen at \$71 million for the previous five years.

Although this is phenomenal growth, and it will allow, for the first time in our country's history, some access to our legal system for every poor person in every state, it does not provide sufficient resources to address all the legal needs of all eligible clients in a program's service area. The \$300 million budget for the 1980 fiscal year is only enabling the Corporation to complete its minimum access funding plan. It makes possible the provision of the equivalent of two lawyers per every 10,000 poor persons throughout the country.

It is gratifying to be here among so many friends who share the common concern of how to provide legal representation to those persons who cannot afford an attorney. Many of you have worked long and hard to provide legal assistance to the under-represented in the

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\* President, Legal Services Corporation. Presented before the Conference on Public Interest Practice in Florida; "Practicing Law for Love and Money," Nova University Center for the Study of Law, Ft. Lauderdale, Fla., November 16, 1979.

areas of civil rights, public rights, and/or poverty law.

Today we find that the common thread among all types of public interest representation is that the partnership of the private bar and the public lawyer is essential to this endeavor. It is urgent that the private bar aggressively support, and become more involved in, public interest practice if we are to live up to our nation's promise of equal justice under law.

When the Corporation began operations, less than 2 million of our nation's 29 million poor persons lived in areas with minimum legal access. It was not uncommon in certain areas of this country to have one lawyer per 23,000 poor people. The Corporation is currently engaged in expansion activities in many parts of the United States to rectify this situation. However, even with completion of the minimum access plan, only 15 percent of the indigents' need for civil legal assistance can be met.

We know that public funds will not be available in the amounts necessary to completely meet all the legal needs of the poor; therefore, efforts involving the private bar, like Florida's Public Interest Law Bank, are going to be essential throughout the country. We commend this activity and know that there is a great deal of volunteer work being done in many other locations. The Denver Bar Association operates a volunteer program involving 1,200 private attorneys. Salaries and administrative overhead are paid for entirely by the membership dues of the Denver and Colorado Bar Associations. The Hillsborough County Bar and Bay Area Legal Services program in Tampa, Florida have an excellent volunteer program. The Chicago Volunteer Lawyers organization has over 300 private lawyers volunteering services in a project supported by law firm contributions, foundation and charitable funding, and by a Chicago Bar Association dues check-off.

In its Delivery Systems Study, which was mandated by Congress to examine both the staff attorney model and alternative and supplemental methods of delivering legal services to the poor, the Corporation has funded six pro bono demonstration models: the Bar Association of San Francisco Volunteer Lawyers Project; the Bet Tzedek project serving elderly poor in Los Angeles; the Boston Bar Association Volunteers Lawyers Project; the New Hampshire Bar Association's Citizens Rights Committee Project; Community Law Offices in New York City; and the Legal Counsel for the Elderly operated by the National Retired Teachers Association and the American Association

of Retired Persons in Washington, D.C.

In each of these projects, hundreds of private lawyers are donating their time to delivering legal services to the poor. For example, the New Hampshire project, which is a statewide referral system utilizing a WATS phone system, has 700 out of the 1,000 lawyers in the state, participating.

In addition to direct client representation, the Corporation is funding several other demonstration projects, involving the private bar, to provide training and other support services. In its Quality Improvement Project, for example, the Corporation is funding a professional development project in Greenville, South Carolina. The legal services program will supplement its staff's ability to provide skills training, and litigation support, to staff attorneys and paralegals through contracts with local private law firms.

The New York Lawyers for the Public Interest, and the Council of New York Law Associates, are undertaking a LSC funded Quality Improvement Project that is matching the pro bono services of private law firms with legal services programs in the areas of management assistance, staff development and specialized expertise. Library and research facilities of private firms, for example, are matched with legal services offices.

Additionally, the Corporation is working with the Litigation Section of the ABA to develop a pilot project in about 20 locations whereby experienced private litigators will be matched on a one-to-one basis with legal services lawyers to provide trial advocacy assistance. The Atlanta Legal Aid Society currently has such an experimental project underway and it is finding it very beneficial.

Other methods of involving private lawyers in the delivery of legal services to the poor are also being examined in the Corporation's Delivery Systems Study. Contracts with law firms, judicare, prepaid legal services, and legal clinics are included. The Delivery Systems Study's main objective is to determine the extent to which delivery models involving the private bar differ from the traditional staff attorney legal services programs, based on cost, quality, client satisfaction, and impact on the poverty community. The Study is scheduled to be completed and submitted to the Congress in mid-1980.

To help increase access to our legal system for the average person, other groups are examining the utilization of alternative methods of dispute resolution which include small claims court, arbitration and

mediation, and neighborhood justice centers. However, even with all this effort involving the private bar and experimentation with other legal remedies, there is need for much more private bar activity if we are to begin to make equal access to justice a reality for the millions of poor people who are now being denied justice because they cannot afford an attorney.

There is considerable debate taking place about whether pro bono work should be mandatory. The New York City Bar, for example, is discussing a proposal to require each lawyer to provide 40 hours a year. The California State Bar had a similar proposal that was defeated in the state legislature. Bar leaders, like Chesterfield Smith, have proposed disciplinary sanctions if lawyers do not contribute volunteer services. The discussion draft of the new ABA Code of Professional Responsibility calls for a contribution of volunteer service annually by each lawyer to meet his or her Canon 2 public interest obligation. Also, a self-policing regulations is proposed.

It is gratifying that the American Bar Association has just launched a major pro bono activation program. Under the sponsorship of the ABA Standing Committee on Legal Aid and Indigent Defendants, and the ABA Special Committee on Public Interest Practice, the ABA has hired a full-time staff person to work with state and local bar associations to establish, in cooperation with legal services programs, viable volunteer projects where none exist and to increase participation where such projects are underway. The ABA program will provide: strong centralized leadership at the national level; technical assistance to develop and implement local pro bono "matching mechanisms" that will bring needy clients and volunteer lawyers together; and resource and clearinghouse services to facilitate communication and technical assistance among bars about new and developing programs and concepts. We hope to work very closely with the American Bar Association, as well as with the National Bar Association, the National Legal Aid and Defender Association, the National Clients Council, legal services programs, and other interested groups.

We are close to completion of a compilation of existing pro bono projects that we hope will serve as a "how to" manual for starting others. Considerations such as recruiting and retention of private lawyers, coordination, training of volunteers, and evaluation and quality control to assure the provision of quality legal services in volunteer programs are some of the issues that will be examined. Funding, too,

will be discussed as it also is a major element. With repeated messages from the Congress and the administration that funding for legal services will not be increased in the increments of the past, and that more reliance must be put on the private bar for support, we must concentrate on innovative ways to finance volunteer programs.

The Florida plan to use the interest from client trust funds to finance such activities is gratifying. In Atlanta, the volunteer program of the Atlanta Bar Association and the Atlanta Council of Young Lawyers that is funded by charging an additional \$1.00 filing fee in all civil actions in the Fulton County State Court, is promising as a prototype for the rest of the country.

Our preliminary research for our pro bono manual involved surveying all of our programs to find out what types of pro bono projects they were undertaking with the private bar. Responses from about 75 programs revealed five basic models: the utilization of private lawyers to handle case overload; private lawyers who take conflict of interest cases; private lawyers who take certain categories of cases; private lawyers who provide training and resource assistance; and rotation plans whereby private law firms loan lawyers and support staff to a legal services program for short periods. Added to these, were models utilizing retired lawyers and preliminary plans for using in-house counsel and government lawyers. These models were operated by legal services programs, bar associations and other independent organizations, and by law firms.

Unfortunately, even though there is encouraging momentum and many private attorneys are already doing their share to meet the legal needs of the poor in their communities, and despite the fact that there has been a history of strong national leadership supporting this kind of activity, there is resistance by significant numbers of private lawyers and even opposition to such legal services by some segments of the private bar. We are finding, in connection with the Corporation's expansion activities, that in certain areas of the country where there has never been publicly-funded legal services, the same opposition exists that was prevalent when the publicly-funded movement began in the mid-sixties.

Of course, for the most part, providing legal services to the poor is accepted. However, we need to renew the dedication and the commitment of the private bar and public officials to the concept that equal justice under law is more than just words that appear on the facade of

the United States Supreme Court. It is a right that belongs to everyone regardless of race, religion, or economic circumstance. We also need to stimulate the concern about public interest law that was present in the sixties and early seventies. We are at a crossroad as we enter the 1980's; we have seen the pendulum swing from the aggressive private bar activities undertaken to help pass the Public Accommodations Act, the Civil Rights Act, the creation of the Lawyers' Committee for Civil Rights Under Law, and the establishment of the poverty law movement, to a more complacent, comfortable posture.

It is my strong feeling that we cannot let this happen while millions of people in this country still have no place to turn for legal assistance. It is time for all of us to join together to make the ideal of equal justice under law a reality. The private bar and the public lawyer are an essential partnership if we are to achieve this. It is vital that we build that partnership. I ask your support and counsel.



## Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question

ALAN MORRISON\*

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It is my thesis today that we need to reexamine the definition of what constitutes the practice of law. The traditional inquiry into what activities constitute the unauthorized practice of law is largely, if not wholly, misguided. What is needed is a whole new mode of analysis. Because we are asking the wrong questions, we are getting answers unacceptable to the way our society operates today.

However, before asking about the unauthorized practice of law, we ought to look into the "authorized" practice of law, commonly known as bar admissions. Why do we have bar admissions? What are we trying to protect? First, we are worried about competence; second, about integrity; and third about the loyalty to the client. Those are the generally perceived components of bar admissions.

For the first component we have examinations and educational experience requirements. For the second we have character investigations. And third, we have an ongoing Code of Professional Responsibility by which lawyers are supposed to guide their actions. The purpose of all of these is to protect the public, not to enable lawyers to protect themselves from competition. This protection of the public is, I think we have to acknowledge, a form of paternalism. We are saying to the public that the cost of having a lawyer is not a relevant consideration. For those areas which we say are exclusively the province of the lawyer, no matter how significant the cost may be, you the public have to have a lawyer if you are going to have someone help you at all.

Are there any limits to what the courts have said about how to *stately* define the practise of law? In the United States Supreme Court case of *Ferguson v. Scrupa*,<sup>1</sup> the Supreme Court said that state deter-

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\* Director, Public Citizen Litigation Group, Washington, D.C. Presented before the Conference on Public Interest Practice in Florida; "Practicing Law for Love and Money," Nova University Center for the Study of Law, Ft. Lauderdale, Fla., November 16, 1979. All rights reserved to Mr. Morrison.

1. 372 U.S. 726 (1963).

minations on these matters are not subject to attack under the due process clause. While that ruling antedates many of the recent first amendment cases under which advertising restrictions were successfully struck down, it seems to me that the first amendment attack on the practice of law will not be a successful one.

A few years ago the Supreme Court in the *Feretta*<sup>2</sup> case said that in the area of criminal law, any person has a constitutional right to defend himself. But the courts have consistently held that a defendant does not have a constitutional right to have someone other than a lawyer defend him/her.<sup>3</sup>

One of the few cases in which the Supreme Court or any other court has held unauthorized practice to be unconstitutional is *Johnson v. Avery*.<sup>4</sup> In that decision the Court ruled that prison authorities could not discipline inmates for acting as writ writers where there were no other facilities available, and where there were no lawyers readily available to handle their grievances. Other than in that narrow area there have been very few successful attacks. The only other one of which I am aware is *Sperry v. Florida*,<sup>5</sup> in which the Supreme Court ruled that where the United States Patent Office, pursuant to a congressional statute, ruled that persons other than lawyers may prepare patent applications, the state of Florida could not, because of the doctrine of federal preemption, exclude that kind of activity under the guise of regulating the unauthorized practice of law. There have also been a few other rulings in the area, where the Internal Revenue authorities have established similar kinds of authorization. But other than those isolated situations, whatever a state does through its courts or its legislature is, by and large, immune from constitutional attack.

There is one other federal challenge to the unauthorized practice of law rules under the anti-trust laws. In *Surety Title Insurance Agency v. Virginia State Bar*<sup>6</sup> the district court ruled that the bar itself, as opposed to a court, cannot define or attempt to define what constitutes the practice of law. Although this decision was reversed on other

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2. *Faretta v. California*, 422 U.S. 806 (1975).

3. *See e.g.* *U.S. v. Whitesel*, 543 F.2d 1176 (6th Cir. 1976).

4. 395 U.S. 483 (1969).

5. 373 U.S. 379 (1963).

6. 431 F. Supp. 298 (E.D. Va. 1977), *vacated*, 571 F.2d 205 (4th Cir.), *cert denied*, 98 S.Ct. 2838 (1978).

grounds, it is generally conceived to have a sound analytical framework. The court said that kind of activity would be an attempt to monopolize and a group boycott, especially in light of the bar's inclination to define the practice of law as broadly as possible to prevent competition.

There is perhaps one other application of the anti-trust laws which has not been brought but which I suppose some day the Justice Department will get around to bringing, and that is to the so called principals which the American Bar Association has entered into with various other professions such as the title insurance companies, banks, trust companies, and so forth. I like to refer to those as territorial truces in which the various professions have divided up the world and decided who can compete with whom in what area. It seems to me that if anyone got around to looking at those agreements they would probably be viewed as horizontal territorial divisions, and hence in violation of the anti-trust laws. We in the District of Columbia have abrogated those principal agreements on the grounds that we didn't want to subject ourselves to any liability. I don't know if those agreements are still being enforced elsewhere, but they continue to remain. Nonetheless the bottom line is that states are by and large free to decide what constitutes the practice of law, at least as far as federal law is concerned.

I want to emphasize, however, that even in the few cases in which unauthorized practice rules have been stricken, the courts have not said that lawyers may *not* engage in those activities under review. The only thing they have said is that you can't keep others from engaging in such activities. For example, no one would contend that writing a fire code is a matter which only lawyers can do. On the other hand, no one would suggest that lawyers ought to be excluded from those allowed to write such codes. The real question before us is the question of exclusivity. That is, what belongs to the lawyers and only to the lawyers, or how has the practice of law been defined?

One definition is that the practice of law is anything usually done by lawyers. As Chesterfield Smith once said to me, "The practice of law is anything my client will pay me to do." I suppose that in my case, that would include riding on airplanes, sitting in court, doing my own filing, my own xeroxing, things that Chesterfield probably doesn't have to do in his practice, but which we have to do in ours. But even that is, of course, a little broad. Somebody has said, "it is anything that lawyers and only lawyers usually do." I don't think you have to be

very astute to see the question begging nature of that kind of definition. It does, however, seem to me that the cases and the definitions such as they are, have broken down into three separate areas. I intend to look at each area; representation in court, drafting of legal documents, and giving legal advice; and see when the questions asked make sense and when they don't.

Perhaps the classic example of lawyer's work is representing someone in a courtroom because that is how the public perceives the lawyer. Yet there are many exceptions to this. The most common, of course, is the right of *pro se* representation, which is, by and large, guaranteed by the constitutions of most states. In the few states where it is not guaranteed by constitution, it has grown up in practice without recent challenge. However, this right doesn't apply if you happen to be a corporation. Corporations are not generally entitled to *pro se* representation. Attempted equal protection challenges to this rule have usually failed. The courts have almost universally said that a corporation is different from an individual. While there is general concurrence with this distinction, no one quite agrees why that should make any difference in this particular context. And when we are dealing with corporations that are little more than legal fictions under which mom and pop run their grocery store, one wonders why they should not be entitled to represent themselves in court.

The Virginia State Bar went so far as to attempt to say that corporations could not even use their own house counsel to represent them in court because that would violate the rule on corporate representation. They have since backed down on that, even as a proposal. Moreover the Virginia rules changed in response to the *Surety Title* case I mentioned earlier, and now the Virginia bar can no longer issue negative opinions as to what constitutes the unauthorized practice of law; that is, they cannot prohibit questionable activities pending approval by the Supreme Court of Virginia. They have to go through fairly complicated procedures to get to the Supreme Court. As a matter of fact, the procedures have been in effect for about a year and a half now and they haven't got the first set of opinions up to the Supreme Court yet. I'm not so sure that the Supreme Court of Virginia is going to like the idea of having to review all these opinions when they come up, but that is quite another matter.

In any event, these equal protection claims on behalf of corporations, have not succeeded thus far. There is one small ray of hope, at

least where the corporations are non-profit organizations that are, like the American Civil Liberties Union or like our organization, exercising their first amendment associational rights. We believe in this area the unauthorized practice of law rules may run afoul, not of the equal protection clause so much, as the First Amendment freedom of association clause.

Beyond courtroom representation, there are a series of cases involving representation in administrative agency proceedings. Courts took the traditional view that litigation is litigation whether you are in the courthouse or before an administrative agency. The cases first arose in the area of workmen's compensation, and I think it is not unfair to suggest that many of the motives of the bar were pecuniary rather than protective in nature. Lawyers saw that they were losing business to lay persons who were representing workers in compensation cases and they didn't like it. I might also say that the courts didn't much like it either. They said that it is irrelevant that the legislature tried to get these cases out of court. The locus of the service, said the court in one case, is irrelevant. I suggest that that kind of response is irrelevant too and that the question ought to be whether having a lawyer is necessary for the protection of the public; and I remain unconvinced that it is.

Now, however, I think that the cases and practices are more accepting that lay persons can represent others before administrative agencies, in the labor area in arbitrations, and in the governmental employee area in connection with grievances. Many contracts, indeed some statutes, specifically provide for representation by persons who are not lawyers. Furthermore, when the lay person is appearing on behalf of a non-profit association, the constitutional arguments I mentioned earlier are even stronger in the context of an administrative agency, particularly where the proceeding is more legislative than judicial in both of functions and format.

The last area where representation is often pressed by lawyers is the legislative area. Yet no authority of which I am aware says that because you are "representing" a client of one kind or another before a legislative body, you must be a member of the bar. Indeed, the opposite is usually the case. Ironically, the legislative representation may be far more important to the client than any court case that will ever arise, and yet it is perfectly all right for non-lawyers to provide such representation.

Speaking of the term, "non-lawyer," every time I use it I ask myself about it. If you go home at night and find your house full of water, you call a plumber. But if you wanted to call somebody else who is not a plumber, would you ever refer to him or her as a non-plumber? Or would you refer to someone else as a non-doctor, or a non-dentist? The only people who manage to divide the world into their profession and everybody else's by putting a "non" in front of them, are lawyers. So I will try, although I don't know that I can succeed, not to use that term here today.

The rationale behind these representation exclusions extends beyond the protection of the client. It is said that we need to insure that lawyers are doing the representing because that's the way to assure that we have orderly and speedy proceedings and thereby protect the independent interests of the courts. I suggest to you that that reasoning, if not wholly specious, is at least vastly overrated. In my view, we ought to start with the premise that the courts exist for the benefit of the people and not vice versa. Only if we can show that allowing persons other than lawyers to represent clients in court would, in fact, impede significantly the interest of other litigants, should we say that the interests of the courts are important. Since we already allow *pro se* representation, the question to be asked is, "will it be any worse if we allow persons who may be knowledgeable, although not trained as lawyers, to help out people who are *pro se*?" As far as I know, there has been no showing anywhere that allowing friends to come in and help out persons in courtroom proceedings is going to produce any sort of significant delay. I should think that those who are urging this proposition ought to have the burden of showing that that kind of delay will occur.

A second point about lay representation is that these cases, by and large, are simple cases. We're not talking about patent litigation, construction litigation, anti-trust suits, or securities fraud cases. We are talking about very simple cases which don't usually require the skills of a lawyer. We aren't talking about situations with complex motions, a plethora of discovery, and detailed procedural maneuvering. To say that lay persons can't conduct anti-trust class action litigation, doesn't answer the question of whether, in most of the cases we are talking about, it makes any sense to say that lay persons cannot be of assistance.

Finally, if we are really concerned about insuring that the client is making a rational choice in being represented by a lay person, the

judge can say to the client, "Do you understand that you have the right to a lawyer? Whether you can afford one or not is a matter for you to determine, but you should know that this person is not an attorney." The judge can say, in a neutral setting, "Think about it." But despite this alternative for dealing with lay assistance, the courts have simply looked the other way.

The consequence of all this is, in general, twofold. Either the case is not brought at all because the person is simply frightened of the courts and won't go in by himself, or he brings the case and loses. Of course, lay representation won't guarantee a different result, but it may help.

In realistic terms the option is not whether it is desirable to hire an attorney, because most people recognize that in most situations lawyers will provide better representation. The problem is they simply can't afford one. It is rather like the familiar famous saying of Anatole France: "the rich and poor alike are equally forbidden to sleep under the bridges of Paris." That's the problem here.

I don't mean to suggest that the courts and other litigants don't have an interest in seeing that the procedures are orderly and conducted in a fair matter. My point is that this interest is often vastly overstated. What is needed is a re-evaluation of the rules regarding lay representation, particularly at the administrative level, where the theoretical goal is to provide a speedy, inexpensive remedy. It simply makes no sense to impose a requirement adding lawyers who will be neither inexpensive nor speedy.

The second general area in which the practice of law has been held to be exclusive is the preparation of legal documents, such as wills, trusts, deeds and merger agreements. The line seems to be drawn, not at drafting of model or sample documents, but at particularization; that is, trying to draft a particular document for a particular situation. The problem with this analysis is that it proves too much. Because everything we do has legal consequences, every document can be seen as a legal document with legal significance and effects. When you file a credit card application, certain rights are established and waived. Hospital admission forms typically purport to establish legal rights and remedies. When a tenant writes a landlord about repairs, it is a document with legal significance. Acceptance of a check from an insurance company by signing it may constitute a waiver of all kinds of rights that you thought you had. The result is that the lines on legal docu-

ments have been drawn in irrational ways.

For those of you who are either home owners or in the real estate business, you know that the single key document in the purchase of a house is the contract to buy. Yet virtually every state allows that document to be prepared by a real estate broker, or by anybody else. Yet the deed to the property, about which you may be able to do almost nothing because you've lost or waived all your rights in the contract, can only be drawn by a lawyer. Similarly, insurance companies or independent agents prepare the most complicated contracts with all kinds of waivers on this and that. But when it comes to filling in a release form to settle a two hundred dollar automobile accident claim, there are cases which have held that only a lawyer can prepare that document because its much too important to be left in the hands of mere laymen.

Now, in part, this pattern is a concession to the shortness of life. Contrary to popular assumption, lawyers are not ubiquitous, or if they are, the average citizen can't afford to have one looking over his or her shoulder everytime they sign a piece of paper. It is not bad that lawyers are not involved in all these situations. The problem is that the lines are not drawn on the grounds of complexities, as evidenced by the deed which an attorney (or a secretary) must do even if it means simply filling in the blanks. To say that that kind of work must come from a lawyer's office, as opposed to a bank, a title insurance office, or a real estate broker's office, simply doesn't make any sense.

The cases have taken another approach in response to this problem: if the drawing of the legal document is incidental to another line of business, then it will be permitted. Therefore, the real estate broker can draw the contract for the house, in part because that's the way he is going to get his fee, and the title insurance company is sometimes allowed to draw some of the settlement documents because that's what the title company is insuring against, and it wants to be sure they are drawn properly.

Yet, these cases, as I see them, seem to constitute little more than a rationalization for territorial truces between the warring professions. One can hardly discern any sensible pattern in them, particularly in terms of the complexity of the work undertaken or the risk involved. Indeed in most of these cases, we have situations in which complexities seem to be the opposing factor rather than the supporting factor; particularly when deciding whether a title company can do something or a



real estate broker can do something, both of whom are, by and large, knowledgeable in the area.

Now, once again, I don't contend that there are not some documents which should be drawn only by attorneys. What I am saying is that the way we decide which ones are solely the province of lawyers is, in a phrase, intellectually bankrupt.

In a wonderful case in the Virginia Supreme Court in 1947, *Commonwealth v. Jones & Robins, Inc.*,<sup>7</sup> Chief Judge Holt, in his dissent to an opinion which said that only lawyers can prepare deeds, quoted Humpty Dumpty in *Alice In Wonderland* and said "anything I say it is, it is." He then went on to observe that, no matter how hard the Supreme Court tried to make it so, to shuck corn is not to practice law. I don't know if we have any opinions in which the shucking of corn has been held to be the practice of law, but we are coming close. And I suggest to you that the time is now to start looking realistically, and not legalistically, at the question of who may draft what kinds of documents.

Now then, let me turn to the third area: the giving of legal advice. Before I do that, let me raise another question, which arises most frequently in this part of the definition of the practice of law. Do you have to be paid for what you have done in order to be guilty of the unauthorized practice of law? While the element of compensation is present in most other areas, it is most prominent in the giving of legal advice. Compensation alone is not enough to trigger guilt, as the selling of legal forms in the five and dime store demonstrates. Of course, there is an old adage that there is no such thing as a free lunch and that is true in the giving of legal advice. Yet, if compensation is an element, it is often very hard to prove and would pose inordinate burdens in many cases. For this reason, in most jurisdictions, the fact that compensation is given or not given is legally irrelevant. It obviates problems of proof, and, I must confess, it is consistent with the notion that we are protecting the person from getting bad advice, not saving the profession from competition.

Yet I have an uneasy feeling that there is an element of overkill here. What the rules of unauthorized practice of law are primarily trying to prohibit is the charlatan who is preying upon innocent people, not the neighbor who simply wants to give you some friendly advice.

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7. 186 Va. 30, 41 S.E.2d 720 (1947).

The compensation problem seems to me to be further proof of the irrational rigidity of the present rules.

Returning to the question of what is legal advice, one finds that it is rather like the question of what is a legal document. It's too broad. So the question has been refined somewhat. Legal advice is advice as to the legal consequences of a course of action on which the recipient relies to determine his or her course of conduct. Now I suppose one could say that when law professors, or perhaps bar review teachers, are giving advice as to what constitutes the law, they are giving legal advice too. But no one has suggested that to be a law professor you have to be admitted to the bar of your state. Indeed, I know one esteemed law school in which there are members of the faculty who are not admitted to practice anywhere, even though they are graduate lawyers. And there are some members of the faculty who aren't even law school graduates. So, the general giving of opinions on the state of the law is not sufficient.

What has been deemed unauthorized practice has been giving particular advice about particular legal consequence. To test that approach, let's pose a problem. I am driving down the highway doing 55 mph and there's a large truck in front of me doing 54 mph. I'm riding with my wife, and she says to me, "Pass that truck." I say to her "I can't, I am now at the legal speed limit." She says to me "Oh yes you can. You may exceed the speed limit to pass the truck as long as you resume the speed limit once you have passed the truck and gone back into your lane." Is she practicing law? After all, she has given me particularized advice as to the legal consequences of a transaction on which I am relying to determine my conduct and for which I may go to jail or lose my driver's license if she is wrong.

Or take a comparable situation in the medical area. I go home at Thanksgiving to visit my parents and my Aunt Gertrude is there. I feel just rotten. My Aunt Gertrude says to me, "What you need to do is to go to bed and take lots of fruit juice and aspirin, and sleep it off." If my doctor would tell me exactly the same thing, does that mean my Aunt Gertrude is practicing medicine without a license? And is that any different from my wife practicing law without a license in the other case, and if so, why?

Take a look at the tax area, and I don't mean simply filling in income tax returns. I'm talking about tax advice and planning. Accountants give tax advice. Life insurance agents give tax advice. Stock

brokers advise you on the tax ramifications of transactions. Your banker may tell you the tax consequences of certain transactions. Surely, the vast industry of pension advisers is giving lots of tax advice. What they are telling you is, if you do it this way you get the benefits of the law, and if you do it that way, you don't get the benefits. Are these people practicing law without a license? Well, maybe yes and maybe no.

Take the *Rosemary Furman*<sup>8</sup> case, for instance. Leaving aside the question of whether Ms. Furman, in typing divorce papers, was preparing legal documents, let's just take the easier situation before she types anything where people come into her office, and say to her, "I would like a dissolution of my marriage." The first question she asks, and the first question on the form she now uses is, "How long have you been a resident of Florida." Now, does she give a legal opinion when she decides what constitutes residence and is that the same as domicile? Is she giving legal advice when she tells someone she or he may or may not get a divorce at that time?

I suggest to you that when we're trying to ask questions about what constitutes legal advice under these circumstances, we cannot come up with any sensible answers. We tried, in Ms. Furman's case, to get the court to back off a little bit from where it had come from in the past. We made a constitutional argument which, both in the original brief, and on rehearing, the court decided by refusing to respond at all. We argued that for indigents and others who cannot afford lawyers, for a dissolution of marriage which is a state controlled monopoly, the decisions in *Boddie v Connecticut*<sup>9</sup> (saying you can't require filing fees for divorces), and *Johnson v. Avery*<sup>10</sup> (the prisoner unauthorized practice case), do not permit a state to require an unaffordable lawyer instead of an affordable legal secretary. In our view the state can no more preclude Rosemary Furman and others from providing that legal assistance than it can preclude prisoners from providing writ writing assistance to their inmates. We lost that case, and we are now going to take it on to the Supreme Court.<sup>11</sup>

Last, let me suggest one other area where legal advice is given all

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8. *Florida Bar v. Furman*, 376 So.2d 378 (Fla. 1979).

9. 401 U.S. 371 (1971).

10. 393 U.S. 483 (1969).

11. On Feb. 19, 1980, the Supreme Court dismissed the appeal.

the time. Ann Landers has a column. Undoubtedly you have seen it. She probably practices medicine but on this occasion she was in the legal business. She received a letter in which the writer said "My husband and I fly around together a lot on airplanes. We don't have a will. We got to thinking the other day when we got in the middle of a bad windstorm, what would happen if the plane went down and we were both killed? Are the godparents of our child legally responsible for bringing her up? And if they aren't, what would happen?" Ann Landers replied "No, the godparents are not legally responsible. If you die intestate, the child will probably be brought up by relatives. But you ought to have a will." Is she giving legal advice? She has certainly told people what she thinks the law is. Is she practicing law without a license? And if so, in what jurisdiction? Well, the problem lies not with the answers but with the questions. What we need are new questions that relate to the reasons that we license attorneys in the first place.

Consider the electrician who comes to your home. Do we require an electrician to change a light bulb? No. Do we require an electrician to do the somewhat more complicated operation of changing a fuse? No. How about if you want to put a new fixture in your dining room? Do we require an electrician to do that? No. How about if you want to rewire your house? The answer is, in most cases, that you cannot do it yourself. The state says that's against the law. No matter how much you want to, you cannot do it, and that rule plainly overrides your free choice and your economic considerations. It overrides it because there is an implicit judgment in it, that the risks of harm, in terms of a major fire, are so great, and the likelihood of success by most lay persons is so small, that cost and free choice are simply no longer relevant.

Take my Aunt Gertrude again. If instead of prescribing rest, chicken soup, aspirin and fruit juice, she said, "What you need is open heart surgery performed by me." We would all recoil because the likelihood of her succeeding is so small and the risk of harm to me is so great, that my free choice in that case, even if I consented before everyone in the world, is irrelevant. The state would say no, Aunt Gertrude may not perform that operation on me.

Now even these questions, of course, eliminate the important element of cost. Cost is related to, but in a way different from, questions of free choice. For instance, driving across the country, you are surely more likely to arrive safely in a 1979 Rolls Royce than you would in a

1940 Studebaker. Yet no one has suggested that everyone has to have a Rolls Royce to drive across country. Even if lawyers are the equivalent of Rolls Royces (and I think most people think they are more equivalent to Studebakers), there are some situations in which society should let people drive Studebakers. In my view, an individual should be able to choose secretaries, real estate brokers, accountants or whatever, instead of having to use lawyers, unless there is a very good reason why free choice and added cost must be imposed for the protection of the individual.

This question of when to limit free choice and when to impose additional cost on individuals is, I think, a rather subjective question. It involves a policy orientated question that is very heavily value laden. It is not the kind of question which courts normally address by applying the law to the facts, and it surely is not a legal question in the sense of interpreting the meaning of a statute, contract or other document. It is the type of judgment which is typically made by legislatures and not by courts. Leaving aside the question of whether the legislature in a particular state has the power to change the rules defining the practice of law, I suggest to you that the judgment is much more legislative than judicial in nature. In fact, the legislatures do this kind of judging in a number of areas involving the legal profession, but it generally has been to add to those areas which are the exclusive province of the lawyer. The problem, of course, is that the legislature cannot, or will not, look at these problems on a unified and widespread basis.

What is needed, I suggest, is a quasi legislative agency, and in fact, the courts may now be acting as such. I think this is what the Supreme Court of Florida did in the *Brumbaugh*<sup>12</sup> case when it drew the lines in the area of assisting persons seeking to attain dissolution of marriage in the form of allowing written but not oral communications between clients and secretaries trying to help them.

The problem is that these issues are arising with increasing frequency and are imposing great burdens upon the courts. Judges are by and large not selected because they are representative of broad spectrums of interest, or because they are trained or otherwise qualified to make policy judgments. The courts are, moreover, not set up to issue rules that have wide ranging effects, in part because there is little public input into the process. Indeed, in the *Brumbaugh* case the Florida Bar

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12. Florida Bar v. Brumbaugh, 355 So.2d 1186 (1978).

never had an opportunity to really address the issue, because Ms. Brumbaugh was appearing *pro se* and yet, in that very narrow context, the court issued an extremely broad rule that effected virtually everybody in Florida.

As I indicated earlier, the bar plainly cannot take on this task because of its own conflicts of interest and economic self-interest in the area. What we need, I suggest, is a new body, established by the legislature, which has as its component parts three separate institutional interests. One is the interest of the bar, which has a major role to play; second, is the interest of consumers of legal services, who have a very important say in the matter; and third, is a group that I broadly refer to as competitors—title insurance companies, real estate brokers, accountants—who would be performing alternative services, if allowed, in competition with services offered by the bar. This mini-legislature would, I suggest, be able to take into account all of the relevant factors, and to issue rules which would ultimately be subject to judicial review. It would be directed to balance the competing interests under a general standard that would call for a balancing of the risk of harm and the likelihood of success on the one hand, against the right of free choice and the added cost on the other. This question is ultimately a practical or policy question, not a “legal” one that the courts are readily able to handle. Moreover, what is needed is flexibility and not rigidity, a further reason for taking this function away from courts who rely so heavily on precedent.

On first thought the answers to the questions in particular cases will not be easy. They will not be automatic simply because we are asking the right questions of an appropriate constitutional body. On the other hand, we will never come up with sensible answers, until at least we start asking sensible questions.

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

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## 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,<sup>1</sup> but another bar exam alone will not create competent attorneys. The development of quality advocates should begin in the law schools. The traditional Langdellian<sup>2</sup> case study method has been under attack for several years.<sup>3</sup> 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,<sup>4</sup> Nova Univer-

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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*<sup>5</sup> 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."<sup>6</sup>

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.'"<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota was appointed chairman.<sup>10</sup> Judge Devitt created a Subcommittee on Procedures and Methods chaired by Judge James Lawrence King.<sup>11</sup> The subcommittee requested that the Federal Judicial Center undertake research into the quality of advocacy in the federal courts.<sup>12</sup> Questionnaires were sent out to all district judges in the spring of 1977.<sup>13</sup> 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?"<sup>14</sup> 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.<sup>15</sup>

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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.<sup>16</sup> This graph seems to indicate, as one might expect, that there is a direct correlation between trial litigation experience and competency.<sup>17</sup> 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."<sup>18</sup> In addition, the most needed areas of improvement in legal knowledge were in the Federal Rules of Evidence and in Federal Rules of Procedure.<sup>19</sup> 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.”<sup>20</sup> 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.<sup>21</sup> The committee’s recommendations have been met with some opposition, however, and adoption is not certain.<sup>22</sup>

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.<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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?<sup>29</sup>

There is a growing consensus 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."<sup>30</sup> 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."<sup>31</sup> 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,<sup>32</sup> therefore, it is incumbent upon the profession to continue to support and develop legal assistance programs.<sup>33</sup>

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.<sup>34</sup>

[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.<sup>35</sup>

The concept of a fair trial in American jurisprudence assumes an adversary presentation to an impartial tribunal.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> This represents a 907.1 percent increase over the number of prisoner petitions filed in 1960.<sup>39</sup> In 1978 alone, the number of petitions increased 12.2 percent over the preceeding year.<sup>40</sup> In light of recent Supreme Court decisions extending the availability of the courts to prisoners,<sup>41</sup> 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.<sup>42</sup> 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,<sup>43</sup> neither civil rights actions nor habeas corpus actions require the appointment of an attorney in every case.<sup>44</sup> Consequently, most<sup>45</sup> prisoner litigants must proceed *pro se*. "The typical *pro se* litigant is indigent, formally untutored in the law and often uneducated."<sup>46</sup> 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.<sup>47</sup> Moreover, sixty-one percent have not completed high school and twenty-six percent have completed eighth grade or less.<sup>48</sup> 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*.<sup>49</sup> 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."<sup>50</sup> 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."<sup>51</sup> 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*<sup>52</sup> 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*<sup>53</sup> and *Smith v. Bennett*<sup>54</sup> struck down state procedures which "effectively foreclosed access"<sup>55</sup> to the courts by requiring indigent prisoners to pay docket and filing fees.

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."<sup>56</sup> For example, the state may not prohibit inmates from assisting other prisoners in preparing petitions for post-conviction relief,<sup>57</sup> nor may law students and legal paraprofessionals be banned from conducting attorney-client interviews with inmates.<sup>58</sup> The courts, however, applying a test of reasonableness, have upheld some restrictive regulations and policies imposed by the state.<sup>59</sup> The burden was placed on the prison authorities to justify the regulations by showing evidence of adequate alternatives.<sup>60</sup>

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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.<sup>61</sup> The scope of the state's obligation was expanded in *Gilmore v. Lynch*<sup>62</sup> and crystallized in *Bounds v. Smith*.<sup>63</sup> 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."<sup>64</sup> In *Bounds*, the United States Supreme Court established beyond doubt "that prisoners have a constitutional right of access to the courts."<sup>65</sup> Moreover, *Bounds* places an affirmative obligation upon the state "to insure that inmate access to the courts is adequate, effective and meaningful."<sup>66</sup> 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."<sup>67</sup>

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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 curiam*, *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 synonymous 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.*,<sup>68</sup> 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. . . ."<sup>69</sup> 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.<sup>70</sup> In *Fluhr v. Roberts*<sup>71</sup> however, the court found the library in *O'Bryan* "overly meager" and required the inclusion of numerous additional volumes.<sup>72</sup>

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.<sup>73</sup> However, ignorance and illiteracy<sup>74</sup> among the inmate population raises the question of whether law libraries alone 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.<sup>75</sup> 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."<sup>76</sup>

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*,<sup>77</sup> 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*<sup>78</sup> has taken the *Hooks* rationale further by requiring the State of Oklahoma to implement and fund an inmate legal assistance program.<sup>79</sup> 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.<sup>80</sup> The guidelines set forth in the Rule include requirements

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.<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> 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 disparate. 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.<sup>86</sup> It also requires that the program be certified by the court, conducted to avoid schedule conflicts with the court, and to maintain malpractice insurance.<sup>87</sup> While the student may not accept payment for services, the program may receive compensation from sources other than the client.<sup>88</sup> 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,

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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<sup>89</sup> and specific areas of study related to the litigation anticipated.<sup>90</sup>

Thus far, twenty-five district courts and three circuit courts of appeal have adopted the Model Rule.<sup>91</sup> 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.<sup>92</sup> While many courts permit students to practice before the bench, some do not.<sup>93</sup> 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.<sup>94</sup>

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.<sup>95</sup> 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.<sup>96</sup> 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<sup>97</sup> by weeding out frivolous complaints.<sup>98</sup>

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.<sup>99</sup> Bar organizations, the Federal Law Enforcement Assistance Administrations, and the Criminal Justice Act,<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> Professor Tobias Simon<sup>103</sup> designed and supervised the program in which seven students<sup>104</sup>

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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 murderer awaiting execution on death row in Florida State Prison when Professor Simon and the students were appointed counsel.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> The theory of recovery arose, as it does in many prisoner suits,<sup>109</sup> under 42 U.S.C. § 1983.<sup>110</sup> 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.<sup>111</sup> It was therefore essential to the establishment of a *prima facie* case<sup>112</sup> that Mr. Tafero testify because there were no other witnesses who could corroborate all of the allegations in the complaint.<sup>113</sup> The problem, however, was Mr. Tafero's incarceration in prison. To secure his presence, a Writ of Habeas Corpus Ad Testificandum<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> The students also learned the mechanical aspects of practicing law such as the issuance of a subpoena duces tecum<sup>117</sup> 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*,<sup>118</sup> submitted *voir dire*<sup>119</sup> questions to the judge,<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup> 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 inflammatory. 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 independent 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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