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The Practitioner as Educator: Clinical Education and the Impending Third-Year Practice Rule

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FOR some years concepts of clinical education methods in the law schools of the United States have been gaining in popularity. Practically every law school bulletin now lists courses which, if not labeled "clinical," are quite obviously geared to the object of learning by doing. In many instances, the instructors assigned to teach these courses are ranked "adjunct," meaning, more often than not, one who is practicing law full time while devoting his spare time to teaching a course or two in a nearby law school.

Closely allied in many jurisdictions with clinical education efforts is the right of third-year law students to engage in a limited law practice. This right has been exercised in many directions and with varying forms of success. It is soon to be experienced in Commonwealth of Virginia courts, and when it is there is a good chance that many practitioners will have the opportunity, welcome or otherwise, to become law professors of at least the "adjunct" variety.

Third-Year Practice: What Is It?

The 1974 session of Virginia's General Assembly enacted a provision, Va. Code 54.42 (1974 Cum. Supp.), to the effect that nothing shall be deemed to prohibit a limited practice of law in an internship program, under the supervision of a practicing attorney, by third-year law students on and after July 1, 1975, pursuant to rules and regulations prescribed, adopted, and promulgated by the Supreme Court of Virginia.

No one can, at this time, say with certainty what the parameters of the third-year practice rule as promulgated by our Supreme Court will be. Yet existing models of apparently successfully operating rules utilized and enjoyed by many third-year law students suggest not only what the Supreme Court of Virginia will permit in the way of student practice but also the extensive involvement in educational functions that practicing attorneys are likely to experience.

The Federal Rules

Rule 7(N) adopted by the United States Court for the Eastern District of Virginia is a carefully drawn program for limited law student practice in federal trial courts in the Commonwealth of Virginia for this rule also exists, although not numbered, in the Western District. It is worth examining in detail for it clearly shows what law students may do in and out of court as well as what will be expected of practicing attorneys in supervisory capacities.

Before a law student may appear in a Virginia federal District Court his dean must certify that the student is a currently enrolled in a law school approved by the American Bar Association, that he has completed at least four semesters of law studies, is of good character, has competent legal ability and has been trained to perform as a legal intern. To date the Deans of the Commonwealth's four law schools have not felt the need to adopt a uniform measure of what good character is, what constitutes competent legal ability, or of what training to perform as a legal intern consists. It is reasonable to assume, however, that a reputation for good character will be regarded as essential and that the students have studied, or be in the course of studying evidence, trial practice, and other practice-related courses as prerequisite to certification.

After receiving such certification, the student may appear before the judges, magistrates, and referees on behalf of any person if that person has consented in writing and the supervising lawyer, who must be counsel of record, has also consented in writing in any civil or criminal matter. He may also appear in any civil or criminal matter on behalf of the government with the written approval of the United States Attorney or one delegated by him to give such approval. Yet in all matters the supervising lawyer must personally be present unless permission to the contrary is granted by the court.
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In addition the certified student may, outside the personal presence of, but under the general supervision of a member of the bar of the court, prepare pleadings and other documents to be filed in any matter in which the student is eligible to appear and may, further, prepare briefs, abstracts and other documents, all of which must, however, be signed by the supervising attorney.

The certified student may also, except when assignment of counsel is required by law, extend assistance to indigent inmates of correctional institutions in preparing documents for post-conviction relief. If, in these matters, there is an attorney of record, all such assistance must be supervised and all documents signed by such attorney. Likewise, a certified student cannot take a deposition in the absence of the supervising attorney.

The certified student is subject to more limitations than merely being supervised. He cannot ask for nor receive any compensation for his services from the person represented, although he may be compensated by a lawyer, legal aid bureau, government agency, and the like. He must, further, certify that he has read and is familiar with the American Bar Association Canons of Professional Ethics.

Finally, it must be noted that Rule 7(N) does not permit lawyers to supervise, willy-nilly, any student who wishes to practice in the federal courts. The supervising attorney must be approved as such by the court and must assume professional responsibility for the student’s guidance, must assist in preparation of the work undertaken by the student, and must assume responsibility for the quality of the student’s work.

On the appellate level, the Fourth Circuit Court of Appeals has adopted Rule 13 which permits eligible law students to appear on behalf of indigent persons in any case or on behalf of the United States with the consent of the United States Attorney. General student eligibility requirements are the same as in the District Courts and, as might well be expected, the attorney of record must bear responsibility for the law student. Within these limitations, the qualified law student may assist in the preparation of briefs and other documents which must, notwithstanding, be signed by the attorney of record. He may also participate in oral argument with leave of court but only in the presence of the attorney of record.

Responsibility Of The Supervising Attorney

It takes little or no imagination to discern that the educational responsibilities of supervising attorneys, be they on the trial or appellate level, are awesome. The law professor, the law school in general, can deal with hypothetical situations or, even more comfortably with problems the answers to which are known. The law student can be graded for his handling of these kinds of problems in a way not in the least reflective on the law professor. But the lawyer who is attempting to educate the law student while at the same time representing a client must answer directly for the student’s
efforts to the client in matters relating to the client’s misfortunes or, at worst, a part of his life.

Clinical Education And The Practitioner: Broader Aspects

Although third-year practice rules will permit law students the opportunity to learn by doing in situations truly of an advocacy nature, the term “clinical education” is of wider dimension. In fact it is so broad that no single satisfactory definition has yet been articulated. As heretofore stated, it refers to learning by doing: teaching law students by actually having them perform the tasks of attorneys. Within this context, active participation by the law student in legal processes is fundamental and the participation, it is often assumed, best takes place outside the formal structure of the law school. At a minimum it should involve observation of some legal or social institution and participation in one of the roles of such institution. This participation, for maximum benefit, should take on characteristics of the lawyer-client relationship. Yet because it is basically an educational experience supervision and academic integration are essential.

Clinical education has become more than the projection of law students into supervised lawyer-client relationships. Early legal clinic efforts sought to expose the law student to real life situations involving aspects of professional responsibility. Much has been written about the ethical (moral?) aspects of handling one type of case or another or of giving advice of one kind or another. And, as reflected in Rule 13 of the Fourth Circuit, the delivery of legal services to the indigent is a contemplated and thoroughly approved objective of clinical legal education. From all of this it has been reasoned that clinical legal experiences give law students a better appreciation of obligations to clients, duties to courts and responsibilities to their professional colleagues. Certainly broader and more sharply honed professional skills are developed and, at a minimum, interest in advocacy is promoted.

Types Of Clinical Programs

From the foregoing it can be seen that opportunities for clinical legal education programs are very much shaped by the community in which a given law school is situated. Examination of the current issue of the Georgetown University Law Center Bulletin, for example, discloses offerings of two types of clinical programs: advocacy programs and non-advocacy programs. Under the former are listed courses in appellate litigation (8 hours), criminal justice clinic (12 hours), family law clinical seminar (3 hours), interdisciplinary criminal justice management training program (12 hours), juvenile justice clinic (10 hours), property rights and administrative process clinical seminar (4 hours), and students in court (10 hours).

Non-advocacy clinical offerings are not as extensive as those in the advocacy program but are still substantial: community legal assistance and street law (6 hours), institute for public interest representation (12 hours), legislative action (8 hours), psychiatry and the law (2 hours), and securities regulation clinic (6 hours).

It has not been the purpose in sketching clinical offerings at Georgetown to draw argumentative inferences concerning what the law schools in Virginia are or should be doing about clinical educational efforts. Since Georgetown is located in the nation’s capital, a large metropolitan area filled with every imaginable aspect of “the law,” clinical educational opportunities are quite broad as well as unique. It is notable, notwithstanding, that many of the instructors listed for both advocacy and non-advocacy programs offered at Georgetown are “adjuncts,” practicing attorneys. Happily, too, it appears that the adjuncts work with regular staff members and thus achieve a high degree of integration of practical and academic experience. The point of Georgetown’s example is this: in almost any conceivable aspect of education through exposure to practical, current, “live” legal experience, the practicing attorney plays an integral part.

Reading Law: A Form Of Clinical Education

Clinical education is not a new visitor to the Commonwealth of Virginia. Still permissible as an avenue of being admitted to the practice of law is reading in an attorney’s office. This, of course, regardless of the merits of the program and the scarcity of regulation governing it, means far more than sitting in a lawyer’s office and reading cases suggested by him on areas of law covered by the bar examiners. It provides the opportunity to observe how the lawyer operates, “to find the way to the courthouse,” sometimes to assist in preparation of pleadings or, at least, memos on the law relating to particular problems being handled by the lawyer, and a thousand and one other things that can accurately be described as learning by doing, both in advocacy and non-advocacy contexts.
Summer Clerkships

The recent popularity of summer clerkships for law students made possible by a generous bar has also provided what, when all is said and done, is perhaps the most efficient type of clinical program in existence. There is no interference with regular academic work, the time is adequate for exposure to most of the aspects of a legal problem and the return to school is soon enough to permit the student to relate the practical aspects of his summer training to his formal law studies. It is an understatement to say that this is a boon to the law teacher and the law school. What sometimes appears to the student to be too abstract to permit understanding takes on life and meaning that makes the professional instructor's task meaningful.

Prospects For The Future

The advent of third-year practice on the state level will significantly expand opportunities for clinical education of the advocacy kind and will, correspondingly, bring more practicing attorneys into one important aspect of legal education. Meanwhile, non-advocacy aspects of clinical education may be spurred to greater growth. Those law schools with healthy budgets may be able to employ full-time clinical education directors. Those not so fortunate will either utilize part-time directors or depend on the practicing bar for gratuitous assistance. Whatever the direction clinical legal education takes in the Commonwealth, the practicing lawyer will play a significant role. The full-time teaching lawyer stands by, ready to be of assistance.

Selected Bibliography
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