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LAW SCHOOL'S PRO BONO ROLE: A DUTY TO REQUIRE STUDENT PUBLIC SERVICE

I. Introduction

Both the American Bar Association's Model Rules of Professional Conduct and the New York Code of Professional Responsibility exhort every lawyer to fulfill the professional responsibility of performing pro bono publico¹ services.² This responsibility is a necessary result of the profession's monopoly on legal services.³ But despite the swelling ranks of lawyers,⁴ the indigent's access to civil legal services remains extremely limited.⁵ This problem exists for many reasons. One is that the large majority of lawyers do not participate in pro bono activities.⁶ In addition, some educators question whether law

1. Pro bono publico is defined as "for the public good; for the welfare of the whole." *Black's Law Dictionary* 1083 (5th ed. 1979).

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 & comment; N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1970 amended 1978). Rule 6.1's Comment incorporates the language in the N.Y. CODE EC 2-25:

The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and the government to institute additional programs to provide legal services.

Id.

3. See N.Y.L.J., May 3, 1988, at 1, col. 4 (New York Court of Appeals Chief Judge Wachtler cites lawyers' professional responsibility to perform pro bono legal services in association with profession's monopoly on legal services); Committee to Improve the Availability of Legal Services, *Preliminary Report to the Chief Judge of the State of New York* at 21 (July 1989) [hereinafter Wachtler Commission]. The Wachtler Commission concluded that a lawyer's responsibility exceeds that of an ordinary citizen because "of unique training and skills and of the exclusive, publicly granted franchise to practice law. Indeed, no other group is qualified or lawfully entitled to fill the need for legal services." *Id.*

In order to protect the public, the A.B.A. Model Rules and local judiciary laws allow only authorized lawyers to practice law. See, e.g., N.Y. JUD. LAW §§ 478, 484 (McKinney 1983 & Supp. 1988). The Rules also recognize that in the increasingly complicated web of courts and statutes, the layperson will need the help of a lawyer. This need is not lessened by the fact that a person cannot afford legal counsel.

4. As of 1986, there were approximately 700,000 lawyers practicing in the United States, a figure that increases by about 26,000 a year. AMERICAN BAR ASSOCIATION, COMMISSION ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM at 1 nn. 3-4 (1986) (legal profession must respond to society's changing needs for legal services) [hereinafter A.B.A. REPORT] (citing Curran, *The Lawyer Statistical Report—A Statistical Profile of the U.S. Legal Profession in the 1980s*, 1985 AM. B. FOUND. RES. J. 4).

5. N.Y.L.J., May 3, 1988, at 1, col. 4; Wachtler Commission, *supra* note 3, at 11-20.

6. Wachtler Commission, *supra* note 3, at 18. The national volunteerism rate is estimated at about 10%. Lezin, *Bridging the Legal Services Gap*, 6 CALIF. L. REV. 15, 61

schools adequately prepare future lawyers for pro bono work.⁷ Student interest in pro bono work may even decrease during law school.⁸ In addition, debts from attending law school,⁹ coupled with the high cost of practicing law, exert a major pressure against performing pro bono services.¹⁰

This Note asserts that law schools have an ethical obligation to implement a required course in which students assist in the delivery of legal services to the poor.¹¹ Part II analyzes the background of the current legal services crisis. Part III examines the pro bono responsibility of both the profession and the law school. Part IV details the benefits of student public service, while Part V presents the arguments against student public service programs. Part VI recommends a model outline for a required law school course. This Note concludes

(1986). Another estimate is that 15% of lawyers participate in organized pro bono programs. *Pro Bono Publico*, 73 A.B.A.J. 54 (1987).

7. See, e.g., Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL ED. 570, 583-85 (1983) (law schools train students to service societal elite but ignore the needs of poor and middle class).

8. See Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 619 n. 819 (1985) (studies found more than half of entering law students undertake law to "help people, especially the disadvantaged and oppressed") [hereinafter Abel] (citing Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes and Values of Law School Students*, 44 TENN. L. REV. 85, 93-96 (1976) (research indicates substantial percentage of law students actually shift away from initial social welfare values while in law school) and Hedegard, *Causes of Career Relevant Interest Changes Among First Year Students: Some Research Data*, 1982 AM. B. FOUND. RES. J. 789, 801-07 (study results show significant drop in student interest in practicing criminal law)). *Contra* O. MARU, RESEARCH ON THE LEGAL PROFESSION at 34 n.17 (2d ed. 1986) (studies assert only 14 to 18% of students entering law school rank service to indigent as primary reason for entering law school). The different years in which the studies were taken may point to other influences changing student values, such as the external social and political climate.

9. Law school debts can reach an aggregate amount of \$70,000. See generally LAW ACCESS, LAW ACCESS LOAN APPLICATION AND PROMISSORY NOTES (rev. ed. 1989).

10. Wachtler Commission, *supra* note 3, at 18. See generally, *Training for the Public Profession of the Law: 1971*, PROC. ASS'N AM. L. SCHOOLS, Appendices I & II (critical overview of the evolution of legal education) [hereinafter The Carrington Report].

11. "Every lawyer should support all proper efforts to meet this need for legal services." N.Y. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25; MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 & comment (ethical consideration including those lawyers teaching in law schools, especially if they can implement required clinical programs that deliver legal services to the poor).

While exhorting law schools to do more to improve legal services to the poor, the Wachtler Commission concluded that placing institutional requirements on New York law schools was inappropriate. Wachter Commission, *supra* note 3, at 57-58. The Commission rejected the idea of requiring all law students to participate in legal services clinics as a condition to graduation. *Id.* This Note agrees that law schools should adopt their own educational policy but proposes that law schools have a duty to teach students how to deliver pro bono services. Law schools may (or may not) choose to fulfill this duty.

in Part VIII that law schools could both promote student involvement with those presently in need of legal services and lay the groundwork for future pro bono involvement by requiring students to participate in clinical programs.

II. The Need for Legal Services

The origins of legal services for the poor can be traced to the nineteenth century.¹² Yet participation in formal pro bono programs has only sparked controversy in the last few decades. In July 1989, a committee appointed by New York Court of Appeals Chief Judge Wachtler recommended mandatory pro bono services.¹³ The dispute between those in favor of mandatory pro bono service and those against it flows from the federal government's expansion of legal rights in the 1960s,¹⁴ such as the right to counsel.¹⁵ This expansion led to a rise in the demand for free legal services as many indigent people tried to exercise these rights.¹⁶ Congress responded to this demand by allocating funds for the provision of legal services to the poor.¹⁷

12. "The Legal Aid Society, based in New York City, is a private, non-profit law office dedicated since 1876 to providing legal representation to persons who cannot afford a lawyer. It may well be the oldest formally organized legal aid society in the United States." LEGAL AID SOCIETY 1987 ANNUAL REPORT at 16 (quoting *Blum v. Stenson*, 465 U.S. 886, 890 n.3 (1983)); cf. Norlander, *Mandatory Pro Bono—It's the Law*, N.Y.L.J., Jan. 30, 1989, at 1, col. 1 (mandatory pro bono goes back 500 years).

13. See Wachtler Commission, *supra* note 3, at 6. Despite this committee's recommendation, the bar has consistently voted against mandatory pro bono. See N.Y.L.J., October 24, 1989, at 1, col. 3 (state bar panel rejects mandatory pro bono); N.Y.L.J., June 29, 1988, at 1, col. 6 (state bar poll rejects mandatory pro bono). In 1980, members of a New York City Bar committee also recommended mandatory pro bono service. This recommendation, however, was also rejected. See *Special Committee on the Lawyer's Pro Bono Obligations, Toward a Mandatory Contribution of Public Service Practice by Every Lawyer* (N.Y.C. Bar Association 1980) [hereinafter *N.Y. City Bar Report*] (recommending mandatory public service through existing legal aid channels).

14. *N.Y. City Bar Report*, *supra* note 13, at 4, 7-8.

15. *Gideon v. Wainwright*, 372 U.S. 335 (1963); see *infra* note 28. Legislative action included Congress' granting of rights and entitlements of the civil nature under Title VII. 42 U.S.C. § 2000(e) (1964) (Title VII). As a result, the need for civil legal services as well as criminal legal services grew. Since an alleged criminal's rights stem from the Constitution, these take priority over statutorily-based civil claims when it comes to allocating scarce legal resources. Thus, the area that needs pro bono participation the most is the area of civil legal services. See *infra* note 18 and accompanying text.

16. *N.Y. City Bar Report*, *supra* note 13, at 4, 7-8.

17. See Stashower, *Brief History of Legal Services*, 38 N.L.A.D.A. BRIEFCASE 18, 19 (1981) (overview of federally funded legal services). Although the federal funds originally were allocated to the Office of Economic Opportunity, the Legal Services Commission now administers these funds. The Commission was created in 1974 to aid indigents in noncriminal proceedings. Legal Services Corporation Act of 1974, Pub. L. No. 88-452, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996a-1) (1982 & Supp. III 1988).

Despite the efforts of legal aid agencies and the private bar, present legal assistance to the poor falls far short of fulfilling the need for legal services.¹⁸ The problem is twofold. First, many individuals cannot obtain free or subsidized legal services. Recent cuts in public funding have made it less likely that existing legal services organizations will be able to handle every legitimate case.¹⁹ Second, the severe strain on legal aid offices caused by the huge caseloads and limited funding can result in ineffective assistance of counsel²⁰ to those who do receive legal services.²¹

While cases overload public defenders' offices, little help comes from the private sector.²² Only ten percent of the nation's lawyers are

18. 'The best estimate is [40%] perhaps only [20%] of the legal needs of the poor are being handled by legal services staff attorneys . . . [who with] pro bono lawyers are only scratching the surface of the need.' Percy, *Does Legal Aid Belong in the Classroom?*, 14 STUDENT LAWYER 16, 21 (1986) (quoting Basille J. Uddo, Legal Services Commission Board member) [hereinafter Percy]. Earlier research indicated that the American legal system meets approximately 20% of the poor's legal needs. See Siporin, *Who Is Left to Defend the Poor?*, 9 BARRISTER 45-49 (1982) (estimate by Legal Services Corporation researchers).

New York's Legal Aid Society serves over 250,000 people a year. LEGAL AID SOCIETY 1988 ANNUAL REPORT. Even so, about half of New York City's two million poor have unsolved legal problems. Interview with Archibald Murray, Attorney-in-Chief of the Legal Aid Society (Dec. 23, 1987) (notes available in Fordham Urban Law Journal office [hereinafter Murray interview]; see also N.Y.L.J., May 1, 1989, at 53, col. 1. "The need for civil legal services is vastly beyond our ability—we have to turn away hundreds of clients," according to George A. Davidson, President of the Legal Aid Society. N.Y.L.J., Oct. 30, 1987, at 36, col. 3; see generally, New York State Bar Association, Committee on Legal Aid, *New York Legal Needs Study: Report on the Status of the Project* (May 1989).

19. Congress cut the Legal Service Corporation's (LSC) budget by 25%, from \$321 million to \$241 million. 42 U.S.C. § 2996i (1981). This cut severely reduced the number of legal services lawyers. President Reagan had wanted to discontinue the LSC, and Reagan's appointees to the LSC have continued this policy into the Bush Administration. Wall St. J., Aug. 29, 1989, at A18, col. 1. As former Attorney General Edwin Meese explained, federal government funding had deterred private bar lawyers from providing legal services to the poor, and now "the legal profession will take up the slack if given a reasonable opportunity." L.A. Daily J., Oct. 28, 1981, at 1, col. 2.

20. "Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits." *Evitts v. Lucey*, 469 U.S. 387, 395 (1985) (fourteenth amendment due process clause guarantees criminal defendant effective assistance of counsel on first appeal as of right).

21. See Note, *Ethical Violations Resulting from Excessive Workloads in Legal Aid Offices: Who Should Bear the Responsibility For Preventing Them?*, 16 LOY. U. CHI. L.J. 589, 595 n.26 (1985) (excessive workloads causing legal aid lawyer burnout and disrupted service).

22. Eisenberg, *The Private Bar and Indigent Criminal Defense*, 37 N.L.A.D.A. BRIEFCASE 121, 125-27 (1980) (summarizing types of private bar indigent criminal defense and their inadequacies).

involved in pro bono work.²³ At the same time, an American Bar Association poll indicated that eighty-four percent of lawyers say they would like to perform pro bono work.²⁴ The main reason why lawyers do not participate in pro bono work seems to be not a lack of interest, but a lack of time and expertise.²⁵

III. The Responsibility of Lawyers and Law Schools

The Constitution of the United States guarantees the right to counsel in criminal cases.²⁶ The American Bar Association Model Rules of Professional Responsibility does not distinguish civil and criminal cases when it imposes the professional responsibility to perform pro bono service.²⁷ Every lawyer simply has the professional responsibility to render legal services to the poor.²⁸ This responsibility stems from the profession's monopoly on the rendering of legal services.²⁹

23. See *supra* note 6.

24. N.Y.L.J., Nov. 16, 1982, at 1, col. 4 (random sample of 528 members of the ABA and 78 student members). Over half of those polled would contribute at least 50 hours a year. *Id.*

25. A lawyer with no pro bono experience, starting from scratch, will doubt whether the little time the lawyer can spare for pro bono work will be fruitful. Interview with Professor James Cohen, Director of Clinical Education at Fordham University School of Law (Sept. 16, 1987) [hereinafter Cohen interview]. Indeed, the time required to train the lawyer is the main obstacle to pro bono participation. *Id.* "The time lost by lawyers who would have to do far more, and often arcane research because of their lack of expertise in a certain area can certainly not be justified since they may use this knowledge on a one-time basis." N.Y.L.J., May 1, 1989, at 51, col. 1 (quoting Eugene Souther, President of the New York County Lawyers' Association).

26. U.S. CONST. amend. VI. In *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Supreme Court recognized the sixth amendment guarantee of court-appointed counsel in federal prosecutions. The fourteenth amendment guarantees this right in state felony proceedings, *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963), and in misdemeanor proceedings where incarceration is possible, *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) ("absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony unless he was represented by counsel at his trial"); see also *Scott v. Illinois*, 440 U.S. 367, 369 (1979) (defendant's claim of violation of right to effective counsel considered only where defendant actually is incarcerated).

27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 ("[a] lawyer should render public interest legal service") and comment.

28. *Id.*

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of prominence or professional workload, should find time to participate . . . [in pro bono].

Id.; see N.Y. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25.

29. N.Y.L.J., May 3, 1988, at 1, col. 4; see also Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981) (mandatory pro bono not unconstitutional taking because profession receives monopoly in return); Wachtler Commission, *supra* note 3, at 21.

Recognizing the legitimacy of this responsibility, the Supreme Court has stated that it would uphold a requirement of pro bono service as a condition of the license to practice law.³⁰ Similarly, Congress and the New York legislature have authorized the courts to appoint uncompensated counsel to represent an indigent defendant,³¹ and the courts have upheld appointments under these statutes.³²

The legal bar also has a responsibility to help students and young lawyers become competent³³ and ethical³⁴ attorneys. In addition to the responsibility to make legal services available to all sectors of society, the duty to foster competency means that the bar should participate in teaching students to become competent in delivering legal services to the poor.

30. *Supreme Court of Virginia v. Friedman*, 108 S. Ct. 2260, 2267 (1988) (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 (1985)).

31. 28 U.S.C. § 1915(d) (1964) (federal judge may request an attorney to represent an indigent); CPLR § 1102(a); *see also* 42 U.S.C. § 2996e(d)(6) (Supp. 1988) (“[a]ttorneys employed by a recipient shall be appointed to provide legal assistance without reasonable compensation only when such appointment is made pursuant to a statute, rule, or practice applied generally to attorneys practicing in the court where the appointment is made”).

32. *See, e.g., Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986) (28 U.S.C. § 1915(d) guarantees indigents “meaningful access” to courts); *McKeever v. Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982) (28 U.S.C. § 1915(d) gives court power to appoint); *Matter of Smiley*, 36 N.Y.2d 433, 440, 369 N.Y.S.2d 87, 93 (1985) (assignment of counsel under CPLR § 1102(a) in court’s discretion); *Matter of Farrell*, 127 Misc. 2d 350, 351, 486 N.Y.S.2d 130, 131 (Sup. Ct. Westchester County 1985) (“[c]ounsel has the duty to provide uncompensated services for the indigent . . . [A]ssignment of counsel without compensation does not violate an attorney’s constitutional rights”). *But see* *Mallard v. United States District Court*, 109 S. Ct. 1814 (1989) (28 U.S.C. § 1915(d) does not authorize court to require unwilling counsel to represent indigent).

33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (duty to maintain competence of profession); N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, at 1-2 (“the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education”); *see* Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A.J. 295, 296 (1980). The Chief Justice, citing the A.B.A. Task Force on Lawyer Competency, suggested that (1) “training in the practical aspects of law should begin in law school and should be available to every student that wants it” and (2) experienced trial lawyers and judges should be part of that teaching experience. *Id.*; *see Report and Recommendations of the Task Force on Lawyer Competency: The Role of Law Schools*, A.B.A. SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR (1979) (bar has duty to assist development of legal skills training programs within law schools).

34. The legal profession has a responsibility to teach ethics by example to students and recent graduates working at firms; *see* A.B.A. REPORT, *supra* note 4, at 19. If the practicing lawyer acts inconsistently with the ethical considerations by failing to take the pro bono obligation seriously, it could undermine even the best academic effort at inculcating professional responsibility. *Id.* Conversely, lawyers and students working together on pro bono matters have a mutually reinforcing effect on the professional responsibility of all involved. Documentary Supplement, *Student Practice as a Means of Providing Legal Service to the Indigent: An Empirical Study*, 15 WM. & MARY L. REV. 363, 414 (1973) (cumulations of statistics concerning student practice).

A demonstrated commitment to pro bono work is essential on the part of law schools as well, so as to correspond with their roles as teachers of professional responsibility.³⁵ The law school's task is to create lawyers out of students. Because lawyers have a duty to perform pro bono services, law schools should teach students *how* to fulfill this lawyer's obligation.³⁶ The ethical and professional responsibility to serve the legal needs of the poor applies to law schools as well as to law students and practicing lawyers.³⁷

Until the early 1960s, when many law schools began to implement the clinical teaching method, the law schools' role in providing legal services to the poor had been minimal.³⁸ This new teaching method

35. A.B.A. REPORT, *supra* note 4, at 19 (Bar Association calls for law professors to be role models). The report advises law schools, practicing attorneys and judges to heed the rapid growth in the public's legal needs and to respond with increased attention to professional ethics and efficiency. The A.B.A. Report noted that a strong commitment to pro bono work has not been demonstrated. *Id.* at 19 n.64 (citing Shaffer, *Moral Implications and Effects of Legal Education*, 34 J. LEGAL ED. 190 (1984) and Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL ED. 247 (1978)). The A.B.A. Report also cites an interview with former Dean Erwin Griswold of Harvard, who observed that students leave law school with a diminished desire to serve society. *Id.* at 19.

[F]or future lawyers, proper ethical training is all the more imperative. Therefore, it is the responsibility of the law schools to demonstrate to students their moral obligation to help those who are less fortunate than they are. It is the task of law schools to mold the type of caring lawyers that will do credit to themselves and to their profession.

N.Y.L.J., May 1, 1989, at 51, col. 1 (quoting Eugene Souther, President of the New York County Lawyers' Association).

36. A.B.A. REPORT, *supra* note 4, at 16. The law school is in the best position to teach young lawyers service to others. "We begin our recommendations with law schools, not because they represent the profession's greatest problems but because they constitute our greatest opportunities." *Id.* The law school's and student's obligation is derived from the legal profession's duty to render legal services to those in need of them. *See id.* "We believe that law students should be viewed as members of the legal profession from the time they enter law school." *Id.*

As technocrats, we can lose feelings for the human tragedies in which we participate; we can also permanently anaesthetize our capacity for indignation at injustice or mendacity. Teachers, it would seem, do have an ethical responsibility to do what can be done to help students resist this dehumanizing effect of technocratic learning.

Carrington, *Of Law and the River*, 34 J. LEGAL ED. 222, 224 (1984); *see also supra* notes 26-32 and accompanying text (analyzing legal profession's duty to do pro bono).

37. A.B.A. REPORT, *supra* note 4, at 16. "Law schools have their own role to play in distributing needed legal services." *Id.* Although the rule contemplates the individual lawyer, the rule can be extended to a law school as a collection of lawyers. Murray interview, *supra* note 8. The New York Code of Professional Responsibility states that all "proper efforts" to extend service to indigents should be encouraged. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25.

38. It was not until 1957, however, that state bar associations, beginning with Colorado, began to authorize practical training for law students. *People v. Perez*, 24 Cal. 3d

resulted in service to indigent clients,³⁹ and, although once perceived as a threat to the standard case method, has now established its place in the law school curriculum.⁴⁰

Within the last decade, law schools have recognized an affirmative obligation to teach legal ethics,⁴¹ the American Bar Association has urged the creation of innovative ways of teaching professional responsibility.⁴² Because a clinical program can both teach students the mechanics of pro bono work (and hence how to fulfill their professional responsibility) as well as provide legal services, law schools should consider requiring students to participate in a clinical program. Making the program mandatory would demonstrate to the student the law school's commitment to pro bono work.⁴³

IV. The Benefits of Student Public Service Participation

A. The Client's Interest

A law school should teach its students their professional responsibility of engaging in pro bono services by teaching them *how* to render effective⁴⁴ assistance of counsel.⁴⁵ In a clinical program students

133, 141, 155 Cal. Rptr. 176, 181 (1979); cf. A.B.A. REPORT, *supra* note 4, at 49 n.154 (1986) (noting "historical" role played by law schools in providing legal services to the poor).

39. Interview with Professor Jacqueline M. Nolan-Haley, Fordham University School of Law Assistant Director of Clinical Education (November 2, 1987) [hereinafter Nolan-Haley interview] (notes available at Fordham Urban Law Journal office) (service to the poor has been a convenient offshoot of clinical education's primary purpose of teaching students practical lawyering skills). In a speech during the dedication of Hastings Law School's new law library, Edwin Meese suggested that law schools replace groups funded by the Legal Services Commission by creating legal service centers. L.A. Daily J., Oct. 28, 1981, at 1, col. 2.

40. Nolan-Haley interview, *supra* note 39. The existence of clinical programs at a law school is now a factor in the American Bar Association's accreditation review. *Id.*; see also Bird, *The Clinical Defense Seminar: A Methodology for Teaching Legal Process and Professional Responsibility*, 14 SANTA CLARA L. REV. 246, 270 (1974) (law school clinical training very useful in developing competence as an attorney).

41. Professional responsibility courses are now a requirement at law schools in accordance with American Bar Association accreditation standards.

42. A.B.A. REPORT, *supra* note 4, at 16.

43. The law school would not merely be shifting the responsibility to students since the law school assumes administrative responsibility for the programs. In any case, a requirement of public service sends a clear signal to students that pro bono work is their professional responsibility.

44. "The right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (court will not retrospectively judge whether counsel's advice was right or wrong but whether it was within the range of a reasonably competent counsel's advice). The Supreme Court defined "effective assistance of counsel" in *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (all circumstances must be considered in claims of ineffective assistance of counsel). The *Strickland* Court

could provide effective assistance of counsel where there is adequate attorney and faculty supervision.⁴⁶ Several Supreme Court justices have recognized this role of law students in providing legal services to the poor. In his concurring opinion in *Argersinger v. Hamlin*,⁴⁷ Justice Brennan wrote: "I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision."⁴⁸

The primary benefit of a clinical program would be the students' assistance in civil claims.⁴⁹ Since the Constitution only protects the right to counsel in criminal cases, the students' work would not give rise to constitutional claims of defective assistance of counsel.⁵⁰

set forth a "reasonable professional assistance" test which included a presumption of competency. *Id.* This presumption affords a "heavy measure of deference to a counsel's judgments," and gives a "strong presumption of reliability to all trial results." *Id.* at 691; Gonego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 199 (1984) [hereinafter Gonego, *The Future of Effective Assistance of Counsel*]. In order to support a claim of ineffective assistance of counsel, the defendant must show actual prejudice—in other words, that the defendant would have won but for the ineffective counsel. *Strickland*, 466 U.S. at 691-96. One commentator suggests that in the guise of a reasonable competency formula, the Supreme Court has reinstated the "farce and mockery due process" test wherein the ineffective assistance must shock the court. Gonego, *The Future of Effective Assistance of Counsel*, *supra*, at 196-99 (legal profession needs to develop performance standards as part of effort against ineffective assistance of counsel); *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir.) (first court to use "farce and mockery" test), *cert. denied*, 325 U.S. 889 (1945).

45. See Swords, *The Public Service Responsibilities of the Bar: The Goal for Clinical Legal Education*, 25 U. MIAMI L. REV. 267, 268, 271 (1970) (stressing teaching professional responsibility in clinical work).

46. Cohen interview, *supra* note 25. Professor Cohen pointed out that the combined efforts of a lawyer, a faculty member and students can far surpass the quality of representation attained by a lawyer working alone. *Id.* In right to counsel cases, if the participating attorney supervises the students' work, claims of ineffective assistance of counsel will be inapplicable.

47. 407 U.S. 25, 41 (1972) (extending right to counsel to all proceedings where incarceration possible).

48. *Id.* Justices Douglas, Stewart, and Brennan's concurring opinions. *But see* Hardaway, *Student Representation of Indigent Defendants and the Sixth Amendment: On a Collision Course?*, 29 CLEV. ST. L. REV. 499, 500 (1980) (student representation tends to undermine sixth amendment right of counsel).

49. Interview with Paulette J. Williams, Assistant Attorney-in-Charge at New York's Legal Aid Society Volunteer Division (February 16, 1988) [hereinafter Williams interview] (notes available at office of Fordham Urban Law Journal). For example, students can handle domestic relations cases such as uncontested matrimonial work, name changes and adoptions. Most of these are not taken by Legal Aid because they are not as urgent as other cases. *Id.*

50. U.S. CONST. amend. VI; *see also* *Argersinger v. Hamlin*, 407 U.S. 225, 241 (1972). Fears of malpractice claims, however, remain a concern, since malpractice applies to a law school clinic as it does to any provider of legal services. Who will pay for the malpractice insurance is a major hurdle in the pro bono process, but in the end, it will be-

Although assistance of counsel is a necessity in most civil cases,⁵¹ the need for it is left largely unsatisfied because resources are focused on the criminal matters in which there is the constitutional right to counsel.⁵²

B. The Student's Interest

In addition to the immediate value to the client of legal services rendered by students, early pro bono experience and training will encourage pro bono participation after admission to the bar.⁵³ Practicing pro bono as a student will erase the fear of the unknown that paralyzes many well-intentioned lawyers.⁵⁴ Law schools can motivate students to do pro bono work in the future by "sensitizing students to the needs of the poor people."⁵⁵ Clinical programs develop students'

come another necessary cost of a legal education. Raising money is difficult but not impossible, and as with the rest of this proposed law school course, once it is accepted in principle and tested on small-scale, sufficient financing is possible. The existing arrangement for malpractice coverage between Legal Aid's Volunteer Division and participating attorneys can be used as a model.

51. MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, at Rule 6.1 comment. "The rights and responsibilities of individuals . . . are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do." *Id.* See also Note, *Forcing Attorneys to Represent Indigent Civil Litigants: The Problems and Some Proposals*, 18 U. MICH. J.L. REF. 767 (1986) (uncompensated case assignment places unfair burden on attorneys when the state could raise funds to pay minimum fee).

52. Davidson, *supra* note 18, at 36, col. 3. In New York, the Legal Aid Society concentrates the bulk of its resources on criminal defense. *Id.* "The [Legal Aid] Society has 800 lawyers, paid with government funds to defend indigents charged with crimes," [Davidson] explained, but the government pays only 100 lawyers to help "those who are not accused of crimes but face life and death problems of a civil nature." *Id.* As a result, Legal Aid is unable to assist many who have meritorious civil claims. *Id.* Only the most urgent cases can be handled by Legal Aid. Williams interview, *supra* note 49. The limitations imposed by inadequate funds force the New York Legal Aid office in Harlem to turn away more clients than they actually take. *Id.*

53. Experience has shown that pro bono activity early in one's career substantially increases the possibility of future pro bono involvement. Murray interview, *supra* note 18.

54. Cohen interview, *supra* note 25. Many lawyers are intimidated by their inexperience in delivering legal services to the indigent. Nothing will encourage pro bono practice more than the student's knowing he or she has done it before. *Id.*

55. Percy, *supra* note 18, at 21. "Every law student ought to have an opportunity to work in a program of law for the poor not for what he brings to the poor but for what the poor can teach him." Bamberger, *Supplying the Resources—Can Law Schools Help?*, PROC. HARV. CONF. L. & POVERTY (March 17-19, 1967); Syllabus, March 1988, at 1, col. 2 (Tulane's mandatory student pro bono program purports to expose students to indigents' legal needs). *Contra* The Carrington Report, *supra* note 10, at 42 ("it would be hard to find a correlation between such [clinical] experience and concern for social jus-

ethics,⁵⁶ personal values,⁵⁷ personal relationships with clients,⁵⁸ work habits⁵⁹ and the perception of their professional role.⁶⁰

By requiring students to put their pro bono responsibility into practice, clinical pro bono programs will teach students professional ethics in two ways.⁶¹ First, the requirement of pro bono service on the student level impresses upon the student the obligation of pro bono service contemplated by the Code of Professional Responsibility and the Model Rules of Professional Conduct. This is important to counter the perception that paying "lip service" to the Code is enough—a perception supported by the fact that only ten to fifteen percent of the the nation's lawyers do most of the pro bono work.⁶² Working with a lawyer who is doing pro bono work, such as the attorney of record in a clinical program case, positively influences the student's perception of his own duty.⁶³ Second, as with clinical programs in general, the "hands-on" experience of pro bono service will increase the student's ability to fulfill this professional duty as a practicing lawyer.

Through exposure to pro bono work, the law student learns that there is more to being a lawyer than just making money.⁶⁴ The stu-

tice; if the present bar is insensitive, it is not because it's members are not exposed to reality").

56. Gold, *Legal Education, Law and Justice: The Clinical Experience*, 44-1 SASKATCHEWAN L. REV. 97, 110-13 (1980) (clinical law professor describes growth experiences in clinical work with students) [hereinafter Gold].

57. *Id.* at 113-15.

58. *Id.* at 115-17.

59. *Id.* at 117.

60. *Id.* at 117-19.

61. Clinical education is an excellent vehicle for teaching professional responsibility since it forces "the individual student to assume some responsibility for his actions." Redlich, *The Moral Value of Clinical Education: A Reply*, 33 J. LEGAL ED. 613, 616 (1983).

Mandatory clinical programs will transform the hopes of the N.Y. Code's Ethical Considerations into reality. Ethical Consideration 1-1 states that "[a] basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." Ethical Consideration 2-1 states that "one of the most important functions of the legal profession [is] . . . to assist in making legal services fully available." *Id.*

62. *See supra* note 6.

63. "Professional ethics can be effectively taught only if the students while learning the canons of ethics have available some first-hand observation of the ways in which the ethical problems of the lawyer arise and of the actual habits (the 'mores') of the bar." Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907, 922 (1933) [hereinafter Frank].

64. Gold, *supra* note 56, at 113. From the statistic that only 10% of lawyers account for most of the pro bono work done, society can infer that "service to others (with money)" has become the professional standard. *See* Brown, *The Trumpet Sounds: Gideon—A First Call to the Law School*, 43 TEX. L. REV. 312 (1964) (law schools should challenge economic-oriented bar to change attitudes).

dent also learns how the personal relationship between a lawyer and a client can affect performance.⁶⁵ The professional skill of controlling personal feelings towards the client cannot be taught from books.⁶⁶ At least one lawyer has lamented law school's inattention to the subject of client relations, especially when clients cling to superhuman expectations of what the lawyer could do.⁶⁷ In the clinic, a student learns not only to provide legal relief but also to combat client alienation by reinforcing the client's "sense of autonomy, [and dispelling the client's] feeling of being . . . manipulated by the system."⁶⁸

The impersonal strictures of court deadlines and appearances will teach students serious work habits.⁶⁹ In exchanges with lawyer adversaries, the student lawyer will move quickly from playing the lawyer to being a lawyer.⁷⁰ Finally, clinical work helps students evaluate career choices intelligently, by enabling them to assess their abilities in performance rather than in the abstract.⁷¹ In sum, teaching the

65. "Not only must students become acutely sensitive to the human relations aspects of their practice, but they must also learn how to control their own personal involvement in their client's problems." Swords, *The Public Service Responsibilities of the Bar: The Goal for Legal Education*, 25 U. MIAMI L. REV. 267, 272 (1971) (interaction with clients at ghetto clinic enhances student's professional responsibility) (citing Ferren, *The Teaching Mission of The Legal Aid Clinic*, 1 ARIZ. ST. L.J. 37, 46 (1969)). Interpersonal skills are especially paramount for the lawyer as mediator. See Silberman & Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 N.Y.U. REV. L. & SOC. CHANGE 741, 742 (1986) (because mediation is more fruitful than hostile adversarial proceedings, courts should order mediation).

66. If a student dislikes the client, the student learns the valuable lesson of providing professional service to a client despite personal differences. Gold, *supra* note 56, at 115.

67. See Newman, *What They Never Told Me in Law School*, 122 N.J. LAW. 15, 16 (1988) (coping with client's human needs not taught at law school).

68. Swords, *The Public Service Responsibilities of the Bar: The Goal for Legal Education*, 25 U. MIAMI L. REV. 267, 274 (1971) (citing Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 811 (1967)) [hereinafter Swords]. The Legal Aid Society's Community Law Office in East Harlem is an excellent example of a law office which is an extension of the community and is not perceived as symbolic of "the system." Interview with David W. Wechsler, head of Legal Aid's Volunteer Division (Jan. 19, 1988) [hereinafter Wechsler interview] (notes available at Fordham Urban Law Journal office).

69. Gold, *supra* note 56, at 117.

70. *Id.* at 117-18. The student thrust into the world of lawyering will inevitably imitate the dress and carriage of "real" lawyers—symptom of a developing sense of role. Also, student interaction with participating lawyers can be a step toward working with their law firms. Syllabus, March 1988, at 1, col. 2.

71. See Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education*, 50 OR. L. REV. 57, 68 (1970). Second year students are anxious to apply what they have learned. Frank, *supra* note 63, at 921 (best law students generally bored by second year because dialectics of case system is learned in a comparatively short time). The proposed clinic does not threaten to do away with traditional methods of studying law. Rather, the clinical method complements the classroom method. Swords, *supra* note 68, at 273-75 (classroom discussion helps students through difficult periods).

student the mechanics of pro bono work gives the student lawyering skills and thereby provides incentive for continued pro bono involvement.⁷²

C. The Law School's Interest

Regarding clinical apprenticeship as an essential component of legal education is by no means a recent invention,⁷³ but law schools' pivotal role in shaping the legal profession's response to a changing society is more critical today than ever before.⁷⁴ The legal profession's role in society is to provide legal services to all sectors of society.⁷⁵ The law school's purpose is to train lawyers, and thereby sustain a profession in which lawyers are capable of performing their

[I]t is not enough to let students *see* these things. Mere exposure may breed cynicism, despair or disgust. It is essential to give students perspective on what they see: the causes of the problem; what is being done about it; the special responsibilities of the legal profession, if any, in the area. Thus, a strong classroom element should accompany any fieldwork experience.

Sacks, *Student Fieldwork as a Technique in Educating Law students in Professional Responsibility*, 20 J. LEGAL ED. 291, 294 (1968) (emphasis in original). The application of legal theories to real cases enlivens studying. *See id.*

72. An associate with little or no courtroom exposure may welcome the prospect of pro bono work as a means to practice trial advocacy skills.

73. *See Frank, supra* note 63, at 912. "Proposals for 'clinical' law schools or 'internships' have been increasingly prominent in recent years." Lasswell & MacDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 291 n.137 (1943).

74. The demand for legal services has increased at a revolutionary rate in the last 25 years, engendered by the formulation of guarantees of legal counsel in the 1960's. *N.Y. City Bar Report, supra* note 13, at 8. Lawyers can no longer cater to a minority of the population's legal needs and still claim an exclusive franchise on legal representation. *See A.B.A. REPORT, supra* note 4, at 52.

The A.B.A. Report calls for law schools to help coordinate the bar's attempt to do pro bono work. *Id.* at 78 n.154. The private bar needs the law school link to the poor because the private bar is so disjointed. *Id.* The Carrington Report suggested that an entire overhaul of the legal education system is necessary. The Carrington Report, *supra* note 10, at 1-9. Mere implementation of clinical programs is not a sufficient response to the social changes that confront the legal profession. *Id.* The Carrington Report suggested that three years of law school is unnecessary for the future practice needs of lawyers. *See id.* If the student majored in legal studies at college and one year in law school was sufficient, the start-up cost of practice would be much lower. *See id.* This decreases the "time is money" pressure against doing pro bono.

75. As an elite profession holding a monopoly on access to the keys of legal power, and as a profession dedicated to justice, the legal profession has a special ethical concern for alleviating this inequity Public service so conceived is not a charity; rather it is a regular part of an attorney's professional life, as much an obligation as is competence.

Spencer, *Mandatory Public Service for Attorneys: A Proposal for the Future*, 12 SW. U.L. REV. 493, 519 (1981).

societal role.⁷⁶ If the profession is unable to carry out this role, it should not be permitted to retain its monopoly on legal services.⁷⁷

It is in the best interest of every law school to produce lawyers who excel in private practice and engage in community service.⁷⁸ Mandatory clinical apprenticeship is a means to each of these ends, since it both offers practical training in lawyering skills and results in an ability to do pro bono work.⁷⁹

76. See A.B.A. REPORT, *supra* note 4, at 16-19. An analogy may be drawn to the medical profession's efforts in training students to become doctors. See J. FRANK, COURTS ON TRIAL at 229. Frank observed that no medical school teaches surgery solely from books. *Id.* The medical internship periods are intense hands-on experiences. Not only are doctors better trained for practice, but many indigent patients are served by interns. Interview with Dr. Thomas Martin, recent graduate of University of Virginia Medical School (November 25, 1987) (notes available at office of Fordham Urban Law Journal). If law students graduate without knowing how to practice law, "[i]s that not a shocking state of affairs? Think of a medical school which would turn out graduates ignorant of how medicine should be applied, and is applied, in daily life." See Frank, *supra* note 63, at 919-20. *Contra* Clark, "Practical" Legal Training an Illusion, 3 J. LEGAL ED. 423 (1951) (law not comparable to medicine since medical training is much more specialized). Also, medical residents and interns are compensated for their work. *N.Y. City Bar Report*, *supra* note 13, at 45-46. Requiring lawyers to do a public service internship prior to their practicing law more closely parallels the medical profession's method than the clinical course in school. See *id.* at 45-47.

77. Notice should be taken of the growth of legal reform movements such as HALT and the spread of "paralegal" services designed to eliminate legal fees. HALT submits that the legal profession is unwilling or unable to serve the majority of Americans, and therefore, the monopoly on legal services should end. (Information can be obtained from HALT, 1319 F Street, N.W., Suite 300, Washington, D.C. 20077-1335). The A.B.A. has endorsed the practice of law by licensed paraprofessionals in certain well-defined areas. A.B.A. REPORT, *supra* note 4, at 51-52 n. 166. Lawyers should not jealously guard what they cannot or are not willing to handle themselves at all or as efficiently as paraprofessionals. See *id.* Clinical programs, by breaking down the necessary legal skills into daily tasks, can help the profession isolate which functions, now performed by lawyers, should be done by paraprofessionals. Vetri, *supra* note 71, at 83.

78. Interview with Dean John D. Feerick, Fordham University School of Law (Oct. 28, 1987) [hereinafter Feerick interview] (notes available at Fordham Urban Law Journal office). Whether law schools are allowing students to graduate who do not know how to practice law (let alone pro bono law) without additional training of a costly apprenticeship, is now seriously in question. Cohen interview, *supra* note 25.

[M]ost lawyers are ill-prepared to exercise these skills [of interviewing, counseling, negotiating, developing case strategy, preparing for trial, and litigating] immediately after passing the bar. To make matters worse, practitioners rarely have the time to pass on their knowledge to their young associates Law schools . . . can begin turning out lawyers who can do more than read cases and write memorandums.

Vetri, *supra* note 71, at 63.

79. The New York State Bar's Special Committee on Lawyer Competency has found that law school graduates are not prepared for practice and recommends that an additional course in the practical application of law be required by the bar. N.Y.L.J., May 5, 1988, at 1, col. 3. The "hands-on" character of clinical work makes the mandatory public service program a potential solution to this problem. See *supra* notes 49-60 and ac-

D. The Profession's Interest

Student support work⁸⁰ will enable a lawyer to get more results for clients in less time.⁸¹ This use of the law school's resources will encourage private bar pro bono efforts by making them more efficient.⁸² A mandatory clinical program will provide the lawyer with expert consultation by way of the faculty or expert practitioner moderators⁸³ and help the lawyer to more *effectively* aid the indigent.⁸⁴ In turn, the lawyer who assists the economically disadvantaged to exercise their legal rights gains a high degree of satisfaction.⁸⁵

The public perception of the legal profession is an important indication of the profession's integrity. The public now sees a handful of public defenders and private bar volunteers attempt to handle impossible caseloads, while the rest of the nation's lawyers cater to the affluent alone.⁸⁶ Increased pro bono activity would bolster the

companying text. *See also, Final Report to the Judicial Conference of the United States, COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN FEDERAL COURTS*, 83 F.R.D. 215, 229 (1979) (A.B.A. accreditation standards recommended by committee require all schools to have trial advocacy courses because it found significant deficiency in the education of lawyers).

80. Support work could include interviewing clients, researching and drafting memoranda, and gathering evidence.

81. A trial lawyer would rather spend the time going over the briefs and making the arguments in court. The English system, in which the barrister appears in court, while the solicitor does the preliminary work, provides a working analogy.

82. The prospect of having to start from scratch is what deters the private bar lawyer from participating in pro bono. Cohen interview, *supra* note 25. The lawyer knows he or she can do pro bono work, but that it will take a lot of rudimentary research to figure out how to do what the legal services lawyer does everyday and therefore, much more efficiently. *Id.* Pro bono training as a student will eliminate this hurdle.

The firm also may profit by way of billable hours that are already being wasted on inefficient pro bono efforts. *Id.* Since the training will assist lawyers in making efficient use of their pro bono time, any billable hours saved as a result could be donated by the firm to defray the costs of the clinic. *Id.* If all clinical programs do is help large firms save money in training junior associates, as some charge, this could be a selling point that can be used to attract such firms' monetary and human input into these programs. This author is not persuaded that clinical programs benefit larger firms more than smaller firms.

83. "Poverty law needs full-time lawyers handling full-time cases. It is impossible for the private bar to do it alone without the help of a staff-organized program." Siporin, *Who Is Left to Defend the Poor?*, 9 BARRISTER 44, 47 (1982). Congress directed the Legal Services Corporation to allocate a percentage of their funds to establish a staffed program designed to aid private bar attorneys deliver legal services to the poor. *Id.* at 48.

84. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, 466 U.S. 668, 685 (1984).

85. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25.

86. "Remarkably, the richest nation on earth, with over 600,000 lawyers—which

profession's public image.⁸⁷ The lawyer's duty to the poor is a duty to uphold the standards of the legal profession.⁸⁸ Even in today's consumption-oriented society, however, the standard of the legal profession must be service to others.⁸⁹

V. Some Criticisms of Student Public Service

A critical evaluation of the proposed student public service must address the underlying principles of the program and the program's implementation. Theoretically, requiring a clinical program takes student time and school resources away from more traditional academic pursuits. A detailed resolution of this conflict is beyond the scope of this Note, but the tension between studying and practicing as the "right" mode of learning the law is at least a hundred years old and is central to the establishment of all clinical programs.⁹⁰ A zero-sum analysis whereby either alternative is at the expense of the other rekindles the debate of which mode is *better*. Instead, this Note focuses on whether or not a required clinical program is *necessary*, regardless of its cost in terms of academic pursuits. This Note maintains that a law school has the professional responsibility to have a public service clinical program for all students. If this is so, then the

graduated 36,000 lawyers in 1983—has a criminal justice system in which it is hard to find attorneys for a couple of hundred unfortunate members of our society who unquestionably have the greatest need for an advocate." 14 N.Y.U. REV. L. & SOC. CHANGE 5, 8 (1986) (citing statistics from *A Review of Legal Education in the United States: Law Schools and Bar Admission Requirements—Fall 1983*, 1984 A.B.A. SEC. LEGAL ED. AND ADMISSIONS TO THE BAR 69). Attorney's fees limit the poor and the lower middle class' access to the legal system. See New York Court of Appeals Judge Bellacosa's remarks in N.Y.L.J., June 6, 1988, at 1, col. 4.

87. N.Y.L.J., June 6, 1988, at 1, col. 4 (Judge Bellacosa's remarks). It is not a lack of lawyers that limits access. *Id.*

88. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1. "A basic tenet of the professional responsibility of lawyers is that every person in our society should have access to independent professional services of a lawyer of integrity and competence."

89. Feerick interview, *supra* note 78. The "spirit of public service" can and should be the standard of the legal profession. A.B.A. REPORT, *supra* note 4, at 10 (quoting R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953)).

90. The very purpose of law school has long been in dispute. Professor Christopher Columbus Langdell of Harvard, who founded the case method of study, and Judge Jerome Frank, who argued for a clinical method of teaching, epitomize the polar points of view. Langdell argued that it was the law school's job to teach students to *think* like lawyers, not to be able to practice as lawyers. Frank asserted that since law school graduates were unable to function as lawyers without post-graduate apprenticeship, law schools were producing defective lawyers. "Students under the Langdell system . . . resemble prospective dog breeders who never see anything but stuffed dogs." *Frank, supra* note 63, at 912. Judge Frank would not have confined clinical work to legal services to indigents, but would have had it cover the gamut of services available at law offices. *Id.*; see also *supra* notes 78-79 and accompanying text.

debate as to relative merits of the clinical course as opposed to an elective academic course becomes moot.

The implementation of a large clinical program presents logistical problems in supervising students, as well as the financial burden of that supervision.⁹¹ New York's unauthorized practice rule requires supervision of practicing students by an attorney of record, as well as certification of each student by the law school.⁹² Without adequate supervision, students could engage in the unauthorized practice of law, a result which would ultimately be a disservice to the public.⁹³ Courts, however, have upheld student practice of law where it complies with the statute allowing it.⁹⁴ A student program can avoid the

91. Wachtler Commission, *supra* note 3, at 57-58. The high cost of a clinical program's lower student-to-faculty ratio seems to be the main reason for the Wachtler Commission's rejection of required student service. *Id.* Other reasons for the Commission's rejection are the unwillingness to interfere with law school pedagogy, lack of office space at the schools, and a limited return in legal services. *Id.* These obstacles can be worked through. The use of volunteer attorneys and existing community law offices will make the required student service program feasible. The program mechanics could be worked out on a miniature scale. A testing stage—requiring much less participation—would make these obstacles much more manageable.

92. N.Y. JUD. LAW §§ 478, 484 (McKinney 1983 & Supp. 1988) (1986 amendment authorized law students who have completed two semesters at law school instead of former requirement that they be in last year). The student program must be approved by the Appellate Division. *Id.* Similarly, the American Bar Association Model Student Practice rules require the student intern, who appears in court on behalf of a consenting client in right to counsel cases, to be accompanied by a supervising attorney. A.B.A. MODEL CODE OF STUDENT PRACTICE RULE 2A; *see* Walker, *The Spirited Adolescence of the Clinical Component of Legal Education*, 87 F.R.D. 159, 172 n.28 (1980) (full text of the student practice rules) [hereinafter Walker]. Before practicing, however, any student also must complete three semesters at an A.B.A. approved law school. A.B.A. MODEL CODE OF STUDENT PRACTICE RULE 3. In addition, there is a certification process wherein the dean designates students capable of representing clients. *Id.* The law school dean must certify that the student is "of good character and of competent legal ability, and has being adequately trained to perform as a legal intern." The certification must be filed with the court. *Id.* at Rule 4. The supervising attorney also must be approved by the law school dean and must assume "personal professional responsibility" for guiding the student and "supervising the quality of student work." *Id.* at Rule 6. The American Bar Association does not set parameters on student participation in negotiation and counseling. *Id.*

93. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-4; 18 Int'l Ltd. v. Interstate Exp., Inc., 116 Misc. 2d 66, 67, 455 N.Y.S.2d 224, 225 (1982) (sanctions for unauthorized practice of law protect citizens against dangers of legal representation by those unlicensed, untrained and unexamined for such work) (citing *Jemzura v. McCue*, 45 A.D.2d 797, 357 N.Y.S.2d 167 (3d Dept. 1974), *appeal dismissed*, 37 N.Y.2d 750, 374 N.Y.S.2d 624, 337 N.E.2d 135; *Spivak v. Sachs*, 16 N.Y.2d 163, 263 N.Y.S.2d 953, 211 N.E.2d 329 (1965)).

94. *See Daniels v. Maggio*, 669 F.2d 1075, 1084 (5th Cir.), *cert. denied*, 459 U.S. 968 (1982) (supervision of student work avoids abridgement of defendant's right to counsel); *People v. Perez*, 82 Cal. App. 3d 952, 147 Cal. Rptr. 34 (1978), *rev'd*, 24 Cal. 3d 133, 138-42, 151, 155 Cal. Rptr. 176, 178-82, 184 (1979) (student program which complies

unauthorized practice of law if the law school properly certifies its students and makes sure that attorneys supervise the student's work.⁹⁵

Poorly supervised student work also can produce a lower quality of legal representation.⁹⁶ The law school's ability to monitor student and participating lawyer commitment to the program, therefore, should be tested in a pilot program.⁹⁷

Another objection to student public service is that a lawyer may neglect the client because of the time spent training the student.⁹⁸ Similarly, the need for training may delay the advancement of the client's cause.⁹⁹ These concerns are unwarranted, however, because the time the student spends assisting the lawyer compensates for the time and energy required by training.¹⁰⁰ To minimize delay, the law school program should recruit as instructors lawyers who have some experience in pro bono work to supervise the students.¹⁰¹ Moreover, student involvement in the program should continue beyond initial training, so that their new skills can be channelled back into the program.¹⁰²

Practically speaking, the costs of large clinical programs may be

with state bar's rule authorizing student practice provides effective assistance of counsel); *State v. Daniels*, 346 So. 2d 672, 674 (La. 1977) (defendant's non-written consent to student counsel is substantial compliance with state rule); *People v. Masonis*, 50 Mich. App. 615, 619, 228 N.W.2d 489, 491 (1975) (legal representation by law student does not violate defendant's right to counsel if in accordance with state rule); cf. *Cheatham v. State*, 364 So. 2d 83, 84 (Fla. App.), cert. denied, 372 So. 2d 471 (1978) (right to counsel violated since defendant did not consent to student representation and there was no evidence that the students were supervised as required by the state rule).

95. A.B.A. MODEL CODE OF STUDENT PRACTICE RULE 2A, 3, 4, 6.

96. Menkel-Meadow, *Non-Professional Advocacy: The Paralegalization of Legal Services to the Poor*, 19 CLEARINGHOUSE REV. 403-11 (1985) (delegating lawyer tasks to nonprofessional advocates is "paralegalization" which leaves poor outside of legal system).

97. See *infra* notes 107-27 and accompanying text.

98. The Carrington Report, *supra* note 10, at 42. Because of the limits on time and resources at Legal Aid's Volunteer Division, there can be tension between rendering services to clients and supervising law students. Wechsler interview, *supra* note 68.

99. "It doesn't have to result in lower quality, but it will take much longer . . . you introduce between the client and the lawyer, the learning student, so it must take longer." Percy, *Does Legal Aid Belong in the Classroom?*, 14 STUDENT LAWYER 16, 21 (1986) (quoting Clinton Bamberger, former Legal Services Commission executive vice president). Third rate service and inefficiency problems beset a match-up program between five New York City firms and five legal services offices. The program served indigent people with legal needs in New York's housing court. Project coordinator Moreland cited the drain on resources in trying to train real estate lawyers unfamiliar with poverty law. Graham, *Mandatory Pro Bono: The Shape of Things to Come*, 73 A.B.A.J. 62, 65 (1987).

100. A law firm's partner-associate relationship often works on the same principle.

101. Murray interview, *supra* note 18.

102. Williams interview, *supra* note 49.

prohibitive.¹⁰³ A clinical program necessitates close supervision¹⁰⁴ of the students and therefore requires more professors than does a typical lecture class. Full-time faculty are expensive.¹⁰⁵ To limit clinical program expenses, law schools will need to find private bar volunteers to act as adjunct clinical professors.¹⁰⁶ This will reduce to a minimum the number of full-time faculty supervisors needed.¹⁰⁷

Finally, a potential difficulty with student programs is that the private bar will not be interested in participating in the proposed programs. The New York City Bar Association's directory of pro bono services, however, is evidence of the private bar's willingness to participate in some form of pro bono efforts.¹⁰⁸ Furthermore, New Orleans lawyers responded vigorously to Tulane University Law School's mandatory student public service program.¹⁰⁹

VI. Recommendations

Law schools should require students to participate in the delivery of legal services to the poor. Two alternative methods of accomplishing this goal are suggested. The first, the Tulane method, requires

103. Although not antagonistic to the clinical method, Dean Carrington reminds those who espouse the programs to be honest about the costs. The Carrington Report, *supra* note 10, at 42. If law schools are ready to shoulder these costs, a greater use of clinics should be encouraged. *See id.* A less costly proposal is discussed *supra* at notes 107-12 and accompanying text.

104. *See* MODEL STUDENT PRACTICE RULE IV(D); Walker, *supra* note 92, at 172 n.28.

105. The high costs of clinical education as opposed to "the simulation method" must be recognized when weighing the clinical experience's relative worth. E. KITCH, CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 5 (U. Chicago Law School Conference Series No. 20, 1969). The simulation method is a classroom exercise regimen in which the student plays the lawyer to a much greater degree than in the casebook/Socratic method. The simulation method is much more cost efficient than actual clinical work since a faculty member can handle many more students. Moreover, simulation's focus is solely upon the student, instead of being divided between the real client of a clinic and the student. But this advantage of the simulation method is also its disadvantage in that it only serves "simulated" clients.

106. The American Bar Association's Model Student Practice rules requires that supervisors have faculty or adjunct status. Walker, *supra* note 92, at Rule 6. Moreover, the title may make lawyers more willing to participate in the program.

Since at present the percentage of the private bar volunteering their efforts is low, finding volunteer adjunct professors may well be unrealistic. If so, then direct firm or alumni sponsorship of adjunct positions could be pursued. This is akin to in-house pro bono associate positions currently being created by large firms. Establishing a liaison to law schools in the pro bono area could enhance that firm's public relations efforts.

107. *See infra* notes 108-27 and accompanying text.

108. *See The Record of the Association of the Bar of the City of New York* 108-49 (Jan.-Feb. 1986) (listing volunteers and their fields).

109. Nearly 700 attorneys volunteered for the project in its first year. Nat'l L.J., Mar. 14, 1988, at 4, col. 3; *see infra* note 110.

students to register with a private bar program and perform legal services under its auspices.¹¹⁰ The second method, which this Note concludes is preferable, contemplates a more active law school role in administering truly clinical programs in which students would be required to perform legal services.¹¹¹

A. The Tulane Method

In the fall of 1987, the entering class at Tulane Law School was the first at an A.B.A. approved law school to be required to perform community service prior to graduation.¹¹² Each student must complete a minimum of twenty hours of pro bono work. This requirement reflects Tulane's conviction that learning to use legal skills to benefit the disadvantaged is an essential part of legal education.¹¹³ After registering with the New Orleans Pro Bono Project, students are matched with volunteer attorneys.¹¹⁴ The students research and interview, but do not practice law directly or offer legal advice.¹¹⁵ The student's pro bono requirement is enforced by certification by the lawyer overseeing the case as the attorney of record.¹¹⁶ There is no classroom component and no credits are given for the student's work. As such, the required public service does not displace or lessen a student's academic credit requirements.¹¹⁷

The Tulane method's advantage, as well as its disadvantage, is in the law school's minimal administrative role. The private bar handles the bulk of the student supervision, so costs to the law school are small relative to a full-scale clinical program. Without faculty moderation, however, the law school leaves the pro bono training of its students in the hands of an outside lawyer. As with the clinical method, the Tulane method requires an organized pool of private bar volunteers ready to do pro bono work.¹¹⁸

110. See *infra* notes 111-16 and accompanying text.

111. See *infra* notes 113-27 and accompanying text.

112. Syllabus at 1, col. 2 (March 1988). Tulane's program is summarized in a memorandum from Dean Robert Kramer of Tulane [hereinafter Kramer] (available at the Fordham Urban Law Journal office).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. The student input into public service represents a very small percentage of total hours of legal training while at law school. Kramer, *supra* note 112. As a result, the conflict between academic and clinical pursuits is considerably lessened.

118. See *supra* note 111 and accompanying text (New Orleans pro bono project).

B. The Clinical Method

Under the second method, the law school would require¹¹⁹ its students to participate in a clinical program for credit.¹²⁰ The law school would determine the specifics of the program.¹²¹ The program could complement the existing structure of other clinical programs at the school. A typical program would have three levels of participants: the students, the volunteer lawyer supervisors, and the full-time faculty moderators. The students would have direct attorney supervision, and the lawyer supervising the students could consult the faculty moderator, who also should be an expert practitioner.

More specifically, the clinical program would be a required four credit course, preferably to be taken in the student's third year.¹²² The clinic could entail a student's commitment roughly to three hours a week of case work¹²³ and one hour a week of classroom review. The volunteer lawyers would have direct responsibility for each case and would supervise a small number of student assistants.¹²⁴ Faculty moderation tasks would include conducting the classroom review of

119. Although the mandatory nature may seem harsh, students know that the study of law is both a choice and a discipline. Contracts and other substantive law courses must be learned; pro bono work must be required in the same way. The provision of legal services to the poor is a duty that comes with the choice of a service profession. Saul Sorkin calls for a "Public Service Internship Program" to be integrated into law school curriculum, perhaps in the last semester. *N.Y. City Bar Report, supra* note 13, at 45-46.

120. Williams interview, *supra* note 49 (student commitment must be guaranteed and enforceable, perhaps by power to withhold credit).

121. For example, the criteria defining client eligibility must be decided upon. *See generally* Hall & Grades, *Determining Client Eligibility for Appointed Counsel: A Strategy for Reform in New York State*, 14 N.Y.U. REV. L. & SOC. CHANGE 119, 122-23 (1986) (lack of uniform eligibility standards causes legal representation to be more broadly available in civil than in criminal cases in 17 New York counties). The clinic might use Legal Aid Society criteria for determining client eligibility. This could be the case if the law school program is allied with Legal Aid or handles the clients that Legal Aid must turn away on account of its limited resources. Or else the law school may determine that the lower middle class, ineligible for most free legal services, is the hardest hit by the high price of litigation and therefore in greatest need of legal services in general. The limited resources of the law school program will functionally limit the number of clients accepted.

122. N.Y. JUD. LAW § 478 requires that the student has had at least one year of law school. The Legal Aid Society prefers students who work with them to be in their third year. Williams interview, *supra* note 49.

123. The time estimates are a variable that implementation of the program will make more certain.

124. Student support work could include: researching and writing, processing and filing documents, screening and interviewing clients. With client permission and direct attorney supervision, a student can participate in any aspect of the representation. N.Y. JUD. LAW §§ 478, 484 (McKinney 1983 & Supp. 1988); A.B.A. MODEL STUDENT PRACTICE RULES.

the student's work and maintaining contact with the participating volunteer lawyers with whom the students confer.

The law school dean could appoint a committee to enlist alumni who would volunteer to supervise the students' work. The supervisors' time commitment would average five hours a week.¹²⁵ The committee should also contact local legal services organizations for names of lawyers who have pro bono experience, in order to recruit these lawyers for the program.¹²⁶ These lawyers would work on a volunteer basis, under the title of clinical adjunct professors.¹²⁷ Other qualified lawyers, such as former legal services attorneys, could be recruited to accept the salaried faculty position of supervising the work of the students and the adjunct professors.

In addition, legal service centers and law schools could coordinate resources. The legal service centers could refer cases to the student program.¹²⁸ If law schools agree in principle with mandatory pro bono clinical work, the program can at first be implemented on a miniature scale.¹²⁹ In such an experimental model, the volunteer arm of the legal services organization can take a number of the most interested students, train them to do pro bono work, and utilize their efforts.¹³⁰ If successful, other legal services offices might be persuaded to adopt similar models and thus absorb more students.¹³¹

To meet the costs of the clinical program, the law school could ap-

125. Five hours a week for a 10 week course seems a reasonable commitment to ask of participating lawyers since 84% of lawyers polled by the American Bar Association said they would do pro bono work and over half of these lawyers would contribute at least 50 hours a year. N.Y.L.J., Nov. 16, 1982, at 1, col. 4 (random sample of 528 members of the ABA and 78 student members).

126. Murray interview, *supra* note 18.

127. See *supra* notes 90-106 and accompanying text. The prestige of a faculty title may provide an incentive to volunteers.

128. Feerick interview, *supra* note 78. The New York Legal Aid Society Volunteer Division's prior experience with students has generally been positive. Wechsler interview, *supra* note 68. For example, Fordham Law School has a liaison program with Legal Aid's Volunteer Division. According to an interview with a participating student, volunteer students handle social security, disability and housing cases with relative ease. Students obtain cases on a request basis through Legal Aid. Memorandum available at the Fordham Urban Law Journal office. A Legal Aid lawyer is the attorney of record who supervises the student. A preparatory book guides the student from the initial interview through the hearing before the administrative law judge. Nevertheless, the program needs more coordination on the law school side to effect better communication between Legal Aid and the student and to encourage more consistency in the quality of student efforts. Williams interview, *supra* note 49.

129. Wechsler interview, *supra* note 68.

130. *Id.*

131. *Id.* Two American Bar Association manuals are available to aid in developing pro bono programs. These manuals can be obtained through the Pro Bono/Private Bar Involvement Project, American Bar Association, 1155 E. 60th St., Chicago, Illinois

peal to the federal Legal Services Corporation which now provides funds to law school legal clinics.¹³² Program directors could also petition Congress directly for funding. Alternative sources of funding could include foundations where students pledge a percentage of their future earnings to legal services for the poor.¹³³ Perhaps the best source of funds, however, is the law school's alumni in private practice.

VII. Conclusion

Pro bono work is the responsibility of every lawyer.¹³⁴ Because law schools should actively prepare each student for this responsibility,¹³⁵ they should channel student resources into legal services for the poor.¹³⁶ Student efforts would not only provide great assistance to lawyers who do participate in pro bono programs,¹³⁷ but would also would foster the student's capabilities to perform pro bono work.¹³⁸ In order to achieve a significant increase in lawyers who do pro bono work, law schools must train students how to fulfill this professional responsibility.

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60637. Another manual, *The Resource: A Pro Bono Manual*, ABA Order Fulfillment No. 469, can be obtained through the same address.

132. See Percy, *supra* note 99, at 17. Where this cuts into Legal Aid office funds there will be objections. A liaison between the law school and Legal Aid may solve this impasse if the law school students work under Legal Aid supervision. At another extreme is former Attorney General Meese's suggestion that law school funded programs replace the Legal Services Commission altogether. See *supra* note 19. During the 1980's, Legal Services Commission funds were severely cut, so the law school may not have much luck. See *supra* note 19.

133. Schools that have foundations such as this include University of California at Berkeley, New York University, Stanford University, University of California at Davis, Iowa State University, Ohio State University, Santa Clara Law School, the University of Florida, Northwestern University, Vanderbilt University, University of Chicago, and the University of California's Hastings College of Law. Nat'l L. J., Jan. 4, 1982, at 4, col. 3.

134. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25.

135. "All ABA-accredited law schools are required today to provide 'instruction in the duties and responsibilities of the legal profession.'" A.B.A. REPORT, *supra* note 4, at 16 (quoting ABA, *Approval of Law Schools—Standards and Rules of Procedure*, Standard 203(a)(iv) (1983)).

136. See *id.* "In local communities, law schools can serve, in effect, as clearinghouses to determine what type of pro bono services are required." *Id.*

137. See *id.* "[Law schools] constitute a pool of unusually skilled talent and can help minimize the mismatching of legal talent with client needs." *Id.*

138. See generally Abel, *supra* note 8.

