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Clinical Programs That Allow Both Compensation and Credit: A Model Program for Law Schools

Roy D. Simon Jr.
Washington University School of Law

Tom Leahy
Loyola University School of Law

CLINICAL PROGRAMS THAT ALLOW BOTH COMPENSATION AND CREDIT: A MODEL PROGRAM FOR LAW SCHOOLS

ROY D. SIMON, JR.*
TOM LEAHY**

INTRODUCTION

"Clinical training for law students," wrote Professor Robert McKay in 1971, "is in my judgment the most important development in legal education since the general acceptance of the case method many decades ago."[1] In the 1970's, Professor McKay's judgment was borne out by a stampede to clinical programs.[2] One scholar has labeled the 1970's "the decade of the clinic."[3]

* Assistant Professor of Law, Washington University School of Law; member of the Illinois and Missouri bars; J.D., 1977, New York University School of Law; B.A., 1973, Williams College. Mr. Simon presently supervises clinical students at a legal services office and at the public defender's office, and teaches a classroom course in pretrial litigation.

** Member of the Illinois bar; J.D., Loyola University School of Law, 1977; B.A., University of Notre Dame, 1973. Mr. Leahy is an Illinois State Bar Association Delegate to the American Bar Association (ABA) House of Delegates.

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1. COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS viii (2d ed. 1973) (Introduction by Robert B. McKay) [hereinafter cited as CLEPR]. Professor McKay is currently Chairman of the Section of Legal Education and Admissions to the Bar of the American Bar Association (Section of Legal Education). He formerly served as Chairman of the Committee on Guidelines for Clinical Legal Education (Committee on Guidelines), and was Dean of New York University School of Law from 1967 to 1975.

2. For a picture of the explosive growth of clinical programs from 1970 to 1976, see Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency,* B.Y.U. L. REV. 695, 881 (1977). For signs that this growth is slowing in the 1980's, see Cavers, *Signs of Progress: Legal Education, 1982,* 33 J. LEGAL EDUC. 33, 36 (1983).

3. Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade,* 33 J. LEGAL EDUC. 604, 604 (1983).

Although the term is often used more broadly, the authors use the terms "clinic" and "clinical education" in this article to mean law school courses in which students receive credit for handling actual cases under the supervision of a practicing attorney or a law school faculty member. Although there are many types of clinical education that fit this description, the authors focus on litigation clinics. The authors do not include simulation courses, mock trials, or moot court under the rubric of "clinical."

Despite the rapid growth of clinical legal education, relatively few clinical programs place students in private law firms. A major reason for the failure of clinical programs to expand into private practice is that students in clinical programs cannot receive both credit and compensation at the same time. An interpretation of American Bar Association Standard 306(a)[4] provides: "Student participants in a law school externship program[5] may not receive compensation for a program for which they receive academic credit."[6]

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4. ABA Standard 306(a) sets forth one of the conditions necessary for a clinical course to be eligible for credit. It provides, in pertinent part:

> If the law school has a program that permits or requires student participation in studies or activities away from the law school or in a format that does not involve attendance at regularly scheduled class sessions, the time spent in such studies or activities may be included as satisfying the residence and class hours requirements, provided the conditions of this section are satisfied.
>
> (a) The residence and class hours *credit allowed must be commensurate with the time and effort expended by and the educational benefits to the participating student.*

STANDARDS AND RULES OF PROCEDURE FOR THE APPROVAL OF LAW SCHOOLS Standard 306 (1979) (emphasis added) [hereinafter cited as ABA STANDARDS].

5. "Externship program" is not defined in the Standards and Interpretations, but in the context of Standard 306(a) the phrase apparently refers to any program "that permits or requires student participation in studies or activities away from the law school or in a format that does not involve attendance at regularly scheduled class sessions." *Id.* This definition of "externship program" would cover virtually all clinical courses in which students handle "live" (actual) cases, regardless of whether the students in the externship program are directly supervised by a law school faculty member (so-called "in-house" clinics) or by cooperating attorneys not employed by the law school (so-called "farm-out" programs).

6. ABA Section of Legal Education, Interpretation of Standard 306(a) (Nov.-Dec. 1979) (document provided by ABA Section of Legal Education) (on file at *Washington University Law Quarterly*). The Standards set forth the criteria for approval of American law schools by the ABA Section of Legal Education, which enforces the Standards. The ABA has given the Council of the Section of Legal Education (Council) the authority "to interpret the Standards," *see* ABA STANDARDS, *supra* note 4, at Standard 801(i), and has delegated to the Council "the responsibility for insuring continued compliance with the Standards *as interpreted by the Council*," *id.* rule IV(1) (emphasis added). If a law school violates the Standards as interpreted by the Council, the Council and its Accreditation Committee may recommend that the school's approval be withdrawn. *Id.* Thus, both the Standards and their Interpretations are binding on law schools.

Curiously, there is apparently no written "legislative history" to explain the Council's reasons for adopting the interpretation of Standard 306(a) prohibiting credit-plus-pay clinical programs. As Dean Wayne Alley of the University of Oklahoma School of Law suggests, this is an "unusual omission." Letter from Wayne E. Alley to James P. White (Sept. 15, 1983) (on file at *Washington University Law Quarterly*).

The authors note that neither Standard 306(a) nor any other subparagraph of Standard 306 mentions compensation. Rather, Standard 306 is directed solely toward insuring the educational value of clinical instruction. The "interpretation" of Standard 306(a) thus appears to be in the nature of an amendment, which goes beyond the authority of the Council. Only the full ABA House of Delegates can amend the Standards. *See* ABA STANDARDS, *supra* note 4, Standard 902(a).

The authors believe that this restrictive interpretation of Standard 306(a) is unwise, and should be rescinded. One of the authors, Tom Leahy, has introduced a resolution in the American Bar Association (ABA) House of Delegates recommending that all law schools provide students with opportunities to receive both compensation and credit in properly supervised clinical programs.[7] In this article, the authors set out the arguments for and against "credit-plus-pay" clinical programs, categorizing the arguments on both sides as either educational arguments or economic arguments. The authors then develop a model credit-plus-pay program.[8]

The authors begin with two fundamental premises. First, every law school should be free to design a curriculum that is best suited to serve its own students and produce competent lawyers.[9] Second, each pro-

7. Mr. Leahy presented his resolution on behalf of the Illinois State Bar Association and the ABA Young Lawyer's Division at the ABA's August, 1983 Annual Meeting. The resolution provides:

> BE IT RESOLVED, That the Illinois State Bar Association supports the adoption of the following resolution by the American Bar Association House of Delegates:
> BE IT RESOLVED, that the House of Delegates of the American Bar Association recommends that law schools provide students with opportunities to receive credit for properly supervised, clinical, legal work for which the student may also receive compensation; in accordance with Standard 306 of the American Bar Association Standards for the Approval of Law Schools.

The House of Delegates did not vote on the proposal. Instead, upon Mr. Leahy's own motion, the resolution was referred to the ABA Section on Legal Education, which in turn referred the matter to its Standards Review Committee for study and recommendation.

To facilitate its study, and in accordance with a Council Interpretation of ABA Standard 902, the Section on Legal Education asked the ABA's Consultant on Legal Education, Dean James P. White of Indiana University School of Law, to advise the deans of all ABA approved law schools about Mr. Leahy's proposed resolution, and to solicit their comments. *See* Memorandum D8384-8 from James P. White to Deans of ABA Approved Law Schools (Aug. 19, 1983) (on file at *Washington University Law Quarterly*). A number of deans wrote letters in response to Dean White's memorandum. Portions of these letters are quoted at various places throughout this article. All of the letters quoted in this article are on file at the *Washington University Law Quarterly*.

8. Because there is virtually no empirical research on credit-plus-pay programs, this article is impressionistic, based on the authors' experiences, observations, reading, and discussions. Since the authors have found no logical or empirical justification for an absolute prohibition against credit-plus-pay programs, they advocate serious experimentation with credit-plus-pay programs.

Credit-plus-pay programs were tried at some schools before they were prohibited by the current interpretation of Standard 306(a). From 1971-79, Marquette University awarded credit for a supporting seminar held in conjunction with paid externships in various government offices. To avoid the problem of "double-dipping"—receiving pay and credit for exactly the same work—students were awarded credit only for the supporting seminar, not for work in their government agencies. Letter from Dean Robert F. Boden to James P. White (Aug. 26, 1983) (on file at *Washington University Law Quarterly*).

9. In the rapidly growing field of clinical legal education, freedom to experiment with differ-

gram offered by a law school should be evaluated on its own educational merits, not on the basis of a rigid litmus test such as compensation.[10]

I. ARGUMENTS IN FAVOR OF CREDIT-PLUS-PAY PROGRAMS

A. Educational Arguments in Favor of Credit-Plus-Pay Programs

1. Advantages of Private Practice as a Clinical Setting

Most existing clinical programs place students either with government agencies or with law offices serving non-paying indigent clients. This structure can offer an excellent clinical education, but government agencies and indigent clinics are not the best clinical settings for all students.[11] Recent surveys indicate that more than half of all law graduates will enter private practice for their first job after law school.[12]

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ent types of programs is especially important. "Clinical training, like other aspects of legal education, is too vital to be denied the flexibility of diverse experimentation and adjustment to meet the needs of individual legal education programs." ABA-AALS COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, CLINICAL LEGAL EDUCATION 6 (1980) (Introduction to Committee Report) [hereinafter cited as CLINICAL LEGAL EDUCATION]. This bias in favor of experimentation is shared by Dean Wayne E. Alley of the University of Oklahoma School of Law, who opposes the present interpretation of Standard 306(a) because he believes that lawyer competency "can best be achieved by permitting to law schools wide innovation and the establishment of incentives for student participation in courses developing practice skills." Letter from Wayne E. Alley to James P. White (Sept. 15, 1983) (on file at *Washington University Law Quarterly*).

10. With respect to the interpretation prohibiting simultaneous compensation and credit in clinical programs, several legal educators have stressed that the test for the creditworthiness of a clinical program should be its educational value, not the presence or absence of compensation. As Dean Alley of the University of Oklahoma School of Law has expressed it: "There can be inadequate supervision of an uncompensated program and exemplary supervision of a compensated program." Letter from Wayne Alley to James P. White (Sept. 15, 1983) (on file at *Washington University Law Quarterly*). Dean Theodore J. Clements of Gonzaga University School of Law wrote: "There are many settings in which students can have a well-structured and supervised learning experience which merits academic credit, and I personally see no good reason why they should not also be compensated for their work." Letter from Theodore J. Clements to James P. White (Aug. 31, 1983) (on file at *Washington University Law Quarterly*). Conversely, as Dean George J. Alexander of The University of Santa Clara School of Law has written: "With or without pay, inadequate externship experience should not lead to credit. Schools have an obligation to supervise clinical work which cannot be satisfied by merely monitoring compensation or its absence." Letter from George J. Alexander to James P. White (Sept. 27, 1983) (on file at *Washington University Law Quarterly*).

11. Some of the drawbacks of placing students in legal services clinics serving only indigent clients are catalogued in Grossman, *Clinical Legal Education: History and Diagnosis,* 26 J. LEGAL EDUC. 162, 176-78 (1974).

12. The most recent authoritative survey is the National Association of Law Placement, Inc.'s NALP 1982 EMPLOYMENT REPORT AND SALARY SURVEY (1982), results of which are summarized

Students planning to enter private practice would generally derive greater benefit by being placed in private law offices for clinical instruction.[13]

Even for students not planning to enter private practice, private law offices would have several advantages over government agencies and indigent clinics. The primary advantage is that most private law offices handle a more diverse caseload than government agencies and indigent clinics. Government administrative agencies typically handle a narrow substantive range and practice primarily before a single specialized administrative forum.[14] Prosecutors' and public defenders' offices deal exclusively with criminal matters.[15] Offices funded by the Legal Services Corporation are expressly prohibited from working on fee-generating cases and criminal matters.[16]

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in an NALP Press Release (Dec. 12, 1983) (on file at *Washington University Law Quarterly*). The NALP report analyzes the job choices of the class of 1982.

Private Practice	57.6%
Judicial Clerkships	10.6%
Government	10.5%
Business Concerns	10.4%
Academic	3.0%
Public Service-Public Interest	2.9%
Military	1.6%
Other	3.4%
TOTAL	100.0%

13. A basic tenet of legal education is that skills learned in one field of study are transferable to other fields of study. Thus, good litigation habits learned in a clinic serving indigents should be transferable to a private firm serving large corporate clients. But a student planning a career as a private practitioner concentrating in personal injury litigation is likely to learn more by working in a clinical setting involving personal injury work than in a legal services office with a heavy landlord-tenant and consumer problem caseload.

14. Prosecutors' and public defenders' offices are also restricted to particular forums. Each local United States Attorney's Office, for example, practices exclusively in federal court in its home district, never in state courts. In the St. Louis City Public Defender's Office, where Washington University places some clinical students, nearly every misdemeanor trial is conducted before the same judge.

15. Discovery is also much more limited in criminal cases than in civil matters. For example, many states do not permit discovery depositions in criminal cases. *See generally* Comment, *A Proposal for Discovery Depositions for Criminal Cases in Illinois,* 16 J. MAR. L. REV. 547 (1983).

16. *See* 45 C.F.R. §§ 1609.3, 1613.1-.4 (1982). The restriction against accepting fee-generating cases is sweeping: a "fee-generating case" is defined as "any case or matter which . . . reasonably may be expected to result in a fee." *Id.* § 1609.2. This restriction precludes legal services offices from taking many of the types of cases common to private practice, including most personal injury and product liability suits and any other cases likely to result in substantial money damages.

Private law offices, in contrast, are not fettered by statutory or regulatory restrictions. Private offices frequently handle both civil and criminal cases, litigate in the full range of state and federal forums, and take on cases covering a variety of substantive areas. Private lawyers often litigate business and personal injury cases that seek greater damages and justify more discovery than most cases involving indigent clients.[17] A clinical student is thus likely to get exposure to a wider range of legal problems in a private office than in a government agency or indigent office.

In addition, unlike indigent clients, the clients of private firms are often sophisticated in legal matters, challenging students to convince clients that a particular theory or tactic is proper. Knowledgeable client participation leads to a more balanced attorney-client relationship, a relationship more likely to resemble what the student will encounter after graduation than most current clinical settings afford.[18]

2. Opening the Door to Private Firms

Students are unlikely to gain access to the educational benefits of private practice, however, unless they can receive pay as well as credit. Private law offices are organized and operated for profit. Most firms will not want to expend billable time with clinical students unless clients can be billed for hours worked by students. Yet most firms would not bill clients for time spent by uncompensated "credit-only" clinical students.[19] Clients would be irate if they discovered that they were paying for student services provided to the law firm without charge, just as they would be angry to receive a bill for information provided to

17. In particular, the clients' ability to pay allows private attorneys to take far more depositions than is usual in most indigent clinics or government agencies. Because so few civil cases go to trial, especially within the short time frame of clinical courses, depositions are often a clinical student's only opportunity to examine a live witness under oath and in the presence of an opposing attorney. Also, since depositions can be reduced to a written transcript, they provide a rare opportunity for students to review their performance. Consequently, depositions are an especially valuable teaching tool in clinical education.

18. Some critics of existing clinical programs have noted that placing students in poverty law clinics "presents students with a comparatively restricted view of the law, one which is not typical of the types of practices most students will ultimately choose as careers." CLINICAL LEGAL EDUCATION, *supra* note 9, at 78.

19. Some support for our theory is found in the experience of the externship program at the University of Oregon School of Law. According to Dean Derrick A. Bell, Jr., "at least some externship opportunities have not opened because the potential sponsors are reluctant to work with persons (students or otherwise) who are not receiving proper compensation." Letter from Derrick A. Bell, Jr. to Tom Leahy (Nov. 1, 1983) (on file at *Washington University Law Quarterly*).

the firm at no cost by a government agency.[20] From the law firms' perspective, the solution to this problem is to pay clinical students the going hourly wage for student clerks and bill clients the standard hourly rate for part-time student law clerks.[21]

3. Advantages of Putting Students on the Payroll

Paying clinical students who work at private firms would have two important educational benefits. First, a law firm with an investment in a student's time will have an incentive to provide adequate supervision to ensure that the law firm is getting its money's worth in terms of quality work.[22] Second, law firms will not ask paid students to do menial tasks that can be performed more economically by others. If a student is working for credit only, no one in the law firm can photocopy cases, serve subpoenas, or organize documents at less cost to the law firm than

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20. Billing clients for services received by the firm at no charge might also violate DR 2-106(A) of the ABA Model Code of Professional Responsibility, which provides that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1979). If the law firm does not pay for a student's services, any fee charged to clients for the student's services could arguably be viewed as "clearly excessive."

21. The ABA Model Rule on student practice, which has served as a model for many states, apparently contemplates that lawyers may pay student practitioners and charge their clients for the services rendered by the student. The Model Rule provides, in relevant part, as follows:

> In order to make an appearance pursuant to this rule, the law student must:
>
> . . . .
>
> E. Neither ask for nor receive any compensation or remuneration of any kind for his services from the person on whose behalf he renders services, but this shall not prevent a lawyer, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

MODEL STUDENT PRACTICE RULE § III(E) (1973), reprinted in CLEPR, *supra* note 1, at 48. Several state rules tracking the ABA Model Rule have made it clear that this language allows private attorneys to pay clinical students and charge clients for the students' services. *See, e.g.,* ARIZ. S. CT. R. 28(e), § V(D) (rule "shall not prevent a lawyer . . . from paying compensation to the eligible law student, nor shall it prevent any such lawyer or agency from making such charges for its services as it may otherwise properly require"). *But see* S.C. S. CT. R. 52 (law student cannot receive compensation from client, employer, or law school).

22. A related point has been made by the Board of Governors of the Society of American Law Teachers (SALT) as follows:

> Large firms, with both the resources to supervise students effectively and the ability to present challenging assignments may be quite willing to pay good [clinical] students for their work. *Their willingness to pay a student may actually guarantee that the student will be given appropriate assignments.*

Enclosure to Letter from Wendy W. Williams (President of SALT) to James P. White (October 20, 1983) (on file at *Washington University Law Quarterly*) (emphasis added).

the unpaid student. Once the law firm has to pay the student an hourly wage, the firm will find less highly paid employees to do routine work.[23]

In short, private law firms will be more receptive to clinical students, will supervise them more conscientiously, and will give them better assignments, if the students are paid and their time can be billed out to clients at a profit. The authors therefore consider pay an essential element of any clinical program that hopes to benefit from the educational advantages of private firms.

4. Faculty Supervision of Part-Time Work

A significant and often overlooked educational advantage of credit-plus-pay clinical programs is that they will lead to faculty supervision over part-time student jobs in private firms, greatly enhancing the educational value of this work. Many law students planning to enter private practice do not take clinical courses because they believe they can learn more working part-time for a private firm than in a law school clinical course operating out of an indigent office or government agency. Unfortunately, students working part-time now receive no faculty supervision at all. These students would benefit enormously if they could combine law school supervision with work in a private practice setting. This combination of work and faculty supervision would result if credit-plus-pay programs were allowed. Credit-plus-pay programs would thus enable law schools to exert control over the educational content of part-time jobs which are now totally outside the law school's sphere of influence.

B. Economic Arguments in Favor of Credit-Plus-Pay Programs

1. Facilitating Participation by Financially Needy Students

A major economic argument in favor of credit-plus-pay programs is that they make it easier for financially needy students to participate in clinical programs.[24] Under the interpretation of Standard 306(a) bar-

23. Thus, allowing law schools to develop credit-plus-pay clinical programs would "erect a barrier against efforts to exploit the services of law students by obtaining those services without any compensation flowing from the agency benefitting from those services." Letter from Robert F. Boden (Dean of Marquette U. Law School) to James P. White (Aug. 26, 1983) (on file at *Washington University Law Quarterly*).

24. The authors use the term "financially needy students" to include both "financial aid students"—those receiving loans, grants, or other aid directly from the law school—and those who do

ring pay in clinical work, less affluent students are often unable to enroll in clinical programs.[25] Clinical courses generally require a heavy and open-ended time commitment from students.[26] Students who need to work in part-time jobs to finance their legal education[27] frequently

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not receive any financial aid from the law school but need to work part-time during law school to afford to stay in school. Arguments that apply to financial aid students would apply with equal force to students who must work even though, or perhaps because, they do not qualify for financial aid.

25. This point is made by the Society of American Law Teachers in a position paper on Standard 306(a). The position paper states:

> Disallowing credit for compensated externships discriminates against students who are forced to work for pay in order to finance their legal education. For them, externships must, under the present interpretation, be sacrificed to work for which they, unlike their wealthier classmates, will receive no credit. Should they want practical experience and require pay, they will be forced to take additional class work to compensate for the lack of credit although other classmates will be relieved of some classroom pressure by their externship work.

Enclosure to Letter from Wendy W. Williams (President of SALT) to James P. White (Oct. 20, 1983) (on file at *Washington University Law Quarterly*). At the September 1983 meeting of its Board of Governors, SALT voted unanimously "to oppose the present interpretation of Standard 306(a) which bars academic credit for paid externships." *Id.*

Derrick A. Bell, Jr., Dean of the University of Oregon School of Law, also opposes the present interpretation of Standard 306(a). He writes: "This law school has an externship program that is greatly hampered by the inability of many students to afford both their tuition and the cost attendant in accepting an externship opportunity." Letter from Derrick A. Bell, Jr. to Tom Leahy (Nov. 1, 1983) (on file at *Washington University Law Quarterly*).

26. At Washington University, where Mr. Simon teaches, students in the Introductory Lawyering Clinic (four credit hours) are required to spend a minimum of 16 hours per week doing clinical work. If an important hearing or filing deadline is approaching, however, a student may spend 20 or even 25 hours doing clinical work that week.

27. The percentage of law students working part-time is apparently growing. According to John C. Roberts, Dean of Wayne State University School of Law in Detroit:

> Important changes in the economic and educational climate in the 1970's are driving more students to seek part-time work. First, a combination of difficult economic times for law firms in many parts of the country and the large supply of available law graduates has reduced the amount of active recruiting done by some law firms, and has increased reliance on part-time work as a route to permanent employment. Second, at least some firms in major cities are responding to the economic downturn by relying more on part-time help and thus hiring fewer associates. Third, major changes in the financing of legal education are driving more students to seek part-time employment during Law School in order to finance their education.

Roberts, *Dean's Column,* 3 WAYNE LAWYER 2 (1983).

One recently published study of law students working part-time indicated that over 40% of students surveyed at two publicly supported law schools were working part-time, and just under 40% were working part-time at two private law schools of average rank. These figures shrank to around 20% at three "national, elite" law schools. Pipkin, *Moonlighting in Law School: A Multi-school Study of Part-Time Employment of Full-Time Students,* 1982 A.B.F. RESEARCH J. 1109, 1117 (Table 1). But Professor Pipkin's study is based on data compiled in 1976, *id.* at 1116, and does not take into account the double digit inflation of the late 1970's or the severe recession of 1981-82. In a more recent survey, presented to the AALS annual meeting in Cincinnati in Janu-

cannot spend the time necessary to take clinical courses.[28] If students could be compensated for clinical work, this problem would be alleviated.[29]

2. Avoiding Exploitation of Student Labor

A second economic argument favoring credit-plus-pay programs is that student wages would prevent lawyers from exploiting student labor. Private practitioners view clinical students who cannot be paid primarily as a source of free labor for research or menial work. A private firm thus has an economic incentive to request credit-only clinical students even if the firm is not committed to proper supervision or does not have assignments that would be educationally appropriate for clinical students.[30] Combining pay and credit would remove the incen-

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ary, 1983, 75-80% of the law students surveyed at three schools (Georgetown, Wisconsin, and Columbia) reported working part-time. At the school with the highest tuition, 70% said they worked 15-25 hours weekly. The most common reason for working was "to pay for legal education." Tushnet, Survey Outline (Jan. 1983) (unpublished paper on file at *Washington University Law Quarterly*). Whatever the cause, there is "unmistakable evidence that both the number of students working part-time and the number of hours worked by each are increasing." Roberts, Part-Time Student Employment and Legal Education: A Modest Proposal 4 (1983) (unpublished manuscript on file at *Washington University Law Quarterly*) [hereinafter cited as Roberts, Part-Time Student Employment].

28. At The Dickinson School of Law in Carlisle, Pennsylvania, for example, half of the faculty favors lifting the ban on credit-plus-pay programs "as a way to encourage more students to participate in clinical programs, to provide financial benefit to students and to guarantee that the clinic programs are not just for wealthy students who do not need to spend time in part-time jobs." Letter from Dean William L. Wilks to James P. White (Sept. 1, 1983) (on file at *Washington University Law Quarterly*).

29. To the extent that students who work part-time are already enrolled in clinical courses, credit-plus-pay programs should have the positive corollary effect of freeing up more of their time for their traditional classroom courses. As Dean Robert F. Boden of Marquette University Law School has written, a clinical program in which students are paid for their clinical work:

> allows students to earn money in part-time employment while participating in the overall clinical experience, thus eliminating the necessity of those students seeking additional part-time employment beyond the clinical experience in order to sustain themselves and acquire the resources to pay tuition; in short, it tends to limit part-time outside employment undertaken at the expense of devotion of sufficient time to other courses in the curriculum.

Letter from Robert F. Boden to James P. White (Aug. 26, 1983) (on file at *Washington University Law Quarterly*).

30. The same point has been made with respect to government agencies by Marquette University Law School Dean Robert F. Boden, based on his experience with Marquette's clinical programs over more than a decade. When Marquette's clinical programs were first set up in 1971, the school insisted that its students be paid a reasonable rate of compensation for work done at the externship placement. In Dean Boden's words: "We felt that compensating students for practice services rendered outside the school through the award of academic credit was an exploitation of

tive for exploitation.

3. *Raising Revenue for the Law School*

The most compelling economic argument in favor of credit-plus-pay clinical programs is that such programs could raise money for the law school. This money could be used to supplement financial aid and support the costs of clinical programs.[31] Since non-paying clinical placements do not generate any income, credit-plus-pay programs present a rare opportunity for law schools to raise revenue above and beyond tuition. This point will be discussed in greater detail in Section III below, where the authors develop their model credit-plus-pay program.

II. ARGUMENTS AGAINST CREDIT-PLUS-PAY PROGRAMS

A. *Educational Arguments Against Credit-Plus-Pay Programs*

1. *Conflicts of Interest and Supervision Problems*

The major educational arguments against credit-plus-pay clinical programs are contained in a joint report by the Association of American Law Schools—ABA Committee on Guidelines for Clinical Education.[32] The Project Director's Notes, which explain the Committee's reasons for particular guidelines,[33] offer the following rationale, which we call the "conflict of interest" objection:

> The primary focus of a law firm is representation of the client. Clinical legal studies involving fieldwork are concerned with both the student and

law students. It was a means of getting a certain volume of work done by law students at no cost to the agency. . . ." *Id.*

Marquette was forced to stop insisting on compensation for its clinical students when the current interpretation of Standard 306(a) took effect in 1979. Marquette is now "rewarding students only through academic credit, and, as was predicted, a certain amount of exploitation has set in. . . . It is going to be very difficult to turn this around, if it is ever turned around. But I wish we could at least be at liberty to try to turn it around." *Id.*

31. The means by which the law school might tax and distribute funds earned by the students are discussed in detail *infra* at text accompanying notes 87-93.

32. CLINICAL LEGAL EDUCATION, *supra* note 9. The Committee on Guidelines was jointly established in 1977 by the ABA and AALS to analyze developments in clinical legal education and develop guidelines for clinical programs. *Id.* at 3. No previous attempt had been made to undertake a comprehensive analysis of clinical training. *Id.* at iii (Preface signed by all Committee members). Anxious to avoid rigid rules for clinical education, the Committee was "emphatic . . . that the nature of each clinical program, and the extent to which clinical training should be made available to students, is a matter for individual institutional determination." *Id.*

33. *Id.* at 41. The Project Director was Mr. Steven H. Leleiko, a prominent writer on clinical legal education.

> the client. They seek to educate students in the context of client representation. The Committee felt that payment of student salaries provides the law office with a powerful element which can distort the relationship between the law school and law firm.
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> . . . .
>
> The problem presented by the joining of credit and compensation is that it dangerously tips the balance away from the educational focus and toward a focus on client service in a context which properly starts with this predilection. . . . The thrust of the Guidelines is to assure the educational purpose of clinical legal study. Student salaries tend to blur the distinction between a job and educational study for the employer, the student, and the law school.[34]

According to this argument, serving clients often conflicts with educating students.[35] Student salaries would give law firms a lever which would tend to resolve conflicts in favor of serving the client at the expense of the student's education.[36]

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34. *Id.* at 99-100. Curiously, the Committee on Guidelines would not absolutely prohibit credit-plus-pay programs. Guideline X(B) states:

> Academic credit should *ordinarily* not be awarded for student work for which the student also receives remuneration.

Id. at 28 (emphasis added). Even this language passed by only a 4-3 vote. *See id.* at 99-100.

35. A helpful summary of the "conflict of interest" argument, showing that conflicts are not confined to credit-plus-pay programs, appears in Wizner & Curtis, *"Here's What We Do": Some Notes About Clinical Legal Education,* 29 CLEV. ST. L. REV. 673, 681 (1980). The authors write:

> [I]n almost every outside placement there arises an irreconcilable tension between the demands of clients and the educational needs of students. Legal aid officers, public defenders, and private lawyers perceive that their first duty is to their clients, as indeed it is. Students are often shunted to paralegal duties and given little responsibility. The limited roles result not because students are unable, with training, to handle advanced tasks, but because the office works most efficiently when students do the routine work. On the other hand, in law school programs, the focus is on giving the student a worthwhile educational experience as well as on providing legal services to clients. In practice this means that while the client still comes first, the law school clinic is run with an understanding that the caseload will be adjusted to reflect the fact that students cannot be as efficient as experienced attorneys. Cases are selected with an eye to their value to the student as well as to the needs of the clients seeking assistance. . . .

36. This point has also been expressed by Professor Harry M. Caldwell of Pepperdine University School of Law in Malibu, California:

> If compensation is allowed it diminishes the Law School's ability to provide structured control of the type, quality and quantity of responsibilities assigned our clinical students. Such a change will fundamentally alter the relationship between the supervising attorney, the Clinical Law Director and the clinical student. As our program currently exists, the Clinical Law Director will interact with the supervising attorney and insist that the clinical student be given clerking assignments deemed beneficial to the ongoing educational process. I suspect, however, once compensation from the office of the supervising attorney is introduced, that supervising attorney virtually assumes the role of an employer and as such is free to delegate responsibilities that may not have as their primary objective the best educational concerns of the student.

A second educational argument against credit-plus-pay programs, which we call the "supervision" argument, is that the added element of student salaries would hinder supervision by law schools.[37] Specifically, the Committee on Guidelines was concerned that student salaries would undercut the educational institution's capacity to enforce Guideline VIII,[38] which concerns supervision over clinical students, and

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Memorandum from Harry M. Caldwell to Ronald Phillips (Dean of Pepperdine U. School of Law) (Aug. 25, 1983) (on file at *Washington University Law Quarterly*). Professor Caldwell's views are shared by Professor Kandis Scott of the University of Santa Clara School of Law, who has written:

> Given the responsibility of an attorney to a client, law schools are hard pressed to assure that a supervisor provides a meaningful learning experience to a student extern. This task would be more difficult if a supervising attorney compensated a law student: as the adage says, one who pays the piper calls the tune.

Letter from Kandis Scott to James P. White (Oct. 25, 1983) (on file at *Washington University Law Quarterly*). The authors of this article believe this danger can be eliminated by careful supervision and explicit guidance from the law school. *See infra* text accompanying notes 80-82.

37. CLINICAL LEGAL EDUCATION, *supra* note 9, at 99-100.

38. Guideline VIII provides:

Responsibilities of Faculty and Professional Staff as Supervising Lawyers

A. *Responsibility to Prepare Students*
It is the responsibility of the faculty and professional staff to ensure that each law student is prepared before the student acts. The methods to ensure that the student is prepared include:
1. requiring the student to complete specified prerequisites related to the clinic's work;
2. requiring the student to engage in simulations of the roles the students will be expected to perform; and
3. planning with the student for each event or proceeding in which the student will participate, anticipating, to the extent possible, all issues which may arise during the event or proceeding.

B. *Responsibility for Student Actions and Evaluation of Student Performance*
The individual having direct and immediate supervisory responsibility for the student should:
1. accompany the student in all proceedings where the effects of the actions which may be taken can be irreversible, and be prepared to take over for the student if the client's interests require; and
2. review with the student all actions which the student has or might have taken affecting the client's interests.

Id. at 26-27. Guideline VIII is similar in many respects to Guideline VII(C), which provides as follows:

C. *Supervision of Student Fieldwork*
To provide adequate supervision of student fieldwork, the professor, clinical professor, supervising attorney, *or cooperating attorney* should:
1. assist each student, as needed, with preparation;
2. review regularly each student's work;
3. observe the student's performance of lawyers' roles;
4. accompany each student in all appearances in all situations where the effects of the actions which may be taken can be irreversible; and
5. evaluate the student's performances of lawyers' roles.

Id. at 24 (emphasis added).

Guideline XIII,[39] which governs the law school's supervision of "cooperating attorneys,"[40] the lawyers who would directly supervise students day-to-day in a credit-plus-pay course. Apparently the Committee on Guidelines thought practicing attorneys would feel that paying a salary carries with it the right to dictate what the student must do, regardless of educational value.[41]

The "conflict of interest" argument and the "supervision" argument against credit-plus-pay programs thus overlap. The fear is that practicing attorneys who pay for student help will resist supervision by the law school whenever educating a student conflicts with serving a client.

2. Inadequate Teaching

The real fear is deeper. Many legal educators are apprehensive about placing clinical students in private law firms with or without pay. Some educators fear that private attorneys are too independent to supervise. Other educators fear that practicing attorneys are too busy to teach, do not want to teach, or do not know how to teach.[42] Thus,

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39. Guideline XIII provides:

Teaching Responsibilities of Professional Staff

A. *Supervision of Clinical Professors Not Members of the Faculty and Supervising Attorneys*

One or more faculty members for whom teaching clinical studies is a principal professional responsibility should supervise the teaching of clinical professors who are not faculty members and supervising attorneys.

B. *Supervision of Cooperating Attorneys*

Teaching done by a cooperating attorney should be supervised by a faculty member who:

1. develops the specific curriculum and defines the specific teaching responsibilities of the cooperating attorney;
2. conducts a training program in the responsibilities the cooperating attorney is expected to fulfill;
3. provides continuing supervision and coordination of the cooperating attorney's teaching responsibilities; and
4. oversees a process that evaluates the cooperating attorney's teaching.

Id. at 30.

40. The term "cooperating attorney" is defined in Guideline I(K) as follows:

"Cooperating attorney" means an individual who is self-employed or whose primary employment responsibility is to an outside employer, but who provides an opportunity for a student or students to work in a law office or supervises law student fieldwork and in such a capacity is responsible to the law school, whether or not the individual is paid by the law school.

Id. at 13.

41. On this point, see the remarks of Harry M. Caldwell, *supra* note 36.

42. Two law teachers working in Yale's clinical program, for example, had this to say about practicing lawyers: "Most lawyers who practice are not really interested in teaching, and even when they are, they often are not able to take sufficient time to give students adequate instruction

educators fear that the primary responsibility for teaching in a credit-plus-pay program would fall to a busy law school professor having only limited knowledge of his students' cases.[43]

3. Improperly Motivated Students

Skeptics may also fear that the element of pay will attract improperly motivated students to clinical programs. In credit-only clinical programs, students theoretically choose clinical courses for purely educational motives.[44] Credit-plus-pay programs, however, might attract students whose primary motive is not education but money. These stu-

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in the broader issues relevant to their areas of practice." Wizner & Curtis, *supra* note 35, at 681. Such broad condemnations of practicing lawyers as teachers have a fundamental flaw. Even assuming that "most" lawyers who practice have neither time for nor interest in teaching, there are still many who do have time and interest. The empirical evidence of this is the many adjuncts who teach without charge. If a credit-plus-pay program begins with a very small enrollment of 10 or 12 students, a law school ought to be able to locate 10 or 12 practicing lawyers who are willing and able to supervise those students and instruct them in "the broader issues."

43. The Yale clinical teachers expanded on this problem as follows:

> It simply is not an adequate solution to divide responsibilities so that substantive instruction and simulated exercises are given in the law school classroom while practical training is provided in field offices. The whole point of the clinical experience is to merge and intertwine the substantive and practical aspects. Separating these teaching functions frequently leads to conflict between the "academicians" and the "practicing lawyers" and creates the impression, in the students' minds at least, that "theory" and "practice" are only distantly related.

Wizner & Curtis, *supra* note 35, at 682. The authors believe this problem (if it exists) can be overcome by (1) defining specific teaching responsibilities for the cooperating attorneys, (2) establishing a regular schedule of communications between the faculty supervisor and the cooperating attorneys, and (3) appointing a faculty supervisor who has had sufficient experience as a practicing lawyer so that he can relate theory to practice. *See infra* notes 58-81 and accompanying text.

44. As one law teacher has put it: "Without compensation, one is more sure that the motivation of the student is consistent with the academic aims of the externship." Memorandum from Jim McGoldrick to Ronald F. Phillips (Aug. 23, 1983) (attached to Letter from Ronald F. Phillips to James P. White (Aug. 30, 1983)) (on file at *Washington University Law Quarterly*). Mr. McGoldrick is Associate Dean and Mr. Phillips is Dean of Pepperdine University School of Law.

The authors believe that this general line of argument is mistaken in several ways. First, law students already have many motives for taking clinical courses that have nothing to do with academic aims—e.g., boredom with classroom lectures, desire to start "doing something," or hopes of landing a full-time job with the clinic or agency upon graduation. It is doubtful that compensation will significantly affect student motives for taking clinical courses, especially if the level of compensation is kept low. *See infra* notes 98-102 and accompanying text. Second, the present ban on compensation does not so much select *in* clinical students with high academic motives as it selects *out* those who need to earn money to stay in law school. *See supra* notes 24-29 and accompanying text. Third, a careful process for selecting students eligible for a credit-plus-pay program, including personal interviews, would be a much more accurate method for examining student motives than a broad assumption about the economic behavior of law students. *See infra* notes 63-64 and accompanying text. Last, the authors disagree with the hidden assumption that academic results

dents would view credit-plus-pay courses as little more than part-time jobs[45] and would not take the academic components of the program seriously. This would harm all clinical courses by reinforcing the commonly held (but erroneous) view that clinical programs are not serious academic endeavors.

4. Lack of Courtroom Experience

A final educational objection to credit-plus-pay programs is that students working for paying clients might not receive any courtroom experience, either because paying clients might insist on being represented in court by licensed attorneys, or because many state statutes allow students to appear in court only on behalf of indigents.[46] Thus, students working in private firms might be confined to the law office and get little or no experience on their feet in court.

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and economic motives are necessarily in conflict. Some students work their hardest and learn the most when their motive is financial reward.

45. The Associate Dean of Pepperdine University School of Law has amplified this argument from an administrative perspective:

> [E]very student who clerks for pay would want to convert that clerking into a program for academic credit. Right now, we draw fine lines between the types of programs we approve for academic credit and those that we do not. The fact that the programs for academic credit are non-compensated takes some of the pressure off the line drawing itself. If programs for academic credit received compensation, there would be considerable tension and disagreement about which positions qualified and which did not.

Memorandum from Jim McGoldrick to Ronald F. Phillips (August 23, 1983) (attached to Letter from Ronald F. Phillips to James P. White (Aug. 30, 1983)) (on file at *Washington University Law Quarterly*). The authors believe this problem can be solved by (1) strictly limiting enrollment in the credit-plus-pay program; and (2) establishing a rigorous, detailed curriculum for the program that clearly sets it apart from non-credit part-time clerking jobs. *See infra* notes 58-68 and accompanying text. At a minimum, the active supervision of a law school faculty member in a credit-plus-pay program would distinguish it from non-credit clerking jobs, so "line drawing" should not be difficult.

46. At least 46 states have statutes or rules permitting law students to practice law in some form. Approximately 40 of these states allow students to appear in court only when representing indigents, and/or, in some states, government agencies. At least six states, including Texas and California, also allow students to appear in court when representing paying clients. CLEPR, *supra* note 1, at 28-35. The restriction on court appearances does not, of course, prevent a student from interviewing, drafting, negotiating, counseling, reviewing documents, or performing a host of other tasks on behalf of paying clients, even out of the supervising attorney's presence. *See* MODEL STUDENT PRACTICE RULE § V(A), *reprinted in id.* at 44. Some paying clients may want licensed attorneys handling all aspects of their cases, precluding students from working on their cases even if there is no statutory restriction. It should be noted that indigent clients, too, can refuse to allow students to work on their cases. *See, e.g.*, MO. S. CT. R. 13.01(a) (student cannot represent indigent client without indigent's written consent). Perhaps because they would otherwise be unable to get any lawyer at all, however, indigent clients seldom withhold their consent.

B. Economic Arguments Against Credit-Plus-Pay

1. Too Expensive

The main economic argument against credit-plus-pay programs is that any credit-plus-pay program properly supervised by the law school would be too expensive. The fundamental reason for this high cost is that law professors can properly supervise only a small number of clinical students, perhaps ten or twenty students each semester. A large credit-plus-pay program would thus require many faculty supervisors. This expansion would represent an unacceptable increase in the clinical budget at most schools.[47]

2. Hardship for the Poor

A second economic argument against credit-plus-pay programs is that they would draw students out of non-paying clinical settings focusing on indigents and into private firms catering to wealthier clients. Combined with recent cuts in the budget of the Legal Services Corporation, which uses many clinical students in credit-only programs,[48] a further drain on the already meager legal resources available to indigents would create unacceptable hardships for the poor.[49]

3. Exploitation of Student Labor

A third economic argument against credit-plus-pay programs is that combining credit with pay might force down student wages, giving private firms an incentive to exploit low-cost student labor from clinical

47. For a detailed study of the costs of clinical programs, see Swords & Walwer, *Cost Aspects of Clinical Education,* in CLINICAL LEGAL EDUCATION, *supra* note 9, at 133-90. A school could avoid increasing its overall budget by shifting classroom teachers into clinical courses, but this is not a practical option at most schools. Few schools would be willing to drop classroom courses or increase teaching loads for the sake of expanding clinical instruction.

48. At Washington University, for example, about 10 students per semester are placed at Legal Services of Eastern Missouri, Inc., an office serving only indigent clients.

49. The burden that might fall on the poor if credit-plus-pay programs were allowed has been expressed by Professor Kandis Scott of the University of Santa Clara Law Clinic as follows:

> Many law students now earn clinical course credit working for public agencies. Such experiences expose students to work with the unrepresented and disadvantaged and in so doing impress upon these budding lawyers the importance of public service in our profession. If, as I expect, such agencies will not be able to pay the students, many will turn away from this enriching experience. This will be a loss to the profession in the future.

Letter from Kandis Scott to James P. White (Oct. 25,1983) (on file at *Washington University Law Quarterly*). This concern would apply not only to legal services offices, but also to public defenders' offices, which serve only those too poor to afford an attorney.

courses.[50] If the interpretation banning academic credit for paid externships were rescinded, educators fear that students would put intolerable pressure on schools to give academic credit for part-time work.[51] Since students would be paid partly with credit and partly in cash, students would presumably agree to work for lower wages than they would absent the academic credits.[52] Employers eager to save money would then pressure law schools to place clinical students in their firms. Beset by these dual pressures from students and employers, law schools would lose control over their clinical programs,[53] and the quality of

50. This economic effect of credit-plus-pay programs is anticipated by Professor Gary Palm, Director of the Edwin F. Mandel Legal Aid Clinic at the University of Chicago. If credit-plus-pay programs are allowed, Professor Palm writes, the result "may well be that law firms will give credit (and perhaps simultaneously reduce the rates they pay law students) for work that is already being done by law students on a part-time basis solely for compensation." Letter from Gary Palm to James P. White (Nov. 9, 1983) (on file at *Washington University Law Quarterly*). Professor Kandis Scott of the University of Santa Clara Law Clinic has expanded on this line of reasoning as follows:

> Lawyers will be able to pay lower salaries to students receiving course credit for their work. It is inappropriate for an accreditation standard or interpretation to facilitate the subsidy of certain profit-making law firms. Moreover, law schools will be expected to select those profit-making firms who will receive this subsidy.

Letter from Kandis Scott to James P. White (Oct. 25, 1983) (on file at *Washington University Law Quarterly*).

51. As Associate Dean Jim McGoldrick of Pepperdine University School of Law sees it: "[E]very student who clerks for pay would want to convert that clerking into a program for academic credit." Memorandum from Jim McGoldrick to Dean Ronald F. Phillips (Aug. 23, 1983) (on file at *Washington University Law Quarterly*).

52. Some legal educators foresee a much different economic effect if credit and compensation are combined. According to Professor John Capowski of the University of Maryland School of Law:

> [S]upervisors often have many goals ahead of the one of education. However, extern supervisors often feel a responsibility for education because of the free assistance provided to them by students. If the students are compensated, the education obligation will be diminished, and it is likely that students will simply be working for credit.

Letter from John J. Capowski to James P. White (Nov. 9, 1983) (on file at *Washington University Law Quarterly*). The authors of this article believe that the consequence of diminished educational value can be prevented by selecting cooperating attorneys who desire to teach and by strictly enforcing a detailed and specific educational curriculum for the credit-plus-pay program. *See infra* text accompanying notes 67-73.

53. This is the concern of Dean Nina Appel of Loyola University of Chicago School of Law, who fears "losing control of the academic content" of clinical programs if simultaneous compensation and credit are allowed. Letter from Nina S. Appel to Tom Leahy (Sept. 8, 1983) (on file at *Washington University Law Quarterly*).

The authors of this article view the issue of losing control from a broader perspective. The critical issue is not that law schools might lose control over a few students in a credit-plus-pay program; it is that law schools are already losing control over more and more students who are working part-time to pay for law school. What students learn in part-time jobs is completely beyond the control of the law school. In most instances, students working part-time are given

clinical legal education would diminish.[54]

4. Unfair Competition with Classroom Courses

A final economic argument against credit-plus-pay programs is that these programs would unfairly lure students out of traditional classroom courses.[55] Students should choose courses based on educational

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little real responsibility and are learning relatively little of what they could learn in properly supervised clinical programs. If a successful formula for credit-plus-pay programs can be found, students working part-time can be brought back within the orbit of academic education so that the school can assert some control over what students are learning in their jobs. Thus, while it may or may not be true that a law school would lose control over the academic content of credit-plus-pay courses, it is beyond dispute that a law school would have more academic control over students in credit-plus-pay courses than over students working part-time. If law schools are going to produce more competent lawyers, it is crucial that law schools gain a measure of control over students working part-time. Credit-plus-pay courses are the proper vehicle for accomplishing that objective on a wide scale.

54. This entire chain of economic consequences is predicted by Dean Norman Redlich of New York University School of Law. He writes:

> The Illinois bar proposal [to allow credit-plus-pay programs] would subject us to intolerable pressure to give academic credit for part-time student work which is unlikely to have the educational value of systematic clinical instruction. Law firms would have a great incentive to acquire the low-cost labor provided by programs that pay students partly in cash and partly in credit. Students, on the other hand, would prefer low wages to none, if that is the choice. The combined pressure of these interests would be difficult to resist, particularly if other law schools succumb. Even though the Illinois proposal has the superficial appeal of allowing greater student autonomy, we view it as a mechanism for the exploitation of students. . . . Many students would prefer to engage in low-level work for low pay and academic credit, rather than high-level clinical programs for no pay and academic credit.

Letter from Norman Redlich to James P. White (Sept. 20, 1983) (on file at *Washington University Law Quarterly*).

With all due respect to Dean Redlich, who has been an innovator and driving force behind clinical legal education for many years, the authors doubt that this chain of events would occur if credit-plus-pay programs were permissible. These consequences certainly are not inevitable. Law schools can require, for example, that cooperating attorneys must agree to pay their regular going rate for student clerks as a condition of participating in the credit-plus-pay program. If the credit-plus-pay courses have the benefits for private firms that the authors believe they do, *see supra* text accompanying notes 19-21, then a "going rate" requirement will not deter private lawyers from participating. In fact, the greater danger to students comes from the total lack of compensation in existing clinical programs. As pointed out by Dean Robert F. Boden of Marquette University's School of Law, which has considerable experience with both paying and non-paying clinical placements, it is not compensation but rather the lack of compensation that leads to exploitation of clinical students. *See supra* note 23.

55. This worry has been expressed by Professor Kandis Scott of the University of Santa Clara Law Clinic as follows:

> Finally, the Illinois proposal [to allow credit-plus-pay programs] places school-operated courses in competition with an externship course which pays those who enroll. In a sense law school courses compete with one another for students; every teacher believes he or she offers a special educational opportunity. But none of the teachers offers to pay

value, not monetary reward.[56] The prospect of financial reward would distort student attitudes in choosing courses, biasing students toward courses offering pay regardless of educational value.[57] Students would place enormous pressure on law schools to expand credit-plus-pay programs, which would cause enrollment in traditional classroom courses to decline. Some classroom courses might have to be dropped for lack of interest. This shift toward clinical courses would ultimately weaken the academic base of law graduates, and the emphasis on pay would diminish the image of law schools as scholarly institutions.

III. A MODEL CREDIT-PLUS-PAY PROGRAM

In this section, the authors offer a model credit-plus-pay program. This program would be prohibited under the current interpretation of Standard 306(a), but the authors hope their model program will help to persuade the Council on Legal Education that a viable credit-plus-pay program is both possible and desirable, and that the absolute prohibition on credit-plus-pay courses should be rescinded.

A. Selection of the Participants

The success of any clinical program depends on the quality of the participants and the ability of the law school to supervise the program. The students, the faculty supervisor, and the cooperating attorneys

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students who enroll in his or her course. It's unseemly to superimpose financial gain on curricular design.

Letter from Kandis Scott to James P. White (Oct. 25, 1983) (on file at *Washington University Law Quarterly*).

56. Many students already opt for clinical courses over traditional classroom courses, even though clinical programs are currently non-paying, because they believe the clinical instruction will have greater educational value than another classroom course. At many schools, including Washington University, clinical courses have in recent years been oversubscribed every semester. Interview by Roy Simon with Philip D. Shelton, Associate Dean, Wash. U. School of Law (Nov. 1, 1983). If law schools maintain limited enrollment for clinical programs, the number of students actually taking them will not increase regardless of the amount of money students can make in credit-plus-pay courses.

57. Unfortunately, student course choices are already sometimes skewed because of financial considerations. Students who hold down part-time jobs often choose courses that have the lightest workload or a convenient schedule. Some students take nothing but morning courses so they can work every afternoon. One law school dean, on a recent visit to Yale Law School, "spoke to several upper-class law students who reported that they commuted to New York one or two days a week to work in law firms, concentrating their classes during the remaining days of the week." Roberts, Part-Time Student Employment, *supra* note 27, at n.3.

should therefore be handpicked and limited in number. The authors have several suggestions on these points.

1. Limited Enrollment

The initial credit-plus-pay program should be sharply limited in enrollment, with perhaps no more than a dozen credit-plus-pay students in the first semester in which the program is offered.[58] This will enable the law school to select the participants and monitor the program carefully without creating undue administrative burdens. If the experimental program is a success, it can be expanded gradually.

2. The Faculty Supervisor

The faculty member selected to supervise the program should have substantial experience in private practice so that he can relate to the cooperating lawyers in the program as peers.[59] The faculty member should devote a majority of his time to supervising the credit-plus-pay course.

3. Cooperating Attorneys

Cooperating attorneys should have experience as teachers, whether as adjuncts, as former law professors, or in some other form.[60] They should also be excellent practitioners.[61] Cooperating attorneys should

58. We chose a limit of 12 because we think that number of students can generally be handled by a single supervising faculty member. This view was apparently shared by the Committee on Guidelines. *See* CLINICAL LEGAL EDUCATION, *supra* note 9, at 82 & nn.91-92. Having only one faculty member in charge of the program at its inception will simplify communications among all participants.

59. Criteria for selecting clinical faculty members are suggested in Guideline XV of the Guidelines for Clinical Legal Education. *See id.* at 31-32.

60. Other forms of teaching experience that might be acceptable would include experience teaching in a program of the National Institute of Trial Advocacy (NITA) or a similar simulation course. Those courses demand constant and direct contact with students. We caution, however, against counting a practitioner's luncheon speeches and continuing legal education lectures as teaching experience. Clinical programs are not lecture courses, and lecture experience may be of little value in supervising clinical students in the practice of law.

61. Excellence should be measured by litigation skills, not merely by financial success or prominence in bar associations. Professor Kandis Scott of Santa Clara doubts that any selection process for cooperating attorneys is workable. She writes:

> The most important aspect of quality control is assuring that only excellent lawyer/teachers be permitted to supervise interns. Although I acknowledge that there are many fine lawyer/teachers, I see no practical way law schools can regulate the choice of supervising attorneys who pay compensation. Therefore, this proposal may result in law schools' relinquishing much of their authority over faculty selection.

be assigned no more than two students each, preferably only one.[62]

4. Students

The students allowed into the program should not be randomly chosen but should have to demonstrate excellence in some manner, whether through grades, writing samples, moot court, or other indicia of legal talent.[63] This selection process would be a departure from the normal practice in many schools, but careful selection is essential to help the credit-plus-pay program start up smoothly and to assure cooperating attorneys that students in the program will be capable of assuming important litigation responsibilities.[64]

B. The Key Element: A Detailed Program Manual

Guideline XIII of the ABA-AALS Guidelines for Clinical Legal Education expressly requires that the law school faculty member in charge of a clinical program develop a specific curriculum, define specific

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Letter from Kandis Scott to James P. White (Oct. 25, 1983) (on file at *Washington University Law Quarterly*). In view of the availability of objective criteria, the authors of this article respectfully disagree with Professor Scott. Professor Janet Motley, director of the clinical program at California Western University School of Law, has reported success in the selection of private practitioners to participate in that school's clinical program. Motley, Improving Externship Programs (oral presentation at 1984 AALS Annual Meeting in San Francisco, California (Jan. 5, 1984)). The authors believe that similar success can be achieved in selecting cooperating private attorneys for the credit-plus-pay program.

62. The limitation to one or two students will prevent practitioners from committing themselves to more than they can handle, and will assure that a minimum number of students will suffer if a particular cooperating attorney does not work out. The student practice rules of some states would also limit cooperating attorneys to one or two students. *See, e.g.*, W. VA. R. ADM. PRAC. 6.000, § VI(D) (licensed attorney shall "[n]ot undertake the supervision of more than two eligible students at the same time"). Likewise, the Committee on Guidelines felt that "because of competing time demands, no more than two students should be assigned for supervision to one cooperating attorney." CLINICAL LEGAL EDUCATION, *supra* note 9, at 83.

63. Since clinical courses are so often oversubscribed, many schools use a random selection system to determine who gets into clinical courses. At Washington University, for example, clinical students are chosen by lottery, subject to certain course prerequisites. A random selection process may not be compatible with the hiring standards of private law firms.

64. The faculty supervisor should evaluate each applicant for the credit-plus-pay program and match up the students selected with appropriate cooperating attorneys. Apart from submitting general descriptions of job openings, employers should not have a part in the selection process. If employers were to participate in selecting students, the administrative burdens and political pressures on the law school would substantially increase. The law school could easily get caught in the middle, for example, between two cooperating attorneys who both insisted on getting the same student. Moreover, students would resent allowing employers unconnected with the law school to decide, in effect, how their law school tuition should be spent.

teaching responsibilities for cooperating attorneys, conduct a training program, provide continuing supervision, and oversee a process that evaluates the cooperating attorneys' teaching.[65] If this guideline is taken seriously, a credit-plus-pay program can succeed.

To implement Guideline XIII, a law school should write a detailed program manual to govern the credit-plus-pay program, and distribute the manual to all cooperating attorneys.[66] This manual will be the heart of the credit-plus-pay program. The authors offer the following suggestions for the contents of the manual.

1. Curriculum

a. Mandatory assignments

To define a curriculum, the manual should set forth specific tasks that each student must complete to receive credit. Students should be required, for example, to play a significant role in counseling clients, interviewing witnesses, drafting pleadings, negotiating settlements, drafting discovery requests, attending depositions, and reviewing documents.[67] Students should also be required to observe different types of judicial and administrative proceedings, and to observe the cooperating attorney interview, counsel, negotiate, argue a motion, and perform other specified litigation responsibilities.[68] These requirements will en-

65. *See supra* note 39.

66. Several law schools, including California Western, Delaware, UCLA, and Texas Tech, have already developed detailed guidelines for placing students with cooperating attorneys in clinical programs that award credit only. *See* CLINICAL LEGAL EDUCATION, *supra* note 9, at 111 & n.144. See also the extensive set of guidelines prepared for the clinical program at California Western University School of Law. Clinical Legal Education Program, California Western School of Law, Supervising Attorney Handbook (1983) (J. Motley ed.) (on file at *Washington University Law Quarterly*).

67. At Washington University, which places clinical students primarily in a legal services office and with public defenders, students are required to do all of these things personally. We perceive a potential problem in imposing these requirements on private firms. Private attorneys may hesitate to act as cooperating attorneys in a credit-plus-pay program if students must personally interview clients and witnesses and perform other important tasks, sometimes outside of the cooperating attorney's presence. For that reason, we believe schools should require only that students in the credit-plus-pay program "play a significant role" in the specified tasks. At first, this may mean that the student will only accompany the attorney, perhaps outlining an interview and playing a minor role or just observing. As the cooperating attorney gains confidence in the student, the student's role should increase. A cooperating attorney who refuses to give capable students significant responsibilities as the semester progresses should not be invited to participate in the program again.

68. Washington University requires students in civil clinical placements to observe an administrative hearing, a docket call, a motions argument, a small claims or municipal court trial, a

sure a well-rounded clinical experience.

b. Prohibited assignments

The manual should specifically prohibit certain assignments. For example, cooperating attorneys should not be permitted to assign their clinical students photocopying, cite-checking, Shepardizing, messenger duty, or proof-reading.[69] Students also should not be allowed to spend a disproportionate amount of time reviewing documents, filing papers with the court, writing research memoranda, or performing any other single category of work.[70]

c. Maximum and minimum hours

The manual should establish a weekly minimum and maximum number of hours that the students may spend working in the program. The minimum hours requirement will prevent the course from being a free ride for any student.[71] The maximum hours limitation will prohibit a cooperating attorney from demanding too much of a student's time[72] and prevent the student from working long hours just to earn

state court jury trial, a federal court trial, and an appellate argument. Students must also observe a cooperating attorney or their faculty supervisor interview a client and a witness. Wash. U. "Monthly Clinical Evaluation Form (Civil)" (1983) (on file at *Washington University Law Quarterly*).

69. Obviously a student must cite-check, Shepardize, and proofread her own work product. But cooperating attorneys should not be allowed to assign students routine, non-educational work on briefs and memos written by other lawyers.

70. There can be no hard and fast rule to define what constitutes a "disproportionate" amount of time on any one category of work. Some cases will require a substantial amount of research, for example, but we think the guidelines should emphasize that the credit-plus-pay program is not a research or brief-writing course. Similarly, it would defeat the purpose of the course to assign a student two weeks of constant document review in a dusty back room of a client's factory. But since document review and research are part-of legal practice, the cooperating attorneys must have flexibility to make some assignments involving these skills. Ultimately it will be up to the faculty supervisor to monitor the program carefully and ensure that the students receive an educationally rewarding mix of assignments.

71. At Washington University, for example, students in the four credit-hour Introductory Lawyering Clinic are required to spend a minimum of 16 hours each week on work related to the course. Hours spent in group meetings, court observations, and meetings with the faculty supervisor or cooperating attorney count toward the minimum requirement. The minimum hours requirement is enforced by denying credit to a student whose hours are deficient. The minimum hours requirement is cumulative so that a student who has been ill or out of town for interviews can make up the time later.

72. The maximum hours requirement should not be cumulative but should be enforced every week so that a student will not leave a tremendous number of hours for the end of the semester, and so that a cooperating attorney cannot monopolize a student's entire week for an "emergency."

money, to the detriment of the student's other coursework.[73]

2. The Cooperating Attorney's Teaching Responsibilities

The manual must set out and define for attorneys their teaching responsibilities under Guidelines VII(C) and VIII(B):[74] to assist students in preparing for each upcoming event;[75] to observe, review, and evaluate the students' work;[76] to accompany students in every situation where a client's interests may be irreversibly affected, being prepared to take over if the client's interests require;[77] and to review with the stu-

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The maximum hours requirement can be enforced by denying the student pay for any hours worked in excess of the maximum.

73. Dean Theodore Clements of Gonzaga University School of Law has also recognized that a monetary incentive might present a problem and believes that the problem can be solved. He writes:

> One practical problem with allowing both credit and compensation, suggested by some of our faculty members, is that students may be tempted to work excessive hours if they were being paid for the work. I believe that this problem can be obviated through proper communication and understanding with both students and their employers.

Letter from Theodore J. Clements to James P. White (Aug. 31, 1983) (on file at *Washington University Law Quarterly*).

74. Guidelines VII(C) and VIII(B) are quoted *supra* at note 38. As noted there, the provisions of Guideline VII(C) essentially include the requirements of Guideline VIII(B).

75. Guideline VII(C)(1), *supra* note 38. The faculty supervisor also has an important role in preparing students. *See* Guideline VIII(A), *supra* note 38. According to the Committee on Guidelines: "The planning and development of each component of case strategy is an essential part-of preparation. . . . Each step should be reviewed with the student to be sure the student understands what is to be done, how it is to be done, and why it is to be done." CLINICAL LEGAL EDUCATION, *supra* note 9, at 93 (Project Director's Notes).

76. Guideline VII(C)(2), (3), (5), *supra* note 38; Guideline VIII(B)(2), *supra* note 38. As the Committee on Guidelines recognized:

> A critical component of the supervisory process is review of the student's actions and of the case outcome. One primary purpose of fieldwork is to provide students with experience to see how lawyers function, evaluate how one has performed, and compare one's own performance with professional standards of competence. To do this, the student should be criticized by teachers who are experienced in the functions the student is performing.

CLINICAL LEGAL EDUCATION, *supra* note 9, at 94 (Project Director's Notes).

77. Guideline VIII(B)(1), *supra* note 38; *see* Guideline VII(C)(4), *supra* note 38. The Committee on Guidelines has elaborated on this requirement as follows:

> [S]tudents should be accompanied at all proceedings where a prior stipulation has not determined the outcome, including motion practice, negotiations, pretrial, trial and appellate advocacy. This would include both judicial and administrative proceedings. Some interviewing of clients, data gathering, and counseling may be conducted by unaccompanied students. Initial client interviewing should be structured so as to be conducted jointly by student and teacher, or at least to allow for an immediate response. Follow-up informational interviews may be conducted by unaccompanied students, assuming that the process provides for supervisory review of the interview. In limited situations where the cases are not complex and have been reviewed by the supervisor, the counseling involved is simple, and the client or situation does not present communica-

dents all actions the students have taken or might have taken affecting the client's interests.[78] The manual should explain these responsibilities in both abstract and concrete terms. In the abstract, for example, the manual should instruct cooperating attorneys to prepare students by discussing all actions the students take. As an illustration, the manual might instruct cooperating attorneys to compare the advantages and disadvantages of tape recordings, written statements, affidavits, and depositions for preserving third-party testimony.

3. The Training Program

The training program required by Guideline XIII regarding the cooperating attorney's teaching responsibilities should focus on the school's program manual. At a group training session, the faculty supervisor should explain and further illustrate the requirements set out in the manual.[79] The faculty supervisor should also conduct a simulated meeting with a student to illustrate the type of discussion the cooperating attorney will be expected to have with the students on a regular basis. A second group training session midway through the semester will serve both as a refresher and as a forum for exchanging ideas and ironing out problems.

4. Continuing Supervision of Cooperating Attorneys

A structure for continuing supervision and coordination of the cooperating attorney's teaching responsibilities, another requirement of Guideline XIII, should also be set out in detail in the program manual. The manual should urge each cooperating attorney to supervise the student's work personally to the maximum extent the attorney's schedule permits.[80]

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tion difficulties, the student may communicate advice previously approved by the teacher. In conducting case investigations, it is the responsibility of the teacher to approve the investigatory strategy and be prepared to participate directly if circumstances require, i.e., the information being sought is so complex that the supervisor's experience is required to successfully gain the information.

CLINICAL LEGAL EDUCATION, *supra* note 9, at 93-94 (Project Director's Notes).

78. Guideline VIII(B)(2), *supra* note 38.

79. The faculty supervisor should conduct a group training session for all cooperating attorneys shortly before the program begins. The school's program manual should be distributed at least a week before the meeting so that cooperating attorneys will have time to study it and develop questions.

80. Naturally, there will be times in any private law office when the cooperating attorney is out of town or otherwise unable to supervise the student personally, or when another attorney in

The manual should require a face-to-face meeting at least once a month and a telephone call at least once a week between the cooperating attorney and the supervising faculty member.[81] In addition, the faculty supervisor and the students should have ready access to the cooperating attorney to discuss any problems as they arise. The cooperating attorney should meet with the student she is supervising to discuss litigation strategy and clarify assignments each day the student comes to the office.[82] The faculty supervisor, of course, must also be available to the students and the cooperating attorney whenever questions or problems arise. The required monthly meetings and weekly telephone contacts between the faculty supervisor and the cooperating attorney, as well as the faculty supervisor's weekly meetings with the students, will keep the faculty supervisor abreast of each student's progress toward fulfilling the curriculum requirements, the level of each student's abilities, and the nature of the assignments being given out by the cooperating attorneys.

5. The Evaluation Process

The evaluation process for cooperating attorneys required by Guideline XIII will vary with each school. Some factors worth considering are (1) the faculty supervisor's relationship with the cooperating attorney, including the attorney's accessibility, responsiveness to suggestions, adherence to the school's program manual, and ability to explain

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the office needs student assistance with an educationally valuable assignment. But the problem of supervision by the law school will be greatly compounded if the cooperating attorney delegates a significant portion of his supervisory duties to other lawyers. The manual should therefore require that the faculty supervisor be consulted in advance regarding any proposed work for a lawyer other than the cooperating attorney himself. When the cooperating attorney himself makes an assignment, he should not have to consult with the faculty supervisor in advance. However, students should be required to inform the faculty supervisor of every new assignment no later than the next school day. This will give the faculty supervisor an opportunity to head off objectionable assignments before the students put in many hours of work on them.

81. We emphasize telephone communication over face-to-face communication so that the faculty supervisor will not have to spend an inordinate amount of time traveling from office to office to attend meetings. However, since face-to-face meetings are usually more valuable, especially for resolving problems, we think it is reasonable to ask the faculty supervisor to spend about 15 or 20 hours each month—probably less than 10% of his working hours—in personal meetings with the cooperating lawyers, on whom the success of the program depends.

82 The length of each student's daily meeting with his cooperating attorney will depend on the number of days the student is in the office, the complexity and status of the student's cases, and the amount of free time the cooperating attorney has. If a student is in the office three days a week, a typical meeting might last 20-30 minutes.

ideas; (2) the educational value of the assignments made by the cooperating attorney; (3) the amount of time the cooperating attorney devoted to his teaching duties; and (4) how much the student learned from him. Any cooperating attorney who does not meet high standards should not be allowed to participate in the program again. It is better to reduce the size of the credit-plus-pay program than to entrust it to practicing attorneys who do not measure up.

C. A Pro Bono Requirement

To enable students working in private law offices to appear in court, we would require students in the credit-plus-pay program to take significant responsibility for at least one pro bono matter. This will qualify students to appear in court on the pro bono case under nearly all state laws allowing student practice.[83]

This pro bono requirement will not burden firms already handling a pro bono caseload, and should benefit firms not currently handling pro bono cases. Private firms can use pro bono matters as a way of educating their younger attorneys, since there is no quicker way for a new attorney to gain first-chair experience than to handle a pro bono case.[84] Unfortunately, many private firms are reluctant to give up the billable hours that an associate must spend working on a pro bono case before the key depositions and the settlement or trial take place. However, tasks such as interviewing, counseling, investigating, arguing motions, and negotiating would be excellent experience for students. Thus, a pro bono requirement might mutually benefit law firms and students by providing law firms with an inexpensive staff to prepare pro bono cases[85] while providing students with important litigation responsibilities and court experience.

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83. *See* CLEPR, *supra* note 1. In a few states, our solution might not be sufficient. Illinois, for example, allows students to practice only for legal aid bureaus, public defenders' offices, and state or local law offices. *See* ILL. REV. STAT. ch. 110A, § 711(b) (1981). Perhaps in those states students could handle pro bono cases referred to the private firm by a legal services office, so that the case would be under the auspices of a "legal aid bureau."

84. Students would in many cases be supervised on pro bono matters by a younger attorney rather than by the cooperating attorney. Otherwise, the firm at which the cooperating attorney practices would lose much of the economic benefit of our plan.

85. Students in a credit-plus-pay program should be paid at their regular rate for their work on pro bono matters, just as associates in the firm are paid their regular salaries even though they spend some time on pro bono matters. The firm will still benefit economically, since it will be paying a student perhaps $8 or $10 per hour rather than giving up an associate's time at a much higher hourly rate. The firm should also see the pro bono requirement as a means of fulfilling the

D. The Economics of a Credit-Plus-Pay Program: Raising and Distributing the Revenue

We have already delineated the major economic arguments against credit-plus-pay programs: they are too expensive; they will shift students away from pro bono work; they will attract poorly motivated students; they will encourage exploitation of student labor; and they will lure students out of traditional classroom courses.[86] Our model largely resolves these problems.

Under our model program, law firms (and government agencies with a budget for paying students) would be required to pay for student services at their usual rate for student clerks.[87] The students, however, would not receive all of the money. Instead, the law school would tax a percentage of the money[88] and put it in a segregated special account.[89] The funds from this special account would then be disbursed for two

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ethical responsibility of its lawyers "for providing legal services for those unable to pay." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1979).

86. *See supra* notes 45-56 and accompanying text.

87. The going hourly rate for law students working at law firms part-time will obviously vary from city to city and from firm to firm. The going hourly rate in four major cities as of October, 1983 was in the following range: Washington, D.C., $7-$15; Chicago, $6-$10; Los Angeles, $8-$12; St. Louis, $6-$10. Interview by Roy Simon with Susan Sullivan, Assistant Dean, Washington University School of Law (Oct. 21, 1983). Dean Sullivan's figures are based on her telephone conversations during the week of October 17, 1983 with law firms in St. Louis and with placement directors at law schools in Washington, Chicago, and Los Angeles. The figures cover all law students working part-time. Third-year students, Dean Sullivan confirmed, normally receive pay in the upper range of the pay scales. The authors recommend that only third-year students be eligible for credit-plus-pay programs. The authors therefore believe that $8 per hour is a fair and conservative pay rate to use in estimating revenues from credit-plus-pay programs. The authors base their calculations below on a figure of $8 per hour. *See infra* note 92.

88. To make collection of the tax administratively easy, the law school can require all firms participating in the program to pay student wages directly to the law school, which will in turn issue a monthly "after-tax" check to each student. Each school should be free to determine the optimal tax rate. Since students up to now have been receiving no compensation at all in credit-only clinical programs, however, they will view any compensation at all from a clinical program as an improvement. Thus, the tax level can probably be set very high at the inception of the program without angering the students, especially if the tax revenues are used in a manner the students consider worthwhile. Consequently, schools will be wise to set the initial tax level at a rate of 75% or more.

Some schools may even want to tax 100% of the student wages and control the distribution of all of the income. If the tax rate is set at 100%, the program may be permissible under the current interpretation of Standard 306(a). *See supra* text accompanying note 6. With a 100% tax rate, only the law school, and not the students, will receive compensation in a clinical program for credit. Any monies received by clinical students will be in the nature of financial aid.

89. Revenue from credit-plus-pay programs should be kept in a segregated account earmarked for purposes connected with clinical programs. The credit-plus-pay program should

purposes. First, funds would be applied toward faculty salaries and other costs of running the credit-plus-pay program.[90] Second, funds would be distributed to clinical students with financial need.[91]

This system of taxing and distributing funds should solve two economic problems at once. By making credit-plus-pay programs partially self-supporting, our plan answers the objection that such programs are too expensive for the school.[92] By allowing payment to students in

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be structured to be partially self-supporting, but it should not have to support the entire law school.

90. A related point was made by Geoffrey W. Peters while he was President and Dean of the William Mitchell College of Law at the University of Minnesota. Dean Peters wrote:

> [W]e support fee generating clinical programs in which clients pay some fees for services rendered by students supervised by clinical faculty as long as those fees are directed to the law school and not to the students. The purpose for such law school fee income clinics is to augment the school budget with such income to help reduce the substantial cost of clinical education.

Letter from Geoffrey W. Peters to James P. White (Sept. 6, 1983) (on file at *Washington University Law Quarterly*).

Dean Peters' proposal is substantially different from ours. A fee generating clinic, although highly desirable, may require substantial outlays by the law school for office space, secretarial help, office equipment, and other necessities of running a law office, including the bookkeeping and accounting functions required in order to bill clients. In terms of start-up costs, overhead, and administrative burdens, our model is more realistic for most law schools, at least as an initial experiment with income-producing clinical programs. A credit-plus-pay program will not require office space, office equipment, or even secretarial help, except to the limited extent required to supervise the program. The major expense will be faculty salaries, which will vary widely depending on such factors as the number of faculty members supervising the program, their seniority, and the extent of their courseload outside the credit-plus-pay program.

91. "Financial need" will have to be determined by each school. Administratively, the simplest method for making the determination is to rely on the law school's central financial aid application process, distributing the funds only to those who qualify for financial aid through that process. However, that method overlooks those students who do not qualify for financial aid but must work to support themselves in law school. Those students are the "middle-class poor" who are often shut out of clinical programs because they cannot make the time commitment to a clinical program while continuing to work part-time for pay. To reach those students, the clinical program would need to make its own determination of financial need. Depending on the administrative resources of the law school and the number of clinical students who request financial aid out of program revenues, the school may or may not be willing to bear the administrative burden of making a separate determination of eligibility for financial aid for clinical students.

92. Revenues will vary depending on the number of students in the program, the length of the semester, the pay scales of the employers, the tax rate imposed by the law school, and the number of hours worked by the students (which will be a function of the number of credit hours given for the course). For our model program, we make the following calculations to estimate revenues: 12 students in a credit-plus-pay program worth four credit hours will each spend an average of 15 billable hours per week (including time spent on pro bono matters), at an average pay rate of $8 per hour, for a semester of 14 weeks. (We define billable hours to include all work for paying clients and pro bono clients, but to exclude student meetings with the faculty supervisor and assignments not directly related to client work, such as required court observations.) This

need of financial assistance, our plan makes clinical programs more accessible to them.[93]

E. Preserving Service to Indigents

We must still address the problem of draining students out of clinical programs serving indigents and into private firms that primarily serve paying clients.[94] In our view, law schools should not abandon indigent clinics that have come to rely on clinical law students to assist full-time attorneys. We therefore suggest two further limitations on credit-plus-pay programs. First, "tax revenues" from student earnings in the

formula would yield gross program revenues of $20,160 per semester, or $40,320 per academic year (12 × 15 × $8 × 14 × 2 = $40,320), not counting summer school. If the tax rate is 75%, the school will net $30,240 for the year, excluding summer school. If a similar summer school session is added, gross revenues would increase by another $20,160, and the school's annual net revenues, after imposing the 75% tax, would come to $45,360 ($60,480 × 75% = $45,360).

These net revenues will increase if students put in more billable hours, if law firms pay a higher average hourly wage, if the faculty supervisor can adequately supervise more than 12 students, or if the school imposes a higher tax rate. For example, if 15 students in a credit-plus-pay program were each to work 17 billable hours weekly at $9 per hour, and the law school set the tax rate at 90%, the law school's net revenue for a full year including summer school would be $86,751 (15× 17 × 9 × 14 × 3 × 90% = $86,751). Net revenues at this level would probably make the credit-plus-pay clinical program entirely self-supporting, without even counting tuition allocable to the credit-plus-pay course. If the credit-plus-pay program gradually tripled in size to 45 students, net revenues could exceed $250,000 annually (3 × $86,751 = $260,253). If credit hours were increased by 50% (from four credit hours to six), students could be expected to spend 50% more billable hours, and revenues would increase proportionately.

93. This point was recently made by William L. Wilks, Dean of The Dickinson School of Law in Carlisle, Pennsylvania. Noting a "50-50 split" on his faculty over the issue of credit-plus-pay clinical programs, Dean Wilks wrote: "Those favoring the change see it as a way to encourage more students to participate in clinical programs, to provide financial benefit to students and to guarantee that the clinic programs were not just for wealthy students who do not need to spend time in part-time jobs." Letter from William L. Wilks to James P. White (Sept. 1, 1983) (on file at *Washington University Law Quarterly*).

The Society of American Law Teachers has also raised this point, with special emphasis on minority students:

> Law schools are involved in an outreach for minority and economically disadvantaged students required by conscience and Standard 212. Many of the students attracted through affirmative action efforts are under financial pressure despite available loans and scholarships. We believe they and other students who cannot afford to work in law offices without pay should not be foreclosed from externship experience.

Position paper attached to Letter from Wendy W. Williams to James P. White (Oct. 20, 1983) (on file at *Washington University Law Quarterly*).

To be sure that our purpose of assisting financially needy students is met, the school should reserve a certain number of places in the credit-plus-pay program for financially needy students, or give financial need weight in the selection criteria. The school may also want to design the selection criteria so that at least some minority students will be chosen.

94. For a full discussion of this problem see *supra* text accompanying notes 48-49.

credit-plus-pay program should be shared fairly with clinical students in non-paying clinical settings for credit only, such as legal services clinics and public defender's offices.[95] This parity requirement will remove the main economic incentive for choosing private practice over indigent work.[96] Second, schools inaugurating credit-plus-pay programs should continue at current levels the number of students now enrolled in programs serving indigents.[97] By these two measures, the drain of students from indigent clinics into private practice should be completely prevented.

F. Protecting Classroom Courses

The final economic argument against credit-plus-pay, that students will choose clinical programs over classroom courses based on money rather than educational benefit,[98] should also be alleviated by taxing a significant percentage of student earnings.[99] Financially needy students will have an incentive to take clinical courses in order to help pay for law school, since participation in the clinic will entitle them to receive financial aid from the credit-plus-pay program's special account,[100] but this is no worse than the present situation in which needy

95. By "shared fairly," we mean that clinical students working for credit in indigent clinics should receive the same hourly wage for their work as students working in private firms in the credit-plus-pay program receive after taking out taxes imposed by the school. Clinical "tax revenues" allocated to financially needy clinical students should be distributed according to the same criteria whether the students work in indigent clinics or in private firms. Our aim is to eliminate any immediate monetary reason for students to choose private practice over either public service or indigent work. Students should choose between the two clinical programs based on educational value, not money.

96. There are also students who have more remote economic incentives for choosing private practice placements over a legal services office. For example, many students think that by working in a private law office they will obtain experience and references to help them get jobs in private practice upon graduation. *See* Tushnet, Survey Outline 2 (Jan. 1983) (unpublished paper on file at *Washington University Law Quarterly*). These remote incentives are not very powerful, however, compared to the incentive of earning money to help pay for law school. *Id.*

97. Since clinical courses are generally in great demand and oversubscribed, *see supra* note 55, most schools should not have any problem filling clinical courses working out of legal services offices and other indigent clinics.

98. *See supra* text accompanying notes 54-56.

99. The higher the tax on student earnings, the less will be the economic incentive of students not on financial aid to take clinical courses instead of classroom courses. If the school taxes 100% of the income from its credit-plus-pay program, students not eligible for financial aid from the credit-plus-pay tax revenues will have no immediate economic incentive to choose the clinic over the classroom. The economic incentive will rise with the tax rate for financially needy students, however, since a higher tax rate will generate more tax revenues to distribute as financial aid.

100. Even this incentive could be eliminated by using income from the credit-plus-pay pro-

students often have a financial incentive *not* to take clinical courses.[101] In any event, the authors believe that if law schools are to produce more competent lawyers, more students should be encouraged to take clinical instruction.[102]

CONCLUSION

In the early days of American legal education there were no law schools. Lawyers got their schooling as apprentices, working in the offices of practicing attorneys.[103] As late as 1922, not a single state required attendance at law school for admission to the bar.[104] Today, however, nearly every American lawyer receives legal training at a law school offering a three-year curriculum concentrating on the case method of instruction.[105]

The 1970's saw a revolution in American legal education, a revolution comparable to the advent of the case method a century earlier.[106]

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gram to augment financial aid for all students rather than just those in the clinic. But if that were done, the financial advantages of clinical courses might not be great enough to permit financially strapped students to enroll in the clinic without also taking a part-time job elsewhere, which would often be impractical.

101. The present situation may indeed be significantly worse, even from a classroom teacher's point of view. Currently, needy students who work part-time must also take a full course load. If needy students could earn money by taking a credit-plus-pay clinical course rather than by working part-time, they would have more time to devote to their classroom courses, and less reason to choose courses that fit in with their work schedules. *See supra* note 27.

As even some opponents of credit-plus-pay programs recognize, "such programs might pull students out of other paid work in their second and third years of law school." Letter from John J. Capowski to James P. White (Nov. 9, 1983) (on file at *Washington University Law Quarterly*). Professor Capowski teaches clinical courses at the University of Maryland School of Law.

102. As Dean Alley of the University of Oklahoma School of Law has put it:

> It is inconsistent to tout the desirability of practice skills and simultaneously set up a disincentive such as a rule against a reasonable compensation for adequately supervised work. The restrictive interpretation [of Standard 306(a)] brings to my mind more a sense of Victorian pudicity than any genuine concern about the quality of legal education.

Letter from Wayne E. Alley to James P. White (Sept. 15, 1983) (on file at *Washington University Law Quarterly*).

103. For an excellent discussion of early American legal education, see McManis, *The History of First Century American Legal Education,* 59 WASH. U.L.Q. 597 (1981).

104. R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980s, at 172 & n.2 (1983).

105. For an argument against three years of case method instruction, see Doyel, *The Clinical Lawyer School: Has Jerome Frank Prevailed?,* 18 NEW ENG. L.J. 577 (1983).

106. According to David F. Cavers, Fessenden Professor of Law Emeritus at Harvard Law School, clinical education represents "the greatest change in the methods, and perhaps I should add the goals, of American legal education since Dean Langdell introduced the case method of law study." Cavers, *supra* note 2, at 35.

Through clinical programs, students began once again to learn law in settings resembling the old apprenticeship method. But clinical programs are much more than apprenticeships. In contrast to apprenticeships, law school clinical programs provide the supervision not only of a practicing lawyer but also of a law school faculty member. Moreover, law school clinical courses usually are not available to students until they have taken two full years of formal legal training at a law school, including specific course prerequisites.[107]

Up to now, however, clinical programs have focused on public interest and poverty law, and have seldom crossed over into the much larger domain of private practice. It is time for law schools to cross over that frontier. If clinical education is to expand in the direction that will have the greatest educational benefit for the greatest number of law students, law schools should draw heavily upon the knowledge and skills of private practitioners.[108]

Because of the economic realities of private law firms and of law schools, the best opportunity for tapping the resources of the private bar is through credit-plus-pay clinical programs. Programs in which law students receive both credit and compensation will permit law firms to bill out student time to clients at a profit, and will simultaneously allow law schools to raise revenue to support the programs.

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107. One reason that clinical courses are generally not available until the third year of law school is that the highly influential ABA Model Rule for student practice prohibits law students from appearing in court until they have "completed legal studies amounting to at least four (4) semesters. . ." MODEL STUDENT PRACTICE RULE § III(C), *reprinted in* CLEPR, *supra* note 1, at 44. The ABA's four-semester requirement, or some equivalent, has been followed by approximately 31 states. *See* F. KLEIN, S. LELEIKO & J. MARITY, BAR ADMISSION RULES AND STUDENT PRACTICE RULES 960-69 (1978) (Chart 1—Summary of ABA Model Rule and State Rules and Statutes).

108. For a recent short piece by a law school dean urging law schools to make better educational use of the private bar, particularly in the context of students holding part-time jobs at private firms, see Roberts, *Dean's Column,* 3 WAYNE LAWYER 2 (1983). Dean Roberts has written:

> A law school might also take the relatively modest step of extending the internship model to a private practice setting. Through contacts with alumni willing to cooperate, or with other lawyers sensitive to the need for thoughtful supervision of part-time work, individual internship experiences could be fashioned.
>
> Finally, law schools should consider experimenting with a seminar based explicitly on the part-time work experience. The law teacher would work with each employer-supervisor in creating the syllabus for the course, and class sessions would be a combination of traditional casebook material and discussions of student experiences in the employment setting. The law firm work experience would in effect be the laboratory section of the course. . . .

These ideas are expanded in an unpublished article by Dean Roberts. Roberts, Part-Time Student Employment, *supra* note 27.

Under the model plan we have offered, law schools sponsoring credit-plus-pay programs will control a large share of the money earned by students, enabling both law schools and students in financial need to benefit. Our "tax plan" on student earnings will also minimize the economic side effects that might erode student representation of indigents and improperly influence student selection of courses if students were to keep all of their earnings from the clinical program for themselves.

We repeat our view that clinical programs should be judged on their educational merits, not on rigid criteria. "To do otherwise is to confuse means with ends, and to substitute a convenient but irrelevant litmus test for a relevant and essential substantive standard of educational value."[109] We agree with Thomas B. Stoel, Jr., a member of the Committee on Guidelines, who urged that "the test for credit-worthiness should be the quality of the education received by the student."[110] Indeed, the work of the entire Committee on Guidelines "indicated that successful clinical programs may be structured regardless of whether supervision is provided by law school or non-law-school personnel. The ingredients determining success or failure have to do with whether specific responsibilities are fulfilled."[111]

We believe that our model plan for a credit-plus-pay program has the ingredients for success. It will assure that cooperating attorneys competently fulfill specific teaching responsibilities and that students in a credit-plus-pay program will receive a first-rate clinical education. We therefore hope that the current absolute ban on credit-plus-pay programs will soon be lifted and that law schools will be free to experiment with programs that offer both credit and compensation.

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109. Letter from Sanford Newman & Herbert Semmel to Steven H. Leleiko (Project Director for Committee on Guidelines) (June 21, 1979), *quoted in* CLINICAL LEGAL EDUCATION, *supra* note 9, at 111. The letter continues:

> Obviously a law school cannot be expected to vouch for the credit-worthiness of any program unless it has a way of ensuring that the program maintains high standards. But this consideration requires only that schools undertake a careful evaluation before granting academic credit and monitor programs to ensure that they do not deteriorate. This is, after all, the only control which the school has even on the quality of courses taught by its own faculty.

Id.

110. CLINICAL LEGAL EDUCATION, *supra* note 9, at 100 (Project Director's Notes). Mr. Stoel was one of the dissenters in the 4-3 vote adopting Guideline X(B), which precludes simultaneous credit and compensation for clinical work. *See supra* note 34.

111. *Id.* at 43.

WASHINGTON UNIVERSITY
LAW QUARTERLY

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