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State Supreme Courts as Regulators of the Profession Part I: Supreme Courts and Legal Education Reform

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COMMENTARY
STATE SUPREME COURTS AS REGULATORS OF THE PROFESSION

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I. Supreme Courts and Legal Education Reform

My topic is Supreme Courts and legal education reform. Perhaps a better title would be the role of the highest courts of each state in assuring the continuous development of quality legal education so that those seeking admission to practice before the highest court of each state have had the necessary education to equip them for the practice of law. Is reform necessary? Has reform taken place? What reform should take place? What is the proper role of high courts in legal education reform?

Throughout the first one hundred years of the United States, legal education was self-education, attained by reading of law or serving an apprenticeship in a lawyer's office. Yet in 1878 in its second annual report, the new American Bar Association's Committee on Legal Education stated that:

> There is little, if any, dispute now as to the relative merit of education by means of law schools, and that to be got by mere practical training or apprenticeship as an attorney's clerk. Without disparagement of mere practical advantages, the verdict of the best informed is in favor of the schools.[1]

Those students who studied law in a law school during the first century of legal education in the United States received a very broad education. The prevailing view concerning legal education in an academic setting was that it should include study of government generally and be of importance to students not intending to be lawyers as well

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1 ABA, *Report of the Committee on Legal Education and Admissions to the Bar*, 2 Rep. of A.B.A. 209, 216 (1879).

as to future practitioners. In Virginia, George Wythe set the course early by offering a model of legal education in which all three branches of the newly established government were studied, not just the judicial branch. Wythe's objective was "to provide training for citizenship and public service as well as for the private practice of law."[2]

Yet since the first meeting of the American Bar Association (ABA) in 1878, and its first Committee on Legal Education and Admissions to the Bar, the leaders of the bar and the bench looked to legal education and the need for its improvement.

The highest courts and bar admission authorities in the various states, recognizing the problems presented by marginal law schools, and the need for formal legal education rather than education through law office reading or apprenticeship, began in the early 1920s to look to the ABA's law school accreditation standards to determine bar admission criteria.

Elihu Root, former U.S. Secretary of State, winner of a Nobel Peace Prize and former president of the ABA, was elected Section Chairman in 1920. He appointed a committee of seven, which he chaired, to report at the next meeting on what action might be taken by the Section and ABA "to create conditions which will tend to strengthen the character and improve the efficiency of persons to be admitted to the practice of law."[3] He sent a questionnaire to every law school dean, state and local bar association, every state board of bar examiners, and a number of individual lawyers.

At the 1921 ABA Annual meeting in Cincinnati, Root presented his committee's lengthy report containing minimum standards for law schools. The report recommendations required at least two years of study in a college before law school and a course of full time law study of three academic years or the equivalent for part-time study. It formally disapproved of the diploma privilege for bar admission. The report also called on the ABA to invest the Council on legal Education with the power to accredit schools.

When Root moved for the adoption of his committee's report, his motion was seconded by William Howard Taft, the Chief Justice of the Supreme Court and former president of the United States.

The Report was adopted by the Section and by the ABA House of Delegates. The resolutions contained in the report were as follows:

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2 Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 610 (1981).

3 ABA, *Proceedings of the Section of Legal Education and Admissions to the Bar*, 43 REP. OF A.B.A. 465, 466 (1920).

(1) The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition for admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

(2) The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

(3) The Council on Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not, and make such publications available so far as possible to intending law students.

(4) The president of the Association and the Council on Legal Education and Admissions to the Bar are directed to cooperate with the state and local bar associations to urge upon the duly constituted authorities of the several states the adoption of the above requirements for admission to the bar.

(5) The Council on Legal Education and Admissions to the Bar is directed to call a Conference on Legal Education in the name of the American Bar Association, to which the state and local bar associations shall be invited to send delegates, for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles above set forth.[4]

These resolutions demonstrated definite effort for the improvement of legal education, and for the uplifting of standards for admissions to the bar. In accordance with the resolutions adopted by the Association, there was a conference held in 1922 in Washington, D.C. Chief Justice Taft, in speaking to this assembly said, "The best general education is to be had at our colleges and universities. . . . For no learned profession . . . is a thorough and general college

4 ABA, *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 44 REP. OF A.B.A. 679–88 (1921); *see also* ABA, *Proceedings of the 44th Annual Meeting*, 44 REP. OF A.B.A. 35, 38 (1921) (quoting resolution as adopted).

education more necessary than for that of the law."[5] The Conference adopted two general resolutions in addition to those endorsing the standards for the approval of law schools. These additional resolutions were the following:

> 3. Further, we believe that law schools should not be operated as commercial enterprises, and that the compensation of any officer or member of its teaching staff should not depend on the number of students, or the fees received,
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> . . . .
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> 5. Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more frequently than from the ranks of any other profession or business, it is essential that the legal profession should not become the monopoly of any economic class.[6]

And thus began the ABA process of law school approval—a process upon which the highest courts of the states have relied.

Over the past sixty years, the accreditation process in law schools has developed under certain fundamental principles. First, the profession itself is best equipped to form the ultimate judgment of quality. Second, participation by different components of the profession, the bench and bar and professorate, is the best way to form that professional judgment. Third, a thorough understanding of the operation and legitimacy of the accreditation process is required for it to be effective.

Today, graduation from an ABA-approved law school provides a student with an education that complies with a minimum set of standards promulgated and enforced by the legal profession. The education obtained at these approved institutions meets the legal education requirements for bar admission in every state in the United States.

The purpose of accreditation is not only to review a law school's compliance with the Standards but also to provide a vehicle for the sharing of information relating to ongoing developments in legal education. Professional review of law schools ensures a confidence by individual state admitting authorities that the public is served by lawyers who have received a legal education meeting standards of the profession. Thus the Section's history and activities have been linked with the development of minimum standards for law schools and the acceptance by the highest courts of these standards as a basis for admission to practice law.

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5 ABA, *Proceedings of the Special Conference on Legal Education*, 44 REP. OF A.B.A. 482, 496–97 (1922) (William Howard Taft, C.J., presiding).

6 *Id.* at 483.

To return to the topic of this paper, supreme courts and legal education reform, we might ask what has been the role of the courts in the shaping of American legal education?

Perhaps I might borrow from a remark of Chief Justice Abrahamson in her Lockhart Lecture given at the University of Minnesota Law School. The title of Chief Justice Abrahamson's paper was *Shall We Dance*, and the dance she envisaged was the relationship between two different partners, the judiciary and the legislature. In that lecture she observed that "the working relationship between the legislature and the judiciary in efforts with respect to statutes hardly compares with two dancers' graceful movements to the lyrical notes of Broadway."[7]

And to paraphrase Chief Justice Abrahamson, have the courts and law schools developed a waltz, or two step, or even a minuet? And how do we induce sometimes reluctant partners to join in the dance?

In the 1970s there was an explosion of new law schools in the United States. In many jurisdictions the impetus for new schools came in part from the highest courts. I remember when Hawaii was exploring the starting of a law school, the then Chief Justice William S. Richardson told me that he saw a law school as a catalyst for law reform in Hawaii. He envisaged a Hawaiian Law Institute where the academics and the judiciary and the legislators could effectuate law reform. Has this happened? I do not know.

In many states I hear academicsCand those are the persons I mostly hearCvoice the need that each state should create its own state law institute, modeled after the American Law Institute created in 1923 as a permanent organization for the improvement of law, whose membership is composed of law professors, lawyers, and judges. But this unfortunately is usually an aspiration, not functioning reality.

We need to develop mechanisms for exchange of information and for addressing problems of law reform and the enhancement of legal education. High court judges and legal educators must work together in this endeavor.

Canon 4 of the *Code of Judicial Conduct* provides:

> A judge subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

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7 Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1046 (1991).

> A. He may speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice.[8]

Thus, I believe it is proper for judges to work with academics in law reform and hence legal education reform.

This effort must not be one-sided, not from the court's perspective, nor from the law school's. We do not need another Indiana Rule 13.

As I wrote to then Chief Justice Arterburn at the time of the Indiana Supreme Court's adoption of Rule 13:

> The basic concern of the American Bar Association in approving a particular school is that the school "maintains a sound educational policy." This is the basic criterion used in the approval and accreditation of law schools. The American Bar Association inspection activity reviews the individual law school's legal education policy, both in form and in operational fact. We do not wish to interfere with the individual law school's exercise of its judgment and discretion in individual cases of administration of its rules. On the other hand, we are interested not merely with the formal paper rules but with how a law school is actually administered. Some fifty-four bar admitting jurisdictions look to the American Bar Association and the Council of the Section on Legal Education and Admissions to the Bar to the bars of recognized national accrediting agency for legal education. The rules and regulations of these jurisdictions require in one form or another a stated number of hours of instruction and a stated period of instruction in residence.
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> As I understand it, the essence of this amendment to the rule concerning educational requirements for applicants in Indiana is a specification of certain courses that a student must take and specific description of the actual courses and the number of credit semester hours which will be required of each student studying towards his first degree in law who wishes to take the Indiana Bar Examination. This proposal represents, I believe, the first effort by bar licensing authorities to control the details of the law school curriculum.
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> I am very much concerned in my capacity as consultant on Legal Education to the American Bar Association in the relationship between bar licensing authorities and law schools. It may well be that as a practical matter, every student intending to take the Indiana Bar would take these courses as they are proposed to be required in the amendment to the rule. The curriculum of each law school in the United States and its teaching methodology of each course is consistently in the process of re-examination by the faculty of each law school. I would suggest that, if the Court pro-

8 CODE OF JUDICIAL CONDUCT Canon 4 (1972).

> ceeds as it is indicated it will do in Rule A.D. 13(3), the Court will then have to constantly re-examine the required courses and revise them as future practice of the law might change.[9]

Happily the Indiana Supreme Court has retracted Rule 13.

This Rule and South Carolina's Rule 5 are examples, I believe, of what can happen when justices and professors do not work together, but rather work against each other.

Chief Judge Kaye has observed:

> Although it is the function of a state's highest court to develop, fashion, pronounce, settle, and declare broadly applicable principles in particular cases that will not only resolve litigants' disputes, but also serve society generally, courts are formally guided only by the parties. Parties do not necessarily have in mind the sensible, incremental development of generally applicable principles of law; they often do not have that in mind at all. Academic writers therefore become genuine partners in the courts' search for wisdom—for determining when and where to move the law to meet the needs of our rapidly changing society.[10]

But legal educators must be responsible in working with judges. Too often they unfortunately assume the role of the judge without the judicial authority. Their role is one of analysis, persuasion, and reasoned thinking, not one of decision making.

In the University of Minnesota Lockhart Lecture, Justice Abrahamson observed:

> The emphasis and scope of the new academic research, however, concern us. To a large extent, academic analyses and debate continue to focus on the judge's interpretation of the text of the legislative enactment to resolve a particular case. Enormous energy is spent studying courts and judicial opinions as if the essence of the legal system is what courts do. Legal scholars usually ask how the judge should interpret the text or what the judge's role is when the statutory language is vague—deliberately or unintentionally—or the statute is antiquated. The continuing emphasis on cases and judicial analysis ignores broader, and perhaps more fundamental, issues that reach beyond the confines of a particular case or code section. Commentators in legal publications give little scholarly attention to the legislature or the legislative process, except for legislative history, or the legislative products, the statutes themselves.[11]

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9 Letter from James P. White to Chief Justice Norman Arterburn, Indiana Supreme Court (Jan. 1974) (on file with author).

10 Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989).

11 Abrahamson & Hughes, *supra* note 7, at 1053–54 (footnotes omitted).

Thus, legal scholars should broadly look at the entirety of the problem rather than a narrow focus.

The task of legal education is to provide continuous review of developments in the legal profession and in society in order to assure that legal education's values respond as fully as possible to the changing needs and obligations of the profession.

As stated in the 1987 *Report on Long Range Planning for Legal Education in the United States*: "Ultimately, each law faculty is the guarantor of quality legal education for its students, the future lawyers of America. Even more is the obligation to the public to train lawyers for competence and professional responsibility in the interest of justice."[12] The authority for the accreditation of law schools comes to the American Bar Association and its Council of the Section of Legal Education and Admissions to the Bar from the highest courts of each state. It is your reliance upon the ABA approval process which forms the basis for this activity by the Section.

In the past two years the accreditation function of the Council has come under attack from two elements of the federal executive branch, the Department of Justice Anti-Trust Division and the Department of Education. The charges of the Justice Department were that the Section, the Council, and its accrediting activities had been "captured" by academics, although the Council in over twenty years has never had more than one-half of its members as academics, the other being state and federal judges and practicing lawyers. And the charge was made when Judge Kaye's colleague, Judge Joseph Bellacosa was serving as chairperson of the Section, and Pauline Schneider, a practicing lawyer and the president of the District of Columbia Bar Association was serving as chairperson of the Section's Accreditation Committee.

The chair of the Section rotates among judges, academics and representatives of the bar. Chief Justice Shepard will chair the Section in 1998–1999.

In order to avoid prolonged litigation, the ABA entered into a consent decree with the Department of Justice.[13]

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12 SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, LONG RANGE PLANNING FOR LEGAL EDUCATION IN THE UNITED STATES, 33–34 (1987).

13 In commenting upon the consent decree, then-ABA President Roberta Cooper Ramo made the following comment:

> As constituted and operated, the ABA's accreditation program has been a core element of the ABA's dedication to public service. The members' efforts over the past seventy-five years have resulted in the Association becoming widely recognized as an impartial, experienced authority on legal education. In every admitting jurisdiction in the United States, graduation

This past August, the House of Delegates of the American Bar Association upon recommendation of the Council of the Section of Legal Education and Admission to the Bar by unanimous vote adopted a recodified set of Standards. Several drafts were submitted to chief justices, deans of ABA approved law schools, bar examiners, and other constituencies.

The most recent Recodification Draft of the Standards reflects the provisions of the Proposed final Judgment between the United States Department of Justice and the American Bar Association, and the suggestions of the Special commission to Review the Substance and Process of the American Bar Association's accreditation of American Law Schools.

This Commission was chaired by a most wonderful individual, former Minnesota Supreme Court Justice Rosalie E. Wahl. Justice Wahl epitomizes the role of the state supreme courts in legal education reform in her service as chair of both the Accreditation Committee, the Council, and most recently this Special Commission.

At the same time, the Council of the Section was responding to concerns of the Department of Education concerning the validity and reliability of the Standards and the ongoing process for revision of the Standards and assuring their validity and reliability.

This past November, representatives of the Council appeared before the Department of Education's National Advisory Committee on Institutional Quality and Integrity to report the recodification of the Standards and their unanimous adoption by the House of Delegates. Yet questions from the Committee went far beyond that. Let me quote briefly from the transcript of that proceeding:

Committee Member: "I have a hard time seeing that supreme courts—and I hope that the supreme courts of this country don't take offense—but I have a hard time seeing that the supreme courts are a

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from an ABA-approved law school satisfies the legal education requirement for sitting for the bar examination. Indeed, the Council of the ABA Section of Legal Education and Admissions to the Bar (the "Council") is recognized by the U. S. Secretary of Education as the national agency for accreditation of professional schools of law, a status the Council has held continuously since 1952.

Under the current Standards and their Interpretations, legal education offered by ABA-approved law schools has benefitted from marked innovation and achieved some notable successes. These have included a broadened curriculum, increased clinical and skills training and the use of instructional resources beyond full-time faculty, as well as substantial expansion and significantly increased access and diversity.

Randolph C. Hasl, *New Accreditation Standards are the Focus of Attention*, NAT'L L.J., Aug. 5, 1996, at C12 (quoting ABA Press Release of June 21, 1996).

removed third party when to sit on those courts, you have to come through and be part of the same system and in some cases, even go back into the same system that they are a part of setting the Standards for."[14]

Again, Committee Member: "I can't think of another discipline, profession in this country that is as tightly controlled by the profession as yours."[15]

Committee Member: "You use a word I have never heard—in order before a law school can do some things, it shall obtain acquiescence. Is that lawyerese for approval?"[16]

I cite these three quotations to show the lack of understanding of our legal system, or indeed, perhaps hostility to lawyers by a public body charged with making recommendations to the Secretary of Education.

There are now substantial challenges to bar admission practices which have serious implications for legal education and the legal profession. We recently have received requests from the Law Society of England and Wales for the ABA to undertake efforts to permit their graduates to sit for the bar in every state, a proposal in an agreement with the Paris Bar and the ABA to assist members of the Paris Bar in seeking admission in American jurisdiction and applications from the University of Victoria (Canada), Kings College (England) and Lieden (the Netherlands) seeking the ability to obtain ABA accreditation and hence allowing the graduates of these law programs to sit for the bar exam in American jurisdiction. The foreign legal consultant rule which some states have adopted does not satisfy the desire of many foreign educated lawyers who now seek full admission to practice in a particular state.

American legal education is at a crossroads. There has been a thirty percent downturn in the number of applicants over the past five years from some 97,700 applicants in 1991-92 to an estimated 68,000 applicants for approximately 43,000 first year openings in ABA approved law schools for Fall, 1997.[17] In this downturn of applicants, fortunately the efforts to increase the number of women and persons of color in law schools has not diminished. Women continue to be approximately forty-four percent of law school enrollment and per-

14 NATIONAL ADVISORY COMM. ON INSTITUTIONAL QUALITY & INTEGRITY, OFFICE OF POSTSECONDARY EDUCATION, U.S. DEP'T OF EDUC., PARTIAL TRANSCRIPT, COMMITTEE HEARING, Nov. 22, 1996, at 68–69.

15 *Id.* at 74.

16 *Id.* at 74–75.

17 LSAC Six Year Volume Summary—Law School Admission Council, Jan. 1997.

sons of color twenty percent.[18] And a role of supreme courts in this matter might be that as suggested by Chief Justice Shepard in his annual State of the Judiciary delivered to the Indiana legislature this past week. Chief Justice Shepard proposed a special program in Indiana to recruit and financially support minority law students, a program like the Council on Legal Education Opportunity program no longer funded by the federal government.[19] Globalization of Law Practice has great implications for legal education—such as 127 ABA foreign summer programs, semesters abroad, cooperatives, and individual studies abroad.

I believe legal education in every law school approved by the American Bar Association is infinitely better than it was twenty years ago. Economic and career demand realities require all law schools to determine how they will continue to increase the quality of their product—legal education—yet accomplish an increasing quality of programs with the constraints of scarcer resources and demand. Greater accountability is the primer of the day. As law school faculties address these matters, they need the advice and counsel of the highest courts of the states. Legal education must protest against the infusion of values that are in any manner unworthy. Each law faculty has the obligation to the public to train lawyers for competence and professional responsibility in the interest of justice. These are large responsibilities, but they are crucial responsibilities for those who seek to train future lawyers in their service of people.

There are many areas in which the state supreme courts and law schools can cooperate to determine what strategies might be followed to address issues and concerns. Implications of the Americans With Disabilities Act to legal education and bar admissions, management of part-time legal education, implications of new technology and distance learning, character and fitness requirements for admission, and the need for strengthening the traditions of professionalism among lawyers. Programs for judges conducted by law schools on such topics as judicial sentencing are another example of cooperative enterprise.

An example of cooperation between the state supreme courts and the law schools is the ABA Model Rule regarding student practice, a version of which has been adopted in almost every jurisdiction (see Appendix).

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18 Fall 1996 Law School Enrollment in ABA Approved Law Schools, Office of the Consultant on Legal Education to the American Bar Association (1996).

19 Randall T. Shepard, State of the Judiciary Address to a Joint Session of the Indiana General Assembly 6 (Jan. 30, 1997) (on file with author).

I would urge that the National Conference of Chief Justices renew a sometimes event, an annual report on American legal education by representatives of the Section. I believe that this annual dialogue would be useful to the Chief Justices, the Section, legal education, and the profession.

Legal education needs the participation and advice of the supreme courts in many areas as both work to improve our profession of law. To again borrow from Chief Justice Abrahamson, let us begin the dance.

APPENDIX[20]

I. PURPOSE

The bench and the bar are responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing assistance to lawyers who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds, the following rule is adopted.

II. ACTIVITIES

A. An eligible law student may appear in any court or before any administrative tribunal in this State on behalf of any indigent person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance, in the following matters:

1. Any civil matter. In such cases the supervising lawyer is not required to be personally present in court.

2. Any criminal matter in which the defendant does not have the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer is not required to be personally present in court.

3. Any criminal matter in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer must be personally present throughout the proceedings.

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20 ABA Model Rule (1969), *reprinted in* FANNIE J. KLEIN ET AL., BAR ADMISSION RULES AND STUDENT PRACTICE RULES 993–95 (1978).

B. An eligible law student may also appear in any criminal matter on behalf of the State with the written approval of the prosecuting attorney or his authorized representative and of the supervising lawyer.

C. In each case the written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

III. Requirements and Limitations

In order to make an appearance pursuant to this rule, the law student must:

A. Be duly enrolled in this State in a law school approved by the American Bar Association.

B. Have completed legal studies amounting to at least four (4) semesters, or the equivalent if the school is on some basis other than a semester basis.

C. Be certified by the dean of his law school as being of good character and competent legal ability, and as being adequately trained to perform as a legal intern.

D. Be introduced to the court in which he is appearing by an attorney admitted to practice in that court.

E. Neither ask for nor receive any compensation or remuneration of any kind for his services from the person on whose behalf he renders the 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.

IV. Certification

The certification of a student by the law school dean:

A. Shall be filed with the Clerk of this Court and, unless it is sooner withdrawn, it shall remain in effect until the expiration of eighteen (18) months after it is filed, or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier. For any student who passes that examination or who is admitted to the bar without taking an examination, the certification shall continue in effect until the date he is admitted to the bar.

B. May be withdrawn by the dean at any time by mailing a notice to that effect to the Clerk of this Court. It is not necessary that the notice state the cause for withdrawal.

C. May be terminated by this Court at any time without notice or hearing and without any showing of cause.