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**Conceptualizing Student Practice for the 21st Century:  
Educational and Ethical Considerations in Modernizing the District  
of Columbia Student Practice Rules**

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## Conceptualizing Student Practice for the 21st Century: Educational and Ethical Considerations in Modernizing the District of Columbia Student Practice Rules

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## INTRODUCTION

The practice of law by law students is a significant departure from the general ethical prescription that only licensed members of a state bar are entitled to represent clients.<sup>1</sup> Indeed, permitting students to practice law is relatively unusual in the world. Clinic students in most other countries usually perform only the tasks that law clerks and paralegals perform in the United States.

Representation by supervised students has been deemed ethical and appropriate, however, because it serves the needs of courts, clients, law schools, the bar, and perhaps the country as well. Courts welcome student practitioners because student representation of indigent litigants helps courts fulfill the constitutional mandate to provide lawyers in criminal cases, and because students bring some level of sophistication to practice in civil cases where lawyers are not required by the Constitution. Clients welcome student representation because students provide some guidance and support where there otherwise would be none. Law schools, students, and the bar welcome student practice because it bridges the gap between theory and practice and increases students’ abilities to practice early in their careers. In addition, it facilitates the formation of strong ethical and professional foundations and protects the norms and values of the profession by introducing them to new lawyers while they are still under close supervision. Finally, student representation enhances the legal system for everyone in the country by enabling more people to resolve

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1. See MODEL RULES OF PROF’L CONDUCT R. 5.5(b) (2010) [hereinafter MODEL RULES].

their legal disputes in a fair manner in a court of law.<sup>2</sup> As long as the students and their supervisors perform their duties adequately, no ethical issues arise.

Experiential learning has become a prominent and sophisticated aspect of modern legal education. Clinical faculties have grown and the number and scope of clinical courses<sup>3</sup> have increased because the pedagogy instills a deep appreciation of theory integrated with practice. Growth has been encouraged by the organized bar which prefers its new members to have clinical experience, and by students who crave the practical, personal, and jurisprudential education that clinical studies provide. As the demand for clinical education grew in the mid-to-late 20th-century, courts and state bars responded by promulgating student practice rules that allowed students to represent people before local and federal tribunals, prescribed the requirements for students' eligibility, and defined the roles and responsibilities of lawyers who would supervise students' work.

The District of Columbia was an early proponent of student practice, enacting its first rules in 1968. Although those rules were modified periodically during the two decades of their existence, they had remained unchanged since the 1980s. Law schools and the practice of law, however, have changed dramatically since 1980. As a result, the District of Columbia rule, which was once a model for other states, became overly restrictive and too narrow to address the new nature of practice and the expansion of clinical courses in District of Columbia law schools. With that in mind, a group of law professors from the six District of Columbia law schools began studying student practice rules from around the country in order to revise and modernize the District's rules. They were later joined by judges from the District of Columbia Court of Appeals to further refine the professors' work and craft a set of amendments. The amendments were implemented in the Fall of 2014.

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2. *Cf.* DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMM'N, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA'S LOW INCOME COMMUNITY 42 (2009) [hereinafter JUSTICE FOR ALL].

3. The definition of clinical education varies depending upon who is using the term. The American Bar Association defines a clinic as a course that provides substantial lawyering experience that involves one or more actual clients and includes (i) advising or representing a client; (ii) direct supervision of the student's performance by a faculty member; (iii) opportunities for performance, feedback from a faculty member, and self-evaluation; and (iv) a classroom instructional component. ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 304(b) (2014). That definition, which describes what is sometimes referred to as an "in-house clinic," guides this article and guided the conversations among the drafters of the amendments to the District of Columbia student practice rule.

This article traces the history of the amendment process. It provides a short history of student practice rules and then, using the student practice rule in effect in the District of Columbia prior to the 2014 amendments, describes the various components of those rules that courts and bars across the nation have implemented to assist courts, advance legal education, and preserve advocates' ethical obligations to clients. It then describes some of the comments to the proposed amendments offered by the District of Columbia Bar and other D.C. lawyers during the public comment period and the modifications to the District of Columbia student practice rule that the District of Columbia Court of Appeals accepted. Finally, it discusses some areas of disagreement that arose during the process and a description of the reasons for those disagreements.

## I. A SHORT HISTORY OF STUDENT PRACTICE RULES

### A. THE NATIONAL EXPERIENCE

Long before the advent of formal student practice rules, several law schools established legal aid dispensaries that allowed law students to counsel or represent poor people in need of legal assistance. The legal dispensaries arose during the late 1890s and early 1900s in reaction to Christopher Columbus Langdell's casebook method of instruction that permeated legal education.<sup>4</sup> The movement also responded to a series of articles written by Jerome Frank that advocated using legal dispensaries and actual cases to train students,<sup>5</sup> and articles written by John Bradway and William Rowe, that described the benefits law school clinical education programs provided to students and clients.<sup>6</sup>

Dispensaries were developed at the University of Cincinnati College of Law, George Washington University Law School, Harvard Law School, University of Minnesota Law School, Northwestern University School of Law, University of Pennsylvania Law School, University of Tennessee College of Law, and Yale Law School throughout the 1890s and 1900s.<sup>7</sup>

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4. Margaret Martin Barry, et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 6 (2000).

5. See generally Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81 U. PA. L. REV. 907 (1933).

6. See generally John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. CAL. L. REV. 252 (1929); John S. Bradway, *Legal Aid Clinic as a Law School Course*, 3 S. CAL. L. REV. 320 (1930); John S. Bradway, *The Legal Aid Clinic as an Educational Device*, 7 AM. L. SCH. REV. 1153 (1934); John S. Bradway, *Legal Aid Clinics in Less Thickly Populated Communities*, 30 MICH. L. REV. 905 (1932); John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174 (1930); John S. Bradway, *The Objectives of Legal Aid Clinic Work*, 24 WASH. U. L.Q. 173 (1939); William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591 (1917).

7. Barry et al., *supra* note 4, at 6 n.10.

None of these schools' states, however, had a student practice rule. The first student practice rule was established in Colorado in 1909<sup>8</sup> to reflect the work of the Denver University College of Law's Legal Aid Dispensary,<sup>9</sup> founded in 1904. The Colorado rule read,

Students of any law school which has been continuously in existence for at least ten years prior to the passage of this section and which maintains a legal aid dispensary where poor persons receive legal advice and services, shall when representing said dispensary and its clients and then only be authorized to appear in court as if licensed to practice.<sup>10</sup>

Notwithstanding this innovation, no other state court implemented a student practice rule until 1957, when the courts of Wyoming<sup>11</sup> and Massachusetts<sup>12</sup> promulgated such rules. Massachusetts, however, had been allowing students to represent indigent clients in civil cases prior to 1957, based on a 1935 state supreme court statement that said “[t]he gratuitous furnishing of legal aid to the poor . . . in the pursuit of any civil remedy . . . do[es] not constitute the practice of law.”<sup>13</sup> Because their representation was allowed based on a client's status as indigent—not on their own statuses as students—the Massachusetts students who represented litigants before 1957 entered their appearances in court as “citizens” rather than as “law students.”<sup>14</sup>

The expansion of clinical education programs in American law schools, which began in the late 1960s, accelerated a nation-wide promulgation of state student practice rules.<sup>15</sup> This expansion was driven by the social upheaval that accompanied the civil rights and anti-Vietnam War movements,<sup>16</sup> a renewed dissatisfaction with the casebook method, and the influx of money to law schools from the Ford Foundation and later

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8. *Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 WM. & MARY L. REV. 363, 370 (1973) [hereafter *Student Practice*].

9. The Denver College of Law is now called University of Denver Sturm College of Law.

10. COL. STAT. ANN., ch. 9, § 254-A (1911).

11. WYO. BAR R. 18 (1957).

12. MASS. SUP. JUD. CT. R. 3:11 (1957).

13. *In re Opinion of the Justices*, 194 N.E. 313, 317–18 (Mass. 1935), cited in *Student Practice*, *supra* note 8, at 370 n. 40; see also Memorandum of Points and Authorities in Support of Petition to Amend Local Rule 96, at 4 (D.C. 1968).

14. *Student Practice*, *supra* note 8, at 370 (citing Ridgberg, *Student Practice Rules and Statutes*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 223 (E. Kitch ed. 1970)).

15. See Barry et al., *supra* note 4, at 16–19.

16. See *id.* at 12–17.

the Council on Legal Education for Professional Responsibility (CLEPR) to establish clinical education programs.<sup>17</sup> The latter effort, led by CLEPR director William Pincus, was met with some wariness on the part of both courts and law schools.<sup>18</sup> Law schools, wedded to the Langdell method of legal education for more than a half-century,<sup>19</sup> were reluctant to reintroduce law practice into the university-based academic law curriculum. Local courts, fearful that faculty members would turn the simplest landlord-tenant case into a Supreme Court initiative, worried about clogged court calendars and the intrusion of the social justice movements of the 1960s and 1970s into every claim initiated by law student counsel. Nonetheless, by 1968, at least fourteen states had promulgated student practice rules.<sup>20</sup>

Development of student practice rules accelerated again after 1969, when the American Bar Association wrote a comprehensive model student practice rule.<sup>21</sup> The ABA model rule acknowledged the court's and the bar's duties to provide legal representation to the poor and encouraged law schools to join that effort by creating clinical instruction in trial work.<sup>22</sup> The rule set forth the kinds of cases and the tribunals wherein representation by law students should be permitted,<sup>23</sup> the eligibility requirements for student certification,<sup>24</sup> and the eligibility requirements for supervising faculty and other lawyers who would guide students' work.<sup>25</sup> The validity of these rules gained further credence after Supreme Court Justice William Brennan noted in his concurrence in *Argersinger v.*

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17. See *id.* at 18–20; J. P. “Sandy” Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL. L. REV. 1, 9–15 (2009); Elliot Milstein, Professor of Law, American University Washington College of Law, Why the Clinical Section Award is Called the “William Pincus Award,” delivered January 2009 (on file with author).

18. See Wallace Mlyniec, *The Intersection of Three Visions—Ken Pye, Bill Pincus, and William Greenhalgh—and the Development of Clinical Teaching Fellowships*, 64 TENN. L. REV. 963, 965 (1997).

19. The case method of legal education, first implemented (and likely developed) by Christopher Columbus Langdell during his tenure as Dean of Harvard Law School during the late Nineteenth Century, employs Socratic questioning to narrow students' interpretations of appellate cases to develop legal analysis skills and doctrinal mastery. See Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 520–27 (1991).

20. Colorado (1909), Massachusetts and Wyoming (1957), Connecticut and Michigan (1963), Florida and New Jersey (1964), New York (1965), Georgia, Iowa, Oklahoma, Minnesota, and Tennessee (1967), and District of Columbia (1968). Frank G. Avellone, *The State of State Student Practice: Proposals for Reforming Ohio's Legal Internship Rule*, 17 OHIO N.U. L. REV. 13, 13 n.1 (1990).

21. See generally ABA, *Model Student Practice Rule*, 94 REP. OF THE ABA 290 (1969).

22. *Id.* at Section I.

23. *Id.* at Section II.

24. *Id.* at Section III.

25. *Id.* at Section IV.

*Hamlin* that “law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas.”<sup>26</sup> Today, every state has a student practice rule and every law school has a clinical education program.<sup>27</sup>

## B. THE DISTRICT OF COLUMBIA EXPERIENCE

The District of Columbia was among the earliest adopters of a student practice rule. An April 1968 proposal by the deans of the five District of Columbia law schools<sup>28</sup> sought to amend what was then Local Rule 96<sup>29</sup> to allow third-year law students to represent indigent litigants. The Board of Judges for the Court of General Sessions passed a June 20, 1968 resolution, by a vote of 12-2, stating that the Board supported “the principle of third year law student participation with members of the Bar present as counsel of record in the representation of indigents.”<sup>30</sup> The United States District Court for the District of Columbia, acting in its supervisory capacity, voted down the proposed amendment, apparently emphasizing the Board’s ambiguous conclusion rather than its stated philosophical support for student practice.<sup>31</sup>

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26. 407 U.S. 25 at 44 (1972).

27. *See Student Practice Rules—Clinical Research Guide*, GEORGETOWN LAW LIBRARY, <http://www.law.georgetown.edu/library/research/guides/StudentPractice.cfm> (last visited Nov. 11, 2014).

28. *In re* Application of the District of Columbia Law Schools, and Certain Other Interested Parties, For an Addition to Local Rule 96 of the United States District of Columbia to Allow for Special Appearances Without Compensation by Third Year Law Students on Behalf of Indigents in the District of Columbia Court of General Sessions, Local Rule 96, 1–2 (1968) (on file with author). B.J. Tennery, American University Washington College of Law; Vernon X. Miller, Catholic University of America Columbus School of Law; C. Clyde Ferguson, Howard University Law School; Paul R. Dean, Georgetown University Law Center; and Robert Kramer, George Washington University National Law Center signed the petition. Also signing the petition were John E. Powell, President, Bar Association of the District of Columbia, and Peter H. Wolf, a principal drafter of the student practice rule. *Id.* At the time, there were only five law schools. *Cf. id.* The University of the District of Columbia David A. Clarke School of Law, founded as Antioch Law School, opened in 1972. *School of Law History*, UNIV. OF THE DISTRICT OF COLUMBIA, <http://www.law.udc.edu/?page=History> (last visited Jan. 8, 2015).

29. D.C. App. R. 96 (1967) then permitted only Bar-admitted lawyers to appear before the Court.

30. Peter Wolf, *D.C. Law School Students in the Courtroom*, 36 D.C. B. J. 11, 42 (1969).

31. *Id.* Apparently in response to the initial assertion by Board of Judges that no amendment was necessary to allow students to represent indigent clients in the Court of General Sessions, proponents of the amendment pointed out that the proposed change would be permissive, not mandatory: the updated rule would make it clear that the Court of General Sessions *could permit* students to represent indigents but that they would not be required to give such permission. The deans also described the immense and growing need for adequate legal representation of indigent litigants and cited examples of



During the summer of 1968, the Rules Committee for the Court of General Sessions proposed the following amendment, which the Board of Judges adopted on September 25, 1968 by a 12-2 vote:

No person other than a member in good standing of the Bar of this Court shall be permitted to appear in this branch in a representative capacity except (1) for the purpose of securing a continuance, and except further (2) a third-year law student may participate fully in the representation of an indigent defendant, and in doing so may address the Court and interrogate witnesses, provided that a member of the Bar of this Court is present as counsel of record for the indigent defendant and is supervising the student's participation.<sup>32</sup>

On October 14, 1968, at the urging of Supreme Court Justice Tom Clark, United States Senator from Maryland Joseph Tydings, United States Solicitor General Erwin Griswold, other legal dignitaries, and numerous academics and legal nonprofits,<sup>33</sup> the United States District Court for the District of Columbia finally approved the change to the General Sessions rule in the form the Rules Committee recommended.

The original rule reflected a time when law school clinical courses were still experimental and when clinical field work took place only in the District of Columbia courts. This did not change when the student practice rule was rewritten and implemented after Court Reorganization in 1971<sup>34</sup> to permit law students to practice in the new District of Columbia Superior Court and the new Court of Appeals.<sup>35</sup> Nor did it change when minor revisions were made throughout the 1970s<sup>36</sup> or when the larger revisions

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jurisdictions where student representation of such clients had been found adequate if not superior to other options.

32. Wallace Mlyniec, Unlabeled in Law Students in Court Papers (unpublished manuscripts) (on file with the author) [hereinafter Law Students in Court Paper] (describing Law Students in the Court Clinic when Mlyniec worked as the Clinical Coordinator at Georgetown University Law Center).

33. Peter Wolf, *D.C. Law School Students in the Courtroom*, 36 D.C. B. J. 11, 42-43 (1969).

34. Prior to Court Reorganization, District of Columbia courts were administered by the federal courts for the District of Columbia. After reorganization, the D.C. courts became independent and were treated similarly to state courts, although they remained courts of the United States pursuant to Article I of the United States Constitution. *Palmore v. United States*, 411 U.S. 389, 398-99 (1973).

35. *See, e.g., Superior Court of the District of Columbia Order*, 99 DAILY WASH. L. REPORTER 1980 (Nov. 9, 1971); *United States Court of Appeals for the District of Columbia Order*, 99 DAILY WASH. L. REPORTER 1980 (Nov. 9, 1971).

36. *See, e.g., Superior Court of the District of Columbia*, 100 DAILY WASH. L. REPORTER 2219 (Nov. 9, 1972).

occurred in 1982.<sup>37</sup> Thus, the rules existing in the Superior Court and Court of Appeals rules that were subject to the 2014 amendments did not address the vast array of legal practice that exists today.

Law Students in Court (LSIC), the original law school clinical program in the District of Columbia, was founded in 1968 as a consortium program comprised of all of the D.C. law schools,<sup>38</sup> in close connection with Rule 96s amendment the same year. Though the rule permitted student practice in any civil or criminal case, in the clinic's early years LSIC staff supervised students from participating District of Columbia law schools only in Landlord and Tenant and Small Claims Court proceedings.<sup>39</sup> After 1971, additional law school clinical courses focusing on many other subject matters were created at the law schools.<sup>40</sup> The District of Columbia law schools became pioneers in providing students with opportunities to engage in supervised law practice through a wide array of clinical legal education courses. Today, the schools' clinical offerings are far broader than what was contemplated at the time the student practice rule took its pre-amendment form in 1982.<sup>41</sup>

## II. CHALLENGES TO STUDENT PRACTICE

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37. These revisions were proposed by the then-clinical deans and directors of the District of Columbia law schools. *See* Appendix A for the text of the 1982 version of D.C. App. R. 48.

38. In the beginning, the Judges preferred that the schools pool their resources so that the court would have one point of contact.

39. *3rd Yr. Students to Civil Courts?* GEORGETOWN LAW WEEKLY, Feb. 15, 1968. In 1972, LSIC launched a criminal justice division, which enabled students to represent individuals charged with misdemeanors punishable by no more than one year in prison. Law Students in Court Papers, *supra* note 32, at 2.

40. *See*, for example, the Jacob Burns Community Clinics that were formed in 1971 on a wide range of other issues, including domestic violence and immigration. *The Jacob Burns Community Legal Clinics*, THE GEORGE WASHINGTON UNIV., <http://www.law.gwu.edu/academics/el/clinics/Pages/Overview.aspx> (last visited Jan. 8, 2015). Antioch Law School, the District's sixth law school, which was founded in 1972, created legal clinics pursuant to Rule 96. *School of Law History*, UNIV. OF THE DISTRICT OF COLUMBIA, <http://www.law.udc.edu/?page=History> (last visited Jan. 8, 2015). It later became the University of the District of Columbia David A. Clarke School of Law. *Id.*

41. *See infra* "Modernizing the District of Columbia Rule;" *see also, e.g., Clinical Program*, AM. UNIV. WASHINGTON COLL. OF LAW, <http://www.wcl.american.edu/clinical> (last visited Nov. 26, 2014); *Law Clinics*, THE CATHOLIC UNIV. OF AM., <http://clinics.law.edu/> (last visited Nov. 26, 2014); *Our Clinics*, GEORGETOWN LAW, <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/> (last visited Nov. 26, 2014); *The Jacob Burns Community Legal Clinics*, THE GEORGE WASHINGTON UNIV., <http://www.law.gwu.edu/academics/el/clinics/Pages/Overview.aspx> (last visited Nov. 5, 2014); *Clinical Law Center*, HOWARD UNIV. SCH. OF LAW, <http://www.law.howard.edu/10> (last visited Jan. 8, 2015); *Introduction to the Clinical Program*, UNIV. OF THE DISTRICT OF COLUMBIA DAVID A. CLARKE SCH. OF LAW, <http://www.law.udc.edu/?page=ClinicIntro> (last visited Jan. 8, 2015).

Challenges to student practice have arisen periodically since the inception of student practice rules, but courts have uniformly upheld the validity of the rules. Few challenges have arisen in civil cases;<sup>42</sup> most have come in criminal and juvenile defendants' motions for post-conviction relief and in criminal and juvenile appeals. Appellants have alleged either (1) constitutional violations of either the absolute right to counsel<sup>43</sup> or the right to effective assistance of counsel<sup>44</sup> or (2) procedural or substantive breaches of the jurisdiction's student practice rules.<sup>45</sup>

#### A. CLAIMS BASED ON CONSTITUTIONAL VIOLATIONS IN CRIMINAL CASES

Constitutional challenges to student practice have rested on either of two claims: (1) that representation by a student lawyer absent a knowing and intelligent waiver of the right to counsel constitutes a violation of the Sixth Amendment's absolute guarantee;<sup>46</sup> or (2) that a student's participation made counsel unconstitutionally ineffective.<sup>47</sup> Courts have sometimes responded to ineffective-assistance-of-counsel claims by assessing the *supervising* attorney's effectiveness and by considering the student's practice errors (procedural<sup>48</sup> or substantive<sup>49</sup>) as one element in the *Strickland* analysis.<sup>50</sup> Appellants have lost in those cases.<sup>51</sup>

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42. Student practice challenges in civil cases are rare. In *Hayden v. Elam*, 739 So.2d 1088, 1093–94 (Ala. 1999), an unsuccessful civil defendant moved for a new trial, alleging that he was denied a fair trial due to a statement the plaintiff's student-attorney made during her closing argument. The student had argued that a claim the defendant corporation made on a tax return was made "under penalty of perjury." The court noted that the student and supervising attorney had not complied with the letter of the law when the student entered her appearance for the plaintiff-appellee. Nonetheless, the court found that the student had not accused the defendant-appellant of perjury and that her argument had not created sufficient prejudice to warrant a new trial. *Id.* at 1093. In *Haro-Ramos v. INS*, 44 F. App'x 168, 170 (9th Cir. 2002), the Ninth Circuit upheld a deportation order where the record provided no evidence concerning the student's compliance with the state student practice rule.

43. *E.g.*, *People v. Nelson*, 156 Cal. Rptr. 244 (Cal. Ct. App. 1979).

44. *E.g.*, *United States v. Rimell*, 21 F.3d 281, 286 (8th Cir. 1994).

45. *E.g.*, *People v. Flemming*, No. A130683, 2013 WL 940361, at \*9 (Cal. Ct. App. March 12, 2013).

46. *E.g.*, *id.*

47. *E.g.*, *Rimell*, 21 F.3d at 284.

48. *In re Denzel W.*, 930 N.E.2d 974, 983 (Ill. 2010).

49. *Matter of Moore*, 380 N.E.2d 917, 921 (Ill. App. Ct. 1978); *Hudson v. State*, 375 So. 2d 355, 355 (Fla. Dist. Ct. App. 1979).

50. *Strickland v. Washington* established that a criminal defendant's Sixth Amendment right to effective counsel is violated where counsel is objectively deficient and there is a reasonable probability that the attorney's errors prejudiced the outcome of the case. 466 U.S. 668, 693–96 (1984).

51. *Moore*, 380 N.E.2d at 921; *Hudson*, 375 So. 2d at 355.

Claims that student representation amounts to a constitutional violation unless the defendant has waived his Sixth Amendment right to counsel have failed because courts have recognized that the supervising attorney's presence and participation fulfills the constitutional mandate.<sup>52</sup> Courts have therefore been unwilling to require a showing that an appellant knowingly and voluntarily waived his right to counsel when he consented to a student's participation in his defense.<sup>53</sup>

Appellants claiming ineffective assistance of counsel have argued that courts should deem counsel ineffective *per se* where attorneys fail to strictly comply with a student practice rule's procedural requirements.<sup>54</sup> No court has accepted that argument,<sup>55</sup> and the *Denzel W.* court specified that the *Strickland*<sup>56</sup> test—not a *per se* rule—should determine the issue.<sup>57</sup>

#### B. CLAIMS BASED ON VIOLATIONS OF STUDENT PRACTICE RULES

Challenges based on violations of state student practice rules have usually relied on claims that failure to comport with rule-mandated procedure—most commonly, failure to obtain or file the defendant's written consent—should invalidate a verdict against the party represented

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52. See, e.g., *People v. Flemming*, No. A130683, 2013 WL 940361, at \*9 (Cal. Ct. App. March 12, 2013); *Gartman v. Pierce*, No. 05-CV-3123, 2012 WL 1932118, at \*23 (N.D. Ill. May 29, 2012); *People v. Nelson*, 156 Cal. Rptr. 244, 250 (Cal. Ct. App. 1979); *People v. Perez*, 24 Cal. 3d 133, 138 (1979).

53. See *Flemming*, 2013 WL 940361 at \*9; *Gartman*, 2012 WL 1932118 at \*23; *Perez*, 24 Cal. 3d at 144. See also *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (establishing that a valid waiver of the Sixth Amendment right to counsel must be knowing and intelligent). In *State v. Edwards*, 351 So. 2d 500 (La. 1977), the Supreme Court of Louisiana rejected an appellant's claim that he was denied his constitutional right to counsel when a student-attorney represented him at a pretrial suppression hearing without a supervising attorney present. Although the court found that the defendant had not consented in writing to the student's participation, it upheld the conviction because it concluded the violation of the court rule did not constitute a constitutional violation.

54. See, e.g., *United States v. Rimell*, 21 F.3d 281, 284 (8th Cir. 1994); *In re Denzel W.*, 930 N.E.2d 974, 984 (Ill. 2010).

55. See, e.g., *Rimell*, 21 F.3d at 286; *Denzel W.*, 930 N.E.2d at 984.

56. *Strickland v. Washington*, 466 U.S. 668, 693–96 (1984).

57. *Denzel W.*, 930 N.E.2d at 984; see also *Duval v. State*, 744 So. 2d 523, 525 (Fla. Dist. Ct. App. 1999) (applying *Strickland* to conclude that a failure to file defendant's written consent to student's participation did not make counsel ineffective, where appellant did not allege actual ineffectiveness). At least once, an appellate court has reversed a conviction obtained while the defendant was represented by a student because the trial court had prevented the defendant from obtaining constitutionally adequate counsel. In *City of Seattle v. Ratliff*, 100 Wash. 2d 212 (1983), the trial court required a student to represent a defendant unsupervised despite the student's claim that he would not be able to supply effective counsel. However, the counsel provided was substantively ineffective because the student, who was representing the defendant in a different action and was summoned to court when the defendant appeared alone, was unfamiliar with the case—not because of the student's status. *Id.* at 221.

by a student.<sup>58</sup> Appellants who have brought such claims have lost either because the court has found sufficient compliance with the rule or because noncompliance did not prejudice the defendant.<sup>59</sup>

Appellants have succeeded where they have shown they were unaware that they were being represented by students<sup>60</sup> and where courts have placed the burden of persuasion on appellees to refute allegations that appellants had not actually consented to student participation.<sup>61</sup> In one such case, the student was unsupervised.<sup>62</sup> In others, students misrepresented their statuses to the defendant and/or the court.<sup>63</sup> Florida's

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58. See *In re Joseph Children*, 470 S.E.2d 539, 542 (N.C. Ct. App. 1984); *State v. Dwyer*, 512 N.W.2d 233, 236 (Wis. Ct. App. 1994); cf. *Hayden v. Elam*, 739 So. 2d 1088, 1093 (Ala. 1999) (finding that by failing to file a revised updated consent form after the supervising attorney was replaced, counsel for a civil plaintiff denied the trial court the chance to determine whether it was appropriate to allow a student to participate in the proceedings (one of the purposes stated in the student practice rule), but that the error did not warrant a new trial for the defendant-appellant).

59. *People v. Flemming*, No. A130683, 2013 WL 940361, at \*8 (Cal. Ct. App. March 12, 2013); *Joseph Children*, 470 S.E.2d at 542; *Dwyer*, 512 N.W.2d at 824 (invoking “no harm, no foul” reasoning); *State v. Daniels*, 346 So. 2d 672, 674 (La. 1977); see also *Gartman v. Pierce*, No. 05-CV-3123, 2012 WL 1932118, at \*23 (N.D. Ill. May 29, 2012) (ruling against a habeas petitioner who at first claimed no actual consent but then changed his argument to allege failure of *procedural* consent to his student lawyer’s participation at trial).

60. In *Matter of Moore*, the Illinois court of appeals vacated a decision ordering an individual committed for mental treatment, on the grounds that neither the defendant nor the lower court judge actually knew the defendant’s appointed counsel was a student. 380 N.E.2d 917, 920 (Ill. App. Ct. 1978). The student was identified as such at the first hearing but thereafter, before a different judge who presided over the jury trial, he was identified as an “assistant public defender.” *Id.* at 900. The student was appointed to second-chair at the trial over the defendant’s request to represent himself. *Id.* See also *Hudson v. State*, 375 So. 2d 355, 355 (Fla. Dist. Ct. App. 1979) (remanding for an evidentiary hearing where the appellant claimed students represented him at trial “without his knowledge or consent”). The *Hudson* court relied on *Cheatham v. State*, 364 So. 2d 83, 83–84 (Fla. Dist. Ct. App. 1978), and *Huckleberry v. State*, 337 So. 2d 400, 401 (Fla. Dist. Ct. App. 1976). In *Cheatham*, a Florida appeals court overturned denial of an aggravated assault defendant’s motion for post-conviction relief because the state failed to refute the appellant’s claim that he had not been informed of or consented to representation by a legal intern. 364 So. 2d at 84. The student had not been supervised by a licensed attorney. *Id.* at 83. In *Huckleberry*, a Florida District Court of Appeals vacated judgment against a defendant who had pled guilty to first-degree murder under the advice of court-appointed counsel. The public defender whom the court initially appointed delegated the duty to a recent law school graduate who had passed the bar exam but failed to meet the state bar’s character requirements. *Huckleberry*, 337 So. 2d at 402. Neither the court nor the defendant was aware at the time the defendant entered his plea that the defendant’s counsel was not a member of the bar. *Id.* at 401.

61. *Interest of C.B.*, 546 So. 2d 447, 447 (Fla. Dist. Ct. App. 1989); *People v. Schlaiss*, 528 N.E.2d 334, 336 (Ill. App. Ct. 1988); *Cheatham*, 364 So. 2d at 83–84.

62. *Cheatham*, 364 So. 2d at 83.

63. *Schlaiss*, 528 N.E.2d at 336 (student was accompanied by a licensed attorney but introduced himself to the court as an “assistant public defender”).

Fourth District Court of Appeals reversed a conviction, finding insufficient evidence to refute an appellant's claim of no consent, despite the student attorney's testimony that the defendant had had actual notice of the student's status.<sup>64</sup>

Less common among challenges under state student practice rules are claims alleging that a student's participation in legal proceedings *at all* constitutes unauthorized practice of law.<sup>65</sup> In *People v. Perez*, the California Supreme Court rejected a claim that a student's participation in the appellant's trial abrogated the appellant's constitutional right to counsel.<sup>66</sup> The court highlighted the rule's drafters' care in protecting the right to counsel and asserted in dicta that a student's participation in court proceedings was not necessarily unauthorized practice of law merely because the court had not yet formally accepted the student practice rule promulgated by the state bar.<sup>67</sup> The *Perez* court elected not to resolve the unauthorized practice issue because the law student had appeared in good faith pursuant to the Bar rule.<sup>68</sup> *Perez* upheld the defendant's conviction because the defendant had consented to the student's appearance and received competent representation.<sup>69</sup>

Other challenges have arisen in the course of students' representation of clients that have not been recorded in decisional law. Such challenges include complaints that have struck at the scope of student practice rules.<sup>70</sup> Opponents of student-represented litigants have attempted to claim that students may not represent certain classes of clients, such as nonprofit corporations; others have taken issue with definitions of indigence, alleging that an opposing party does not clear the common threshold of eligibility for student representation. We know of no appellate case that has addressed such complaints.

### III. MODERNIZING THE DISTRICT OF COLUMBIA RULE

#### A. THE PROCESS

With the history of the District of Columbia rule and challenges to student practice rules in mind, a group of professors and clinical deans and directors from the District of Columbia law schools formed an ad-hoc committee in 2008 to re-examine the District of Columbia student practice

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64. *In Interest of C.B.*, 546 So. 2d at 447.

65. *See, e.g., People v. Perez*, 24 Cal. 3d 133, 143 (1979).

66. *See generally Perez*, 24 Cal. 3d at 133.

67. *Id.* at 136.

68. *Id.* at 143.

69. *Id.*

70. These examples have been obtained by the author through conversations with clinical teachers and statements made at various clinical conferences.

rules.<sup>71</sup> The original rules and later revisions reflected times in which law school clinical courses were still experimental and when clinical students practiced in only the District of Columbia courts. The District of Columbia Access to Justice Commission had noted that law school clinical programs were important service providers in a city where the legal needs of the poor and middle class were seldom met; however, the existing student practice rules did not appear to reflect the important and expanding role clinical programs play in providing representation to under-served populations.<sup>72</sup> Recent changes in the District of Columbia Unauthorized Practice Rules<sup>73</sup> and the maturation of clinical education nationwide and in the District of Columbia suggested that the District of Columbia student practice rules<sup>74</sup> had not kept pace with pedagogical innovations or the evolution of legal practice.

The ad-hoc committee's goals were to review the District of Columbia Courts' student practice rules to determine which parts no longer reflected nationwide trends in legal education and student practice and which were no longer consistent with other D.C. Bar rules implemented after the District of Columbia student rules were last amended. The ad-hoc committee agreed that if it found the rules were in need of revision, it would draft proposed amendments. Those amendments, if required, would reflect the prevailing models of state student practice rules and best

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71. Faculty members who worked on the project were Robert Dinerstein from American University Washington College of Law; Catherine Klein from Catholic University Columbus School of Law; Karen Foreman and Joseph Tulman from the University of the District of Columbia David A. Clarke School of Law; Jane Aiken, Deborah Epstein, and Wallace Mlyniec from Georgetown University Law Center; Phyllis Goldfarb from George Washington Law School; and Tamar Meekins from Howard University Law School. Mark Carlin, former Chair of the Committee on Admissions, also assisted with the project.

72. The services clinical programs provide to the court and to citizens of the District of Columbia should not be underestimated. Clinical education programs save the courts and the city hundreds of thousands of dollars yearly. Moreover, the activities of the clinical education programs have strengthened the cause of justice, improved the lives of countless citizens, and better prepared students for the practice of law. Students are important legal service providers in the initiatives of the District of Columbia Access to Justice Commission. *See JUSTICE FOR ALL, supra* note 2, at 42; *see also id.* at 43–82. The clinics also inculcate in students the best traditions of the legal profession and create the foundation for a lifetime of pro bono service. In short, clinical education programs are significant participants in the legal culture of the region and in the administration of justice.

73. *See* D.C. App. R. 49. Some members of the ad-hoc committee also believed that a comparison of the student practice rules and the unauthorized practice rules indicated gaps between the two sets of rules that suggested that some clinical students might be practicing without lawful authority.

74. *See* D.C. App. R. 48.

practices in clinical education.<sup>75</sup> The new rules would also continue to guarantee the exemplary practice that for years students had rendered to courts, agencies, and clients, and would comport with the definition of “the practice of law” set forth in the District of Columbia Unauthorized Practice of Law Rules.<sup>76</sup> Finally, the amendments would recognize the evolution and success of area law schools’ programs, modernize the rule and make it consistent with best practices, and recognize the growing need for additional legal services for people with low incomes.

The ad-hoc committee met from time to time to consider the rules. It quickly determined that the District of Columbia student practice rules, once a progressive and innovative model for other states to emulate, had lagged behind other rules’ developments, leaving it one of the most restrictive student practice rules in the country. The District of Columbia rules, unlike the rules in other states, unnecessarily limited student and client eligibility and were vague concerning transactional practice and a student’s ability to give legal advice in matters not destined to become legal conflicts. The rules did not clearly authorize practice in non-District of Columbia fora, and they required students to be screened for character in a manner that was costly, cumbersome, and inconsistent with practices in other states. Though the programs and practices of clinical faculty in the District of Columbia had become models for clinical program design and

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75. See generally ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION, A VISION AND A ROAD MAP (2007) available at [http://www.cleaweb.org/Resources/Documents/best\\_practices-full.pdf](http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf). A second edition of *Best Practices* will appear in late 2014.

76. The Unauthorized Practice Rule defines the “practice of law” as “the provision of professional legal advice or services where there is a client relationship of trust or reliance” and provides that “[o]ne is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

- (A) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents’ estates, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
  - (B) Preparing or expressing legal opinions;
  - (C) Appearing or acting as an attorney in any tribunal;
  - (D) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
  - (E) Providing advice or counsel as to how any of the activities described in sub-paragraph (A) through (D) might be done, or whether they were done, in accordance with applicable law;
  - (F) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.”
- D.C. App. R. 49(b).



pedagogy throughout the country, the rules did not recognize how sophisticated clinical pedagogy had become. This shortcoming was not the result of anyone's negligence. The clinical programs and the courts worked splendidly together throughout the early existence of the rules. Because of the absence of any conflict, no one had bothered to take a hard look at the rules for a very long time.

It took several years for the ad-hoc committee to draft a set of amendments that were generally acceptable to the clinical faculties of each school. With the proposed amendments in hand, I, representing the ad-hoc committee, began meeting in April 2011 with the Honorable John R. Fisher, Associate Judge of the District of Columbia Court of Appeals and Chair of its Rules Committee, to further refine the ad-hoc committee's work. Discussion between the Court and the ad-hoc committee occurred in three phases: The first phase consisted of a several-year conversation between Judge Fisher and me. The second involved similar conversations between the Court's Rules Committee<sup>77</sup> and me, followed by a presentation before the Board of Judges. During and after each stage, I reported back to the committee for additional guidance and continued the discussions with the judges. Once the ad-hoc committee and the judges reached agreement, the Board issued an Order and Notice of Proposed Rulemaking to invite public comment.<sup>78</sup> The final phase of the ad-hoc committee's work involved discussions among Judge Fisher, Judge McLeese, and me, with guidance from the ad-hoc committee, regarding the comments the Court received from the public. Most of the public comments received by the Court were supportive of student practice and of the amendments, and thus, they merely supported the conclusions of the Court and the ad-hoc committee. The District of Columbia Bar and the pro bono community made more significant comments, with the former requesting tighter restrictions on supervisors than the amendments proposed, and the latter requesting that the Court expand the proposed rule to provide clients greater access to students.

The original amendments to the rules the ad-hoc committee proposed were not immediately accepted by the judges, and the proposal changed over time. Each iteration of the proposed amendments underwent new debate and consideration by the ad-hoc committee, guided by the goal of devising a set of amendments that would regulate student practice in the areas of law in which the clinical programs were currently providing

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77. The Court's committee was composed of Judge Fisher and Associate Judges Catharine F. Easterly, Roy W. McLeese III, and Kathryn A. Oberly. When the ad-hoc committee's discussions with the Board of Judges began, Judge Fisher was the chair. By the time the amendments were finalized, Judge McLeese had become the chair.

78. Order and Notice of Proposed Rulemaking (Student Practice), No. M-237-10 (D.C. Oct. 31, 2013).

representation<sup>79</sup> and expand the number of low-income clients clinics and their students could represent. Differences between the judges and the ad-hoc committee were resolved when proponents of one or another view were more persuasive, when the ad-hoc committee and the judges reached a compromise position that satisfied the schools and the Court, or when the judges determined to follow their own approach despite disagreement with members of the ad-hoc committee. Throughout the process, Associate Judge John Fisher and I remained the principal revisers of the amendments. The conversations were never acrimonious. Rather, our conversations were intellectual and philosophical discussions about the nature of the bar, the limits and responsibilities of law schools, and the intersection between the two when it came to student practice. In the end, our disagreements were small and we arrived at consensus about most issues with little discussion.

## B. THE AMENDMENTS

The proposed amendments considered (1) case, client, and student eligibility; (2) the admission and certification process; (3) fees and payments for services; and (4) supervisor qualifications. The ad-hoc committee believed the proposed amendments should provide consistency between the student practice rules and current law school practices and should make the rules consistent with best practices and student practice rules currently in force throughout the country. The remainder of this article provides an analysis of each proposed amendment, a description of the final product, and analyses of the two issues that proved most difficult to resolve.

### 1. ELIGIBILITY FOR REPRESENTATION

The practice of law and the nature of clinical education had changed dramatically between 1982, when the District of Columbia student practice rules were last updated, and 2008, when the ad-hoc committee began considering new amendments. The number of clinical courses had grown, and the nature of their work was no longer confined to the practice of criminal law and representation in small claims and landlord-tenant matters in local courts. Pursuant to special student practice rules, clinical programs had expanded their work into federal, international, and non-District of Columbia state courts, into state and federal legislative bodies, and into federal and state agencies. For example, students were litigating

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79. As noted *infra* notes 87–89, the rules as originally written and existing in 2014 were directed primarily at cases involving litigation in the courts. The requirements regarding representation in non-litigation matters were vague.

in the Inter-American Commission on Human Rights,<sup>80</sup> the United States Immigration Court,<sup>81</sup> Maryland state courts,<sup>82</sup> the United States District Court for the District of Columbia,<sup>83</sup> and the United States Appellate Courts in the District of Columbia and Fourth Circuits.<sup>84</sup> In addition to traditional court and agency matters, law students were working on community development projects, tenant conversions of property, small business development, tax preparation, and many other forms of legal work that required client counseling, drafting, and advocacy under the supervision of clinical faculty. In some clinics, students took primary responsibility for their cases in other tribunals just as they did for their cases in the District of Columbia Superior Court. In a few, they acted as law clerks in much the same way law students function in law firms.<sup>85</sup>

These changes in the academy mirrored the changes in modern law practice. In the early years of clinical education, law practice was directed toward litigation and based primarily on common-law concepts. Today, modern law practice is transnational, multi-jurisdictional, regulatory, transactional, and dominated by settlement-oriented resolutions.<sup>86</sup> Moreover, much legal work today is engendered by mutual advantage, not by dispute. Such practice is based less on common-law principles than on regulatory and legislative enactments and principles of cooperation and contract. Although the 1982 student practice rules were read to cover such diverse practices, they were vague and open to contradictory

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80. See *International Human Rights Law Clinic*, AM. UNIV. WASHINGTON SCH. OF LAW, <http://www.wcl.american.edu/clinical/inter.cfm> (last visited Nov. 11, 2014); see also Charlotte Cassel, *Human Rights Clinic Participates in Hearing on Stand Your Ground Laws Before the Inter-American Commission on Human Rights*, MIAMI LAW NEWS (Apr. 15, 2014), <http://www.law.miami.edu/news/2014/april/2764.php>.

81. See, e.g., 8 C.F.R. §§ 1292.1, 292.1 (governing practice before the United States Immigration Court).

82. Cf. MD. RULES GOVERNING ADMISSION TO THE BAR R. 16.

83. See, e.g., *Mohammed v. Harvey*, 456 F. Supp. 2d 115, 116 (D.D.C. 2006).

84. Students practicing in federal courts do so pursuant to the student rules of the various federal circuits relating to “non-lawyers.” See, e.g., D.C. Cir. R. 46 (2013); cf. *Sperry v. Florida*, 373 U.S. 379 (1963); *Attorney Grievance Comm’n of Md. v. Bridges*, 759 A.2d 233 (Md. 2000); *Kennedy v. Bar Ass’n of Montgomery Cnty.*, 561 A.2d 200 (Md. 1989).

85. Students acting merely as law clerks need not be certified pursuant to the D.C. student practice rules since they are not practicing law as defined by the Unauthorized Practice Rule. See Commentary to D.C. App. R. § 49(b)(2). They give no advice to clients, do not appear in court, and do not sign legal documents.

86. See generally CONSTANCE BAGLEY, *WINNING LEGALLY: HOW TO USE THE LAW TO CREATE VALUE, MARSHAL RESOURCES, AND MANAGE RISK* (2013); CARRIE MENKEL-MEADOW, *Foundations of Dispute Resolution*, 1 COMPLEX DISPUTE RESOLUTION, available at <http://ssrn.com/abstract=2141965> (tracing the theory that dispute resolution need not be zero-sum to Western cultural revolution in the 1980s); Lon Fuller, *The Form and Limits of Adjudication*, 92 HARVARD L. REV. 2, 394–404 (1978) (describing “polycentric” legal problems and positing that some are too complex to be resolved through litigation).

interpretations. For example, the 1982 rules permitted students to practice in any civil case but seemed to qualify that by referring to cases “which may be pending in any court or administrative tribunal.”<sup>87</sup> The rules also permitted students to prepare pleadings and other documents, but again seemed to refer only to documents that would be filed in pending cases.<sup>88</sup> Some read the rule broadly by asserting that any legal matters could end up in a court case; others advanced a stricter interpretation, saying that student practice was limited to cases actually in or pending litigation. The ad-hoc committee sought greater specificity regarding the authority for students to practice in non-litigation matters so that the lower courts, administrative tribunals, opposing lawyers, and the Bar would understand the scope of student practice. Clarification would also give law schools clear guidance as they developed and expanded their clinical programs to meet the needs of underserved individuals and non-profit organizations.<sup>89</sup>

Recent changes in the Court’s Unauthorized Practice Rule<sup>90</sup> established that the practice of law in the District of Columbia was not confined to appearances before District of Columbia courts. Rule 49 states that giving legal advice while occupying a law office in the District of Columbia is the “practice of law,” whether or not litigation is contemplated and irrespective of the fora in which litigation may occur.<sup>91</sup> If the 1982 student practice rules were narrowly interpreted, one could argue that students were violating the unauthorized practice rules by providing representation in areas not specially touching on cases in or pending litigation. Given the wide-ranging practices of contemporary clinical education programs, the ad-hoc committee believed it would be prudent for the student practice rules to reflect the general propositions of the unauthorized practice rules.

When drafting the 2014 amendments, the ad-hoc committee wanted to ensure that the new rules anticipated the expansion of clinical programs to meet the unmet legal needs of District of Columbia citizens and the evolving educational needs of students.<sup>92</sup> The ad-hoc committee believed students were capable of providing quality representation in expanded areas of practice. During the 45 years of the rule’s existence, the quality of

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87. D.C. App. R. 48(a)(1) (1982).

88. *Id.*

89. Knowing, understanding, and complying with the Court’s Rules of Professional Conduct and Unauthorized Practice play a significant role in clinical legal education. Clarity in the rules assists in that training.

90. D.C. App. R. 49.

91. *See* D.C. App. R. 49(b)(3). The Unauthorized Practice Rule recognize some exceptions to this general rule. *See* D.C. App. R. 49(c). Most pertinent are those rules regarding federal practice.

92. The value of clinical education was first noted by the U. S. Supreme Court in *Argersinger v. Hamlin*. *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Brennan, J., concurring); *see also* JUSTICE FOR ALL, *supra* n.2, *passim*.

the students' representation of and dedication to their clients had seldom, if ever, been seriously questioned. To the best of the ad-hoc committee's knowledge, no student had ever been sanctioned by either the District of Columbia Court of Appeals or the District of Columbia Superior Court, or had his or her license revoked pursuant to the student practice rules. The ad-hoc committee also knew that students had performed admirably throughout the country in all areas of practice<sup>93</sup> and that the case law surrounding student practice rules recognized that students provided exemplary services.<sup>94</sup> The directors of the law school clinics knew of no students in the District of Columbia who had ever being denied a student license.<sup>95</sup> Faculty clinical supervisors were experienced practitioners in their fields, and the quality of faculty supervision at District of Columbia law schools had always been considered exemplary. Indeed, judges of the District of Columbia and federal courts praised students and faculty for their work and often requested that students take on additional clients.

There was never any doubt that the partnership between the courts and the law schools, which began as an experiment in the 1960s, had succeeded beyond all measure. Today almost every law school in the United States has some form of clinical program and every state has a student practice rule.<sup>96</sup> The American Bar Association Accreditation Standards<sup>97</sup> require that law schools provide skills training,<sup>98</sup> and recognize the educational value of live-client clinical opportunities,<sup>99</sup> simulation courses,<sup>100</sup> and field placement programs.<sup>101</sup> The ABA's MacCrate Report has called on law schools to pay more attention to teaching legal skills and values in law school,<sup>102</sup> and a recent Carnegie

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93. Indeed, nationwide, we know of no student who has ever had his or her license revoked for misfeasance or poor performance. Instances of poor performance have occasionally been handled inside the law school. Clinical Education Listserv, [lawclinic-bounces@lists.washlaw.edu](mailto:lawclinic-bounces@lists.washlaw.edu) (Jan. 24 – Jan. 31, 2009) (on file with the author) (providing results from the discussion of the clinical teachers).

94. *See, e.g.*, *Santiago v. Pinello*, 647 F. Supp. 2d 239, 245 (E.D.N.Y. 2009) (“[S]tudents have provided exemplary representation of the plaintiff.”).

95. Mark Carlin does not recall any student being denied admission during his tenure as chair. Interview with Mark Carlin, Chair, District of Columbia Court of Appeals Committee on Admission, in Washington, D.C. (Jan. 23, 2009). One student with multiple criminal convictions did apply but chose not to submit clarifying information to the Committee on Admissions. Interview with Tamar Meekins, Professor, Howard Law School, in Washington, D.C. (Nov. 10, 2009).

96. *See, e.g.*, *Student Practice Rules—Clinical Research Guide*, *supra* note 27.

97. ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, at 15–25.

98. *Id.* at 15 (Standard 302(d)).

99. *Id.* at 17 (Standard 304).

100. *Id.*

101. *Id.* at 18 (Standard 305).

102. ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM

Foundation Report, *Educating Lawyers, Preparation for the Profession of Law*, calls for an expansion of clinical courses throughout American law schools' curricula.<sup>103</sup> In addition, the recently published *Best Practices for Legal Education: A Vision and a Road Map* advocates an integrated curriculum where theory and practice are merged and where professionalism is taught pervasively throughout all three years of law school.<sup>104</sup>

Expanding the student practice rules to allow representation of clients in any form of law practice met with no resistance during the ad-hoc committee's discussions with the court and was endorsed by public commenters. The judges, like the law professors, were aware that law practice, especially in a jurisdiction like the District of Columbia, was no longer confined to litigation. Given that the Court had recently amended its rules to provide a comprehensive definition of law practice, and given that law students had to be prepared to practice in a multi-national world where law practice encompassed much more than litigation, the judges agreed that the rule should permit students to practice, with supervision, in the same way members of the bar do. Thus, the amended student practice rule adopted the broad definition of the practice of law contained in Rule 49 and permitted student representation in the following:

- (i) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, and other instruments intended to affect or secure legal rights;
- (ii) Preparing or expressing legal opinions;
- (iii) Appearing before any tribunal that permits student practice;
- (iv) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal that permits student practice;
- (v) Providing advice or counsel as to how any of the activities described in sub-paragraph (A) through (D) might be done, and whether they were done, in accordance with applicable law.<sup>105</sup>

The one exception that remains is the limitation on representation in criminal cases. Both the law professors and the judges acknowledged that

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(REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) (1992) [hereinafter AN EDUCATIONAL CONTINUUM].

103. WILLIAM SULLIVAN ET AL., *EDUCATING LAWYERS, PREPARATION FOR THE PROFESSION OF LAW* ch. 5 (2007).

104. STUCKEY ET AL., *supra* note 75, at 97–98.

105. *See* D.C. App. R. 48(a)(3).

the possibility of long sentences in felony cases made the stakes too high to permit representation by students. Thus, students practicing in the adult criminal trial court are permitted to represent only those people charged with misdemeanor offenses.<sup>106</sup> This limitation, however, does not apply to representation in adult probation revocation cases, prison administrative hearings, or appeals.<sup>107</sup> The felony limitation does not exist in juvenile delinquency cases because the penalties are not as harsh.<sup>108</sup>

Although Rule 49 and the amended Rule 48 applied to all aspects of practice within the District of Columbia, the Court recognized that it could not control practice before other tribunals and that those other tribunals in which the students might practice had an interest in regulating and a responsibility to regulate students' work. Thus, the amended rule permits these other tribunals to regulate the eligibility of students, supervisors, and clients, and to regulate the quality of student practice.<sup>109</sup> All students practicing in the District of Columbia will, however, be subject to both the ethical rules of the tribunals in which they practice and the D.C. Rules of Professional Conduct.<sup>110</sup> Moreover, the rule mandates that, in all business documents, students give prominent notice of their student status and that their practice is limited to matters related to the District of Columbia or another state, federal, or foreign court or agency that permits their participation.<sup>111</sup>

#### a. The Students

##### *i. Year in School*

The original District of Columbia student practice rules permitted only third-year students to be admitted to practice. In 1982, the District of Columbia Court of Appeals amended the rules to permit students to practice in the second semester of the second year of law school.<sup>112</sup> Recognizing that no second-semester second-year student had been sanctioned by any court in the District of Columbia, the ad-hoc committee's proposed amendments permitted all second-year students to participate in a clinical program.

In formulating their student practice rules, several states have recognized that the foundational skill of legal analysis is essentially

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106. D.C. App. R. 48(a)(1).

107. *See id.*

108. D.C. CODE § 16-2320(c) (2014). The misdemeanor restriction was embodied in the 1982 rule as well.

109. D.C. App. R. 48(a)(1)(i).

110. *See id.*

111. *See id.*

112. *See* D.C. App. R. 48(b)(2).

mastered by the end of the first year of law school, even though legal analysis continues to be taught in elective courses in the second and third years. Given the nature of most second-year courses, there is little to distinguish a second-semester second-year student from a first-semester second-year student. Non-clinical courses in both semesters in the second year tend to stress legal analysis and offer students little more than additional substantive knowledge in subject matters that are seldom the subjects of clinic courses. Recognizing these phenomena, a number of states<sup>113</sup> permit students in some or all circumstances to represent clients after completing the first year of law school. The District of Columbia Superior Court had also authorized students in either semester of the second year to provide representation to convicted and incarcerated children and adults in disciplinary and probation revocation hearings.<sup>114</sup>

The *Carnegie Report* on legal education noted that permitting students to gain practical client experiences early in their law school careers would improve the overall quality of practice in the United States.<sup>115</sup> The combination of training by clinic faculty and character screening by law schools has demonstrated that students who take clinic courses, whether in the second year or third year, are prepared to provide quality legal representation and to uphold the professional ethics and values of the bar. Such was the case with second-semester, second-year students in D.C. clinics.

Ad-hoc committee members' conversations with clinical teachers in states that permitted second-year students to practice revealed that such students performed their clinic duties well despite their somewhat limited law school experience, and that they were generally welcomed by courts. Moreover, the sophistication of clinical pedagogy today and the quality of the clinical programs in District of Columbia law schools have eliminated the competency problems that some anticipated when the District's rule was first promulgated.

The ad-hoc committee believed that relaxing the student eligibility standards to permit any second-year student to participate in a clinic would have a salutary effect on legal education, provide long-term benefits to the practicing bar, and have no negative effect on student performance or client interests. It would also expand the number of low- and moderate-income clients a clinic could represent.<sup>116</sup> Based on the

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113. California, Connecticut, Hawaii, Iowa, Maryland, Michigan, Minnesota, Nevada, New Mexico, and New York. Rules cited throughout this report may be found at *Student Practice Rules—Clinical Research Guide*, *supra* note 27.

114. Admin. Orders 07-19, 07-20, and 07-21, D.C. Super. Ct. (2007). The Superior Court acted pursuant to the power granted by D.C. App. R. 49(c) (10).

115. SULLIVAN ET AL., *supra* note 103, *passim*.

116. The Access to Justice Commission has called for expanding the services available to under-represented people. JUSTICE FOR ALL, *supra* note 2, at 12.



findings of the Access to Justice Commission, the recent administrative orders of the Superior Court, and the positive experiences of students and tribunals in other states with relaxed eligibility rules, the ad-hoc committee believed that this modest change would produce only positive results.

Altering the year-in-school requirement required little discussion by the judges and garnered no objections during the public comment period. The combination of the success of using first-semester, second-year students in other jurisdictions and the efficacy of student practice in the District for the past forty-five years easily convinced the judges that first-semester, second-year students who were properly trained and supervised in a clinic course could provide competent representation for clients. The final language permitted students to represent clients after they had completed one-third of their legal studies.<sup>117</sup>

#### *ii. Prerequisite Course Requirements*

Because the original rule was litigation-based, it required every student, no matter what kind of clinic he or she intended to join, to have completed studies in civil procedure, criminal procedure, and evidence.<sup>118</sup> Due to changes in law school curricula, development of clinical pedagogy, and expansion of clinical courses, such prerequisites were not always germane to the areas of law in which clinics' students practiced. For example, rules of evidence are relaxed in many administrative hearings and have little to do with tax preparation or business formation; courses in American civil procedure are not directly useful for students working in international human rights, tax, or legislative clinics; and criminal procedure is not needed for practice in civil, legislative, or policy clinics.

The proposed amendments sought to eliminate specific course requirements for students in all types of clinical programs. When the District of Columbia student practice rules were originally promulgated, law school curricula were rather static in their approach to instruction,<sup>119</sup> and classroom components of early clinical courses were either non-existent or experimental. Thus, it was reasonable for drafters of the original rule, contemplating an active District of Columbia court practice, to require instruction in evidence, criminal procedure, and civil procedure as prerequisites for students seeking to represent clients pursuant to student practice rules.<sup>120</sup> The drafters believed these prerequisite courses

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117. D.C. App. R. 48(b)(2); *see* Appendix B.

118. Although the rule said "studies," not "courses," it was generally understood to require a course that taught those subjects.

119. SULLIVAN ET AL., *supra* note 103, at 1–6, 47–59.

120. *See* D.C. App. R. 48(b)(2).

guaranteed that the students would possess some level of competence before they joined the clinic.

In many other states, student practice rules once required similar course prerequisites. However, state bars have recognized that well-structured clinical programs provide better training for client representation than do first-year survey courses. That is one reason forty states and the United States Court of Appeals for the District of Columbia Circuit no longer require specific law school courses prior to clinic participation.<sup>121</sup> Only two of the states that do require prerequisite courses specify courses identical to those the 1982 version of the D.C. rules required.<sup>122</sup>

At some District of Columbia law schools, courses are no longer limited to single legal subject matters.<sup>123</sup> Civil and criminal procedure courses are sometimes taught as one Meta-Procedure class. Criminal law and procedure are sometimes taught together with other forms of government regulation. In many American law schools, Criminal Procedure and Evidence are now elective courses rather than required.

There is also an increasing recognition that foundational survey courses, such as those that were required by the 1982 version of the District of Columbia student practice rules, teach little more than legal analysis about the practice of law.<sup>124</sup> Many schools have added new courses with practical skills components to balance the emphasis on theory, and legal writing courses are more sophisticated than they once were. Even though upper-class curricula now feature more problem-solving, experiential, and multidisciplinary courses than they did in the past, students learn to merge theory and practice principally in their clinical courses. The relevant substantive, procedural, and evidentiary law and skills related to practice are now taught in-depth in the classroom components of clinics, in case-rounds, and in the weekly individual faculty-student supervision sessions that are the hallmark of clinical pedagogy. Thus, the prerequisite courses required by the pre-amendment rule are less important now to students' preparation for representation than they were when earlier versions of the rule were promulgated. The District of Columbia Court of Appeals itself has recognized as much by granting waivers of the prerequisite courses upon a petition by applicants to clinical courses. However, the cost in filing fees and administrative action and the

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121. States requiring prerequisite courses are Arizona, Arkansas, California, Florida, Indiana, Louisiana, Massachusetts, Oklahoma, Rhode Island, Vermont, and Virginia. *Student Practice Rules—Clinical Research Guide*, *supra* note 27.

122. Arizona and Arkansas. Florida requires knowledge in these same subjects but not separate courses. *Id.*

123. At Georgetown, for example, one section of the first-year curriculum combines several traditional subjects. Students in that section learn Contracts and Torts in one course.

124. SULLIVAN ET AL., *supra* note 103, at ch. 3.

time lost to students in clinic courses while awaiting the Court's waiver order seemed unnecessary and counterproductive.

Clinic professors, the Bar, and the courts need assurance that students are trained to perform with a high degree of competence when they undertake legal work for a client; but it is the clinical course curriculum, training, and supervision—not course prerequisites—that provide that assurance. In clinics, students thoroughly learn lawyering skills and the substantive law supporting those skills, through diverse methods of clinical pedagogy. Many clinical courses have their own pre- and co-requisite courses and/or pre-clinic orientation classes that require more hours of instruction in law, evidence, and procedure than a typical first-year classroom course provides. Once the orientation ends and the semester begins, students spend twenty to sixty hours per week, depending on the course's credit allotment, on clinic-related learning. Some learning occurs in the classroom, where the substantive and procedural law relating to clinic cases and projects are discussed and critiqued. Much occurs in the weekly student-faculty case supervision sessions, where law is translated into case theory and strategy, and where execution of that strategy is mooted. In addition, students learn a great deal about theory integrated with practice during discussions prompted by multiple drafts of contracts, pleadings and motions; direct and cross examination questions; briefs and policy papers; and mooted student-prepared arguments, negotiations, and legislative testimony. Of course, learning also occurs during appearances before courts, legislatures, and agencies and in client counseling sessions, where theory and practice come together to advance a client's interests.

The concentration and specialization required for client representation is learned in the clinic, not in substantive law lecture courses. It is now commonly accepted in the profession that the training in substantive, procedural, and evidentiary law that students receive in clinical courses instills a deep understanding of and competence in the law and practice that are the subjects of the clinic. Moreover, the knowledge and the practice techniques learned in the clinic are retained longer than those learned outside the experiential process.<sup>125</sup>

This issue raised little public comment. Eliminating specific prerequisite courses was questioned by the Bar Board of Governors<sup>126</sup> but

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125. "Developments in philosophy and in learning sciences have made increasingly clear the reciprocal interpenetration of cognitive development and social interaction . . . . Skillful practice, whether of a surgeon, a judge, a teacher, a legal counselor, or a nurse, means involvement in situations that are necessarily indeterminate from the point of view of formal knowledge. Professional practice, that is, depends on judgment in order to yield an outcome that can further the profession's intended purposes." SULLIVAN ET AL., *supra* note 103, at 8; *see also* STUCKEY ET AL., *supra* note 75.

126. Comments by the Board of Governors of the District of Columbia Bar on Proposed Amendments to District of Columbia Court of Appeals Rule 48 (Legal Assistance By Law Students) (submitted February 12, 2014) (on file with the author).

only in relation to permitting non-Bar members to supervise students,<sup>127</sup> and by the Committee on the Unauthorized Practice of Law which wanted to see specific details regarding the pre- and co-requisites before the change was made.<sup>128</sup> Nonetheless, the judges and professors began by expressing their different perspectives on how prerequisite course requirements should factor into the updated rules. The ad-hoc committee understood that both clinical courses and the basic law school curriculum had changed significantly since the original rules were promulgated. However, the judges were not as familiar with the changes in academia. The law professors pointed out that prerequisite courses were not relevant to some clinics—especially non-litigation clinics—and that they prevented students from joining some clinics. The professors also stressed that clinic students learned the substantive law and procedure used in their cases more thoroughly in the clinic than in survey courses. The judges did not question the value of the changes in the academy but initially believed students would be better prepared if they took even more courses related to their clinic work before they began to represent clients. While acknowledging the validity of this assertion and the value in students’ training, the professors highlighted that law school is a time-limited experience. The professors understood the pedagogical notion of scaffolding as a way to improve a student’s understanding of the practice of law<sup>129</sup>—that when training is properly sequenced, learning is enhanced and embedded for future use.

At some point, the judges abandoned their resistance and agreed to eliminate mandatory course prerequisites from the student practice rule. Their willingness to try a new method for ensuring preparedness derived from the waivers of these course requirements they had granted in the past, from the realization that few other states required prerequisite courses prior to clinic enrollment, and from a clearer understanding of pedagogical methodology that supported the ad-hoc committee’s position. They also recognized that once they incorporated Rule 49’s broad definition of the “practice of law” into the student practice rules, the prerequisite courses would no longer be related to every kind of clinic.

The amended rules now require that law schools prescribe the necessary pre- and co-requisite requirements for each clinical course to ensure that students are prepared to represent people in the kinds of matters with which each clinic deals.<sup>130</sup> The Court did not attempt to

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127. See *infra* note 195, for a discussion of the proposal to permit visiting faculty to supervise law students.

128. Comments by Cynthia G. Wright, Chair, Committee on the Unauthorized Practice of Law, 3 (submitted March 6, 2014) (on file with the author).

129. Wallace J. Mlyniec, *Developing a Teacher Training Program for New Clinical Teachers*, 19 CLINICAL L. REV. 327, 341 (2012).

130. D.C. App. R. 48(b)(2); see Appendix B.

select those courses but rather left it to the good judgment of the faculty to determine the appropriate courses.

#### b. The Clients

The 1982 rule, like the original rule, allowed students to represent only “indigent” clients. There were two reasons for this limitation: The court did not wish to take fee-generating cases away from the practicing bar, and, more important, the Court and the Bar wanted to assist the hundreds of poor clients who needed representation but who were unable to retain paid counsel.<sup>131</sup> The ad-hoc committee sought to expand representation by replacing the indigency restriction with a provision that would allow students to represent “under-served persons” and leave it to the good faith of the clinical directors to implement the rule. The ad-hoc committee believed that the indigency requirement had become too restrictive given the changing demographics of those in need of assistance and that student representation posed little danger to the profitability of the practicing bar. The ad-hoc committee also believed that the rules should specifically permit representation of non-profit organizations. Although the 1982 rules did not specifically preclude representation of non-profits or tenant coops, the ad-hoc committee felt that clarity would eliminate any ambiguity.

The ad-hoc committee advanced several arguments for expanding the client base. The goal of all the clinical programs in all the District of Columbia law schools is to provide legal services to under-represented people and public interest organizations. A definition of “the under-represented” that is limited to indigent people is elusive because the term is subject to many interpretations. For example, the Access to Justice Commission defined a low-income family as a family of four earning 200 percent of the federal poverty threshold or \$42,201.<sup>132</sup> The Commission noted that some organizations use 250 percent of the federal threshold as a standard.<sup>133</sup> Though indigency thresholds are updated annually for inflation, they have remained otherwise unchanged for decades and may not accurately indicate who is truly poor. Indeed, while many routine expenses have become increasingly important, including childcare, health care, and transportation, their changing cost-values are not reflected in

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131. *Gideon v. Wainwright*, 372 U.S. 335 (1963), had established a constitutional right to counsel for indigent criminal defendants in 1963. *In re Gault*, 387 U.S. 1 (1967), had done the same for alleged juvenile delinquents. Although no similar constitutional right existed in 1967, unrepresented litigants were the staple of landlord-tenant court, small claims court, and domestic relations court.

132. See JUSTICE FOR ALL, *supra* note 2, at 21.

133. *Id.* at 19; see also *id.* at 21–28.

indigency calculations.<sup>134</sup>

The indigent litigants who still populate the civil courts have been joined by the near-indigent who, like their poor counterparts, cannot find lawyers to take their cases to court or represent them in matters not involving litigation.<sup>135</sup> Clinic directors often turn away prospective clients they are not sure meet the indigency standard. The plight of the near-poor caused the Access to Justice Initiative to report that moderate-income individuals may have even less access to legal assistance than individuals in poverty.<sup>136</sup> District of Columbia law school clinics have been ready to provide legal services, but the indigency limitation has prevented students from representing under-represented people who did not fall below the indigency threshold. Though people who need Earned Income Tax Credit assistance, people interested in micro-enterprise and small business, tenant groups seeking to form co-ops, dying people with small estates, and individuals seeking bankruptcy protection may or may not be technically indigent, they need legal assistance to participate fully in the American economy and the American legal system.<sup>137</sup> Small claims cases, torts cases with small damages, and most tenant claims do not attract the private bar since litigation costs outweigh possible awards. Seekers of human rights protection often have some ability to pay, but the costs of pursuing their claims are usually prohibitive. Though some asylum-seekers are able to pay some amount for legal services, few private lawyers specialize in this field. The few public interest organizations and practicing lawyers that have the necessary expertise often refer clients to law school clinics because they themselves are unable to take on additional clients or because clinical faculty and their program staffs have developed greater expertise in these areas of law and practice. The clinics, however, have

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134. *Id.* at 19–20; *see also* JENNIFER COMEY, ET AL., EVERY KID COUNTS IN THE DISTRICT OF COLUMBIA: 15TH ANNUAL FACT BOOK 2008 19–20 (2008) (showing that while public preschool and kindergarten enrollment has increased steadily annually between the 2001–02 and the 2009–10 academic years, enrollment in federally funded Head Start programs increased during the last two years of that period after remaining stagnant since at least 2004). The American Poverty Act of 2008 would have required the Census Bureau to develop new measures of poverty, but the bill died in Committee. The American Poverty Act, H.R. 6941, 110th Cong. (2008).

135. In 2005, nearly half of plaintiffs with probate matters before the DC Superior Court’s Probate Division were *pro se*. JUSTICE FOR ALL, *supra* note 2, at 7, 129–34. “Almost all of the small estate matters (*i.e.*, those involving assets of \$40,000 or less) and the majority of the trust matters before” that tribunal had *pro se* plaintiffs. *Id.* Thirty-eight percent of plaintiffs were *pro se* in adoption cases. *Id.* Over ninety-eight percent of respondents were unrepresented in paternity and child support cases. *Id.* Ninety-eight percent of all litigants—petitioners and respondents—in the Domestic Violence Unit were *pro se*. *Id.* Only about three percent of defendants in the more than 46,000 cases heard in Landlord and Tenant Court in 2006 were represented by counsel. *Id.*

136. *Id.* at 19.

137. *Id.* at 21–28.

been reluctant to take on these clients because of uncertainty concerning the application of the indigency requirement to the prospective client.

There is great need for legal assistance among people who are not formally indigent, yet there are few practitioners able to take these cases.<sup>138</sup> Given the volume of cases clinics actually take, little if any competition with private practitioners for revenue would occur if the clinic client base were expanded.<sup>139</sup> Most states have not limited students to representing indigent clients: Student practice rules in only sixteen states<sup>140</sup> limit representation to the indigent. Federal agency student practice rules seldom contain indigency requirements,<sup>141</sup> and the United States Court of Appeals for the District of Columbia Circuit does not have an indigency requirement.<sup>142</sup> Although the ad-hoc committee did not investigate the reasons many jurisdictions chose not to maintain income ceilings, it nevertheless believed that the District of Columbia citizenry's needs were such that the D.C. student practice rules' client qualification standards should be relaxed. Given the difficulty of using income-based guidelines, the proposed amendments sought to eliminate the indigency restriction entirely in order to increase the number of lawyers able to serve under-served populations in the District of Columbia.

Public comments supported expansion of the client base, but the judges were initially wary of broadening the rules to allow student representation of non-indigent clients. The judges correctly pointed out that there was no shortage of poor people needing legal assistance in the District of Columbia, and that the clinics were not wanting for clients. The judges wondered whether a specific allowance of representation for non-profits would drive clinics away from their public service model. They wondered whether clinics would find interesting start-up companies more attractive than public interest organizations or even poor clients, and thus undermine rather than enhance access to justice. The courts had come to rely on students in many of their divisions and did not want to see their services diverted toward organizations that might start out small but blossom into mega-corporations.

Over time, the judges' discomfort with allowing students to represent non-indigent people subsided. Perhaps the change was based on a

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138. "[T]he needs of those who cannot afford a lawyer substantially outweigh the available resources." *Id.* at 10; *see also id.* at 43–82.

139. *See id.* at 42.

140. Connecticut, Georgia, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia. Kentucky permits representation of the indigent and of students irrespective of financial ability. *Student Practice Rules—Clinical Research Guide*, *supra* note 27.

141. *See, e.g.*, 8 C.F.R. §§ 292.1, 1292.1 (2014) (governing practice before the United States Immigration Court).

142. *Cf.* D.C. App. R. 46 (2013).

realization that all the law schools built their clinics on a social-justice model, where those most in need of service were the ones who would receive representation, and that the clinics were unlikely to abandon that model. Perhaps the judges recognized that the Court's own Access to Justice Commission sought more lawyers for the near-poor. The Court was also aware that many states had no indigency requirement.<sup>143</sup> Whatever the cause of the shift, the Court agreed to expand the rule beyond indigency, and to specifically include non-profit organizations as potential clients. The ad-hoc committee agreed to some limitation on eliminating the indigency restriction.

It took time to find language that encompassed both the ad-hoc committee's and the judges' thinking. The Court and the ad-hoc committee ultimately agreed that the revised rule should permit students to represent "any client who is indigent or who, because of limited financial ability or the nature of the claim, would be unlikely to obtain legal representation"<sup>144</sup> and to leave it up to the good faith of law school faculty to implement the rule. The new rule would also specifically permit representation of any non-profit organization,<sup>145</sup> eliminating the uncertainty engendered by the 1982 rule and again leaving it to faculty supervisors to select non-profit clients who could not otherwise find pro bono counsel.

## 2. THE ADMISSIONS AND CERTIFICATION PROCESS: CHARACTER SCREENING AND DEAN'S CERTIFICATION

Pursuant to the 1982 student practice rules, students seeking authorization to practice were required to submit to a character screening and be approved by the District of Columbia Committee on Admissions.<sup>146</sup> The ad-hoc committee surveyed several state and federal student practice rules and found that the process the District of Columbia rules prescribed was far more cumbersome than what most states required. Although the screening process was not as extensive as that required for a lawyer applying for D.C. Bar membership, it did require time and effort by court administrators and law school faculty, administrators, and students. The ad-hoc committee believed that the process was redundant and could be minimized by relying on the character screening that law schools already undertook prior to students' applying for permission to practice.

The 1982 rules required that a law school dean certify that a student was of "good character and competent legal ability" and "adequately

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143. See *supra* note 140 (listing the sixteen states that maintain indigency requirements).

144. D.C. App. R. 48(a)(1); see Appendix B.

145. See D.C. App. R. 48(a)(1).

146. D.C. App. R. 48(b)(1) (1982).



trained to participate in cases or matters pending before the courts or administrative tribunals.”<sup>147</sup> In ascertaining good character, the clinic directors asked students a set of questions concerning prior arrests, school disciplinary actions, alcohol and drug use, debt, mental health, and litigant status<sup>148</sup>—questions provided by the Committee on Admissions.<sup>149</sup> Students who indicated that they had prior incidents concerning those activities were required to provide written explanations relating to those incidents, and official documents that confirmed their explanations. These students were then counseled by the faculty about their prior actions so that the dean could properly certify that each student was of good character. Such students were also reminded that they would have to collect this information again and answer with even more specificity to state bar committees on admissions when they applied for full membership as lawyers. Once a clinic director was satisfied that a student met the student practice rules’ character requirements, the director forwarded the student’s application to the dean, who certified the student’s good character.

The dean was also required to certify the student’s competency, and did so based on the student’s academic record.<sup>150</sup> Then the application, the student’s answers to the questionnaire concerning arrests and other potentially disqualifying information, the accompanying documentation concerning those events, and the dean’s certificate of good standing were submitted to the Committee on Admissions. The Committee on Admissions reviewed a student’s application package in much the same way the clinic director had before the application was submitted. The Committee staff occasionally requested additional information but conducted no independent investigation beyond reviewing what the applicant had submitted.

No student in recent memory has been denied a student certification once the documentation was provided.<sup>151</sup> Thus, the ad-hoc committee believed that requiring a second investigation after a law school dean has

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147. D.C. App. R. 48(b) (1982).

148. See Appendix C *infra* for the questions asked by the Committee on Admissions.

149. Today’s students may have many more notations on their records for minor arrests and for school disciplinary actions than prior students had because of high school and college zero-tolerance policies. These incidents, which usually occur well before entry into law school, do not result in a denial of admission to the regular bar, but they can cause delays in students’ certifications while documentation is collected from students’ home states. Students’ minor behavioral lapses are not different from those of their predecessors. What has changed is society’s response to those minor behavioral lapses. Notwithstanding this phenomenon, no student has been denied admission to practice because of such minor transgressions.

150. Some, but not all, schools had minimum grade requirements for student participation.

151. See *supra* notes 93, 95.

certified a student's good character, using the same information, created unnecessary administrative burdens and costs to the Committee on Admissions and to the clinic faculty who had to organize and transmit the material. Students were disadvantaged because their work in the clinic and their educational experiences were often delayed while students gathered the necessary information and awaited decisions from the Committee on Admissions. This problem was especially true in Spring-semester clinics.<sup>152</sup>

The ad-hoc committee noted that the United States Court of Appeals for the District of Columbia Circuit did not require character screening by a Bar or Court Committee on Admissions: It delegated the certification of good character to the law school dean,<sup>153</sup> as did most federal courts.<sup>154</sup> Maryland and Virginia had minimal requirements: Applicants must be familiar with state Rules of Procedure and Professional Conduct, and law school deans must certify the students' good character and academic standing.<sup>155</sup>

The ad-hoc committee found that only a few states required students to be formally screened by the Bar to obtain a limited license to practice. A search of the state student practice rules and conversations with clinic directors at other law schools<sup>156</sup> indicated that most states required only a familiarity with the rules and a certification by the dean as to character. Only Florida by its rules required a formal character screening of all students seeking a certification to practice.<sup>157</sup> Missouri rules required screening for those students who also were pre-applying to the Missouri Bar,<sup>158</sup> but no formal screening for other student applicants. Alabama required a formal character screening by virtue of an interpretation of the student practice rule,<sup>159</sup> and West Virginia<sup>160</sup> prohibited practice by

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152. First-semester students usually gather the information during the summer.

153. D.C. App. R. 46(g)(3)(D) (2013).

154. *See, e.g.*, 4th Cir. Local Rule 46(a) (2013); 3d Cir. Local Rule 46.3 (2011); 2d Cir. Local Rule 46.1(e)(3) (2012).

155. RULES GOVERNING ADMISSION TO THE BAR OF MD. R. 16 (1990); RULES OF THE SUP. CT. OF VA., PART SIX, § IV, ¶ 15 (2009). Maryland conducts no actual student screening. Once a clinical program is certified, all future students are admitted upon certification from the Dean. E-mail from Professor Eric Easton, Chair of the Maryland State Bar Association's Section on Legal Education and Admission to the Bar, to Professor Wallace Mlyniec, Professor Georgetown University Law Center (Sept. 8, 2009) (on file with the author).

156. Results of a discussion thread on the Clinical Legal Education Listserv among clinical professors, conducted between January 26, 2009, and January 31, 2009, on file with the author.

157. Rules Regulating the Fla. Bar ch. 11, R. 11-1.3(a) (2014).

158. Mo. Sup. Ct. R. 13.02.

159. E-mail from Robert R. Kuehn, Professor of Law & Associate Dean for Skills Programs, University of Alabama School of Law, to Professor Wallace Mlyniec,

students who had been convicted of a crime of moral turpitude or a felony and by students who had been subjected to an honor code violation. All other states required only a dean's certification.

Requiring that lawyers and students be of good character is important to preserving public confidence in the profession; but the District of Columbia law schools' procedures advance that goal much more efficiently and productively than can screening by the Committee on Admissions. For learning purposes, it makes sense for certification and counseling functions to be performed by law school faculty rather than by the Committee on Admissions. The student practice rules place ultimate responsibility for students' actions on supervising attorneys.<sup>161</sup> Supervisors are also responsible for their subordinates' actions by virtue of the Rules of Professional Conduct.<sup>162</sup> Finally, the dean<sup>163</sup> and the Court<sup>164</sup> may revoke a student's license at any time if reason to do so becomes apparent.

While in school, students are in the process of learning the law and the norms and values of the profession. Clinic directors' conversations with students about character rules and professional norms and values impress upon the students the need for and the importance of maintaining high standards within the profession. Further, understanding their obligations and responsibilities in the context of the actual practice of law helps students to better understand the role of a lawyer in the legal system. Formally enforcing character rules too strictly or too early prevents students from enrolling in a clinic and from being exposed to the professionalism they need prior to applying to the Bar. Ironically, students most in need of professional socialization are sometimes deprived of those lessons because a clinic director believes it will take too long to assemble the written documentation for the Committee on Admissions.

The ad-hoc committee believed that it made sense to leave the certification process within the schools and eliminate the Committee on Admissions' redundant and time-consuming processes. Experiences in other states and in the United States Court of Appeals for the District of Columbia Circuit demonstrated that screening and certification by a dean was sufficient to guarantee the high standards the Court, the Bar, and the public required.

Only the D.C. Court of Appeals Committee on the Unauthorized Practice of Law objected to streamlining the character review and

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Professor Georgetown University Law Center (January 25, 2009) (on file with the author).

160. W. VA. RULES FOR ADMISSION TO THE PRACTICE OF LAW R. 10.1(c) (1989).

161. D.C. App. R. 48(e)(2).

162. D.C. RULES OF PROF'L CONDUCT R. 5.1. (2007).

163. D.C. App. R. 48(c)(1)(ii).

164. D.C. App. R. 48(c)(1)(iii).

application processes.<sup>165</sup> They believed that entrusting the task to the deans created an “inherent tension between the law school dean’s responsibility to undertake this obligation and the understandable desire to include as many students as possible in an approved clinical program”<sup>166</sup> and that the dean would not have sufficient time to devote to this task.<sup>167</sup> Notwithstanding these objections, the ad-hoc committee’s proposal on this matter met with no resistance from the judges. The Committee on Admissions acknowledged that its processes for character screening resembled those the law schools used, and the judges agreed that redundancy was unnecessary. The final rule requires that a student “be certified by the dean of his law school as being of good character and competent legal ability and as being adequately trained to engage in the limited practice of law as defined by these rules.”<sup>168</sup>

### 3. FEES FOR SERVICES

#### a. Student Stipends

Since 1968, it was understood that students should be educated, not enriched, by clinical practice; students were to receive neither fees from clients nor compensation from the court’s budget for representing indigent defendants in criminal cases.<sup>169</sup> The ad-hoc committee understood that students’ lives and financial constraints had changed dramatically since 1968. The ad-hoc committee also knew that students who completed a clinical program often worked on clinic cases after they completed the clinic course but could receive neither credit (by virtue of most law school rules) nor payment (by virtue of court rules). Additionally, the ad-hoc committee knew that students who completed the formal requirements of a clinical program often wished to continue representing clinic clients under supervision as volunteers or for additional credit or financial assistance from their law schools. Some students who had graduated wished to continue representing clients during the summer while they studied for bar examinations. They were able to do so pursuant to the existing student rules because an authorization to practice as a student usually expires in July and can be extended until the student is either admitted to a state bar

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165. Comments by Cynthia G. Wright on Proposed Amendments to District of Columbia Court of Appeals Rule 48 (Legal Assistance By Law Students), Chair, Committee on the Unauthorized Practice of Law (submitted March 6, 2014) (on file with the author).

166. *Id.* at 2.

167. *Id.*

168. D.C. App. R. 48(b)(3); Appendix B.

169. D.C. Code §11-2604 (2001), the Criminal Justice Act, permits payments to lawyers for representing indigent criminal defendants but D.C. Superior Court Rules prohibit the payment of such funds to students. *Cf.* D.C. Super. Ct. Crim. R. 44-I(f)(2)(A).

or denied such admission.<sup>170</sup> The rules of the District of Columbia Superior Court<sup>171</sup> and the United States Court of Appeals for the District of Columbia Circuit also authorize students to continue representing their clinic clients after the students have completed a clinic course.<sup>172</sup>

Students asked by clinic faculty to continue with their duties are often unable to do so without some remuneration. Clearly, the 1982 District of Columbia student practice rules did not and could not prohibit paying students who acted as law clerks on cases for their clinic supervisors. There was uncertainty, however, about whether students could be paid if they were acting as student lawyers pursuant to their certifications after they had completed their clinic courses. The rules could be read to prohibit students from receiving a student research or other like stipend from a law school while working on clinic cases during the summer or during the school year after completing a clinic course, because the student's authority to practice stemmed from a license granted pursuant to the student practice rules.<sup>173</sup> As a result, faculty members were wary of asking students to continue to work on their cases after they completed their clinic courses. The ad-hoc committee believed that the rules should be amended so that students could receive a research stipend or other similar grant if they continued to work on clinic cases after they completed their clinic courses.

The ad-hoc committee's research found that the United States Court of Appeals for the District of Columbia Circuit specifically permits law schools to pay students for their work on clinic cases.<sup>174</sup> In addition, twenty-five states specifically permit the supervising entity to pay students for their work in a clinic,<sup>175</sup> and an additional twenty-one states do not prohibit such payments.<sup>176</sup> The ad-hoc committee saw no reason to prohibit students from being paid by the law school for work on clinic cases after completing their clinical courses, so long as they were paid a typical student research stipend or with a grant paying a similar amount.

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170. See D.C. App. R. 48(c)(1)(i).

171. See D.C. Super. Ct. Crim. R. 44-I(f)(2)(A).

172. D.C. App. R. 46(g)(3)(C) (2013).

173. Surprisingly, the existing rules allowed students to receive salaries as employees of the United States, the District of Columbia, and the Public Defender Service while representing litigants, although these three entities no longer paid students who participated in a law school clinic. D.C. App. R. 48(b)(6) (1982).

174. D.C. App. R. 46(g)(4).

175. See *Student Practice Rules—Clinical Research Guide*, *supra* note 27 (including the following states: Alabama, Arizona, Colorado, Delaware, Florida, Hawaii, Kansas, Louisiana, Maine, Montana, Nevada, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, and Washington).

176. Arkansas, California, Connecticut, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, North Dakota, Tennessee, Utah, West Virginia, and Wisconsin. See *id.*

The ad-hoc committee proposed that the rule be amended to allow such payments.

There was no public comment about this issue. The Court was initially reluctant to authorize payments to students, based on the philosophical notion that clinic work was pro bono work. The judges also worried that payments for post-course work on clinic cases might be unregulated or resemble the kinds of payments students received from law firms for summer work. The law professors pointed out that students could already be paid for all sorts of work on a case, so long as they acted as clerks rather than as student attorneys. The ad-hoc committee assured the Court that money used for student stipends would come from pro bono fellowship organizations or from the schools in amounts no higher than those received by law school professors' research assistants. The professors also reminded the Court that many other states did not restrict such payments.<sup>177</sup> In the end, the Court agreed. The language the Court ultimately chose reads, “[p]ayment of a student research stipend or other law school based support, or a similar grant to a law student or a recent graduate who continues to work on clinic cases after the completion of the clinical course shall not make that student ineligible to practice under this rule.”<sup>178</sup>

#### b. Fees to Clinical Programs

The 1982 version of the District of Columbia student practice rules was silent on the issue of the payment of fees to clinical programs, but most clinical faculty assumed that law school clinics could not receive fees.<sup>179</sup> Despite the absence of authority in the Court of Appeals Rules,

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177. *Id.*

178. *See* D.C. App. R. 48(b)(5).

179. This created an interesting anomaly. If a clinic initiated a civil suit on behalf of a client where the law professor was the attorney of record and students assisted as law clerks and not certified law students, the clinic could obtain fees for the time that the professors and the students spent working on the case. *See* Jackson v. Brown, 614 N.E.2d 847 (Ohio Ct. App. 1992) (awarding attorneys' fees for student work); Jordan v. U.S. Dep't of Justice, 691 F.2d 514 (D.C. Cir. 1982) (holding that fees award could include payment to law school clinic even though students were unlicensed and even though students themselves did not receive payment, and that reduction based on alleged duplicative claims could not preclude payment to clinic entirely); *see also* Center for Biological Diversity v. U.S. Dep't of Interior, 696 F.3d 1 (D.C. Cir. 2012); Ustrak v. Fairman, 851 F.2d 983 (7th Cir. 1988) (reducing attorney's fees award where excessive time was billed at several steps of the litigation, including time for law student to review Court of Appeals rules). *But see* Nkihtaqmikon v. Bureau of Indian Affairs, 727 F. Supp. 2d 91 (D. Me. 2007) (refusing to grant fees for clinicians' work because billed attorneys' hours were sufficient to complete necessary work); Brown v. Iowa, 152 F.R.D.168, 176 (S.D. Iowa 1993) (adjusting over-estimated attorneys' fees, including student hours, to reflect time reasonable lawyer should have spent); Weaver v. New York City Emp'rs Ret.

clinical programs had been permitted since 1982 to receive fees, costs, and penalties prescribed by law in civil actions in the District of Columbia Superior Court, so long as the original indigency eligibility requirements were enforced.<sup>180</sup> That provision recognized that judgments, statutes, or settlements in civil cases often required the payment of lawyers' fees. The United States Court of Appeals for the District of Columbia Circuit also specifically permitted law school clinics to receive fees for their work.<sup>181</sup>

Clinical programs are expensive. Law schools expend millions of dollars from their operating budgets on clinical education. In the early years of clinical education, some of those costs were borne by foundation grants, but for the most part those grants are no longer available. Law schools must cover the costs of clinical education with tuition funds, and tuitions spiral higher every year. Because of the low student to faculty ratio in most clinics, the cost per student is generally higher than the cost per student in a typical lecture class.

As noted in the Access to Justice Commission's report, many low-income and moderate-income clients cannot find lawyers because they cannot cover the entire cost of a lawyer's fee or because the outcome of a contingency fee case will be too low or is too uncertain. The ad-hoc committee believed that if the rules were amended to permit clinics to receive fees below market rate or on a contingency basis, clinics could assist more clients, including people with small damage contingency cases and those who could pay a partial fee and also help defray the cost of the clinical program. The ad-hoc committee also believed that the Superior Court's rule concerning statutory and/or court-ordered fees and sanctions should be included in the Court of Appeals student practice rules to forestall challenges by adverse parties. Because there are not enough lawyers to meet the needs of low-income or moderate-income clients, such a change would not result in clinics taking clients from the practicing bar.

Most states' rules on fees and payment are less restrictive than the District of Columbia's 1982 rule on the matter. Twenty-five states specifically permit students' supervising entities to receive fees from clients,<sup>182</sup> and an additional twenty-one states do not prohibit the practice.<sup>183</sup> The ad-hoc committee believed the experiences in other states,

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Sys., No. 88 Civ. 2662, 1991 WL 24320, at \*2 (S.D.N.Y. Feb. 20, 1991) (awarding fees for students' work but adjusting amount). *But see* Wilkins v. Sha'ste, Inc., No. 99167 2013 WL 4138210, at \*2 (Ohio Ct. App. Aug. 15, 2013), *appeal docketed*, No. 2013-1794 (Ohio March 12, 2014) (declining to award fees for legal interns' work where litigant was never under any obligation to pay).

180. D.C. Super. Ct. Civ. R. 101(e)(1)(A).

181. D.C. App. R. 46(g)(4).

182. *Student Practice Rules—Clinical Research Guide*, *supra* note 27.

183. Arkansas, California, Connecticut, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, North Dakota, Tennessee, Utah, West Virginia, and Wisconsin. *Id.*

in the District of Columbia Superior Court, and in the United States Court of Appeals for the District of Columbia Circuit demonstrated the value of authorizing the collection of statutory and other fees and sanctions provided by law. The ad-hoc committee believed that specifically permitting clinics to receive certain fees and sanctions would enable clinical programs to provide representation to additional low- and moderate-income clients and non-profit organizations whose needs were not being met by market-rate attorneys. Thus the ad-hoc committee sought a clear rule that permitted clinics to accept reasonable fees as long as client income restrictions were met.

There was no public comment on this issue. For reasons not unlike those that underlay its initial concerns about student stipends, the Court was reluctant to approve an amendment allowing clinics to receive fees. Moreover, the Court believed that law schools should support their own clinics, and saw rising tuition as proof they could.<sup>184</sup> The ad-hoc committee could not convince the Court to allow clinics to receive below-market fees from clients who could pay something. Nonetheless, the parties reached an agreeable compromise, and the following language was adopted: “Nothing in this rule shall prevent a law school clinic from receiving court-ordered or statutory fees or court-ordered sanctions related to a case or legal matter.”<sup>185</sup> We left the larger issues about below-market fees from clients for another day.

#### 4. SUPERVISOR QUALIFICATIONS

Law schools, like other parts of universities, have a tradition of inviting professors from other schools to visit on their faculties for one or two semesters. Although non-clinical faculty easily accommodate visiting and new faculty appointments, such accommodations are more complicated for clinical faculty. Unlike visiting non-clinical faculty, new and visiting clinical faculty members must not only be active scholars and accomplished teachers but also active and competent practitioners.<sup>186</sup>

New and visiting clinical faculty members from other states are seldom members of the D.C. Bar. However, the 1982 student practice rules required that supervising faculty members in clinics be active members of the District of Columbia Bar and provided no exemption from this requirement. This prohibition was somewhat surprising since the

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184. The ad-hoc committee declined to engage in a complicated debate about law school finances and pointed out that clinics were often the least well-funded recipients of law school revenues.

185. D.C. App. R. 48(b)(5); Appendix B.

186. Since clinical education has become an accepted part of the academy, clinic faculty members have gained enhanced professional status, security, and governance rights and frequently are required to be productive scholars as well as able teacher-supervisors.



District of Columbia allows lawyers who are members of other state bars but not members of the District of Columbia Bar to practice and appear in court pro hac vice<sup>187</sup> or while providing pro bono legal services.<sup>188</sup> There is no history to explain why the original rule permitted only D.C. Bar members to be supervisors; but as the Board of Governors of the D.C. Bar argued, the differences between the D.C. Rules of Professional Conduct and the *Model Rules of Professional Conduct* is a basis for precluding non-D.C. Bar members from being supervisors.<sup>189</sup>

The student practice rules' faculty-restriction made appointing visiting faculty in clinics complicated. Faculty visits are sometimes arranged quickly because of an emergency. Visiting faculty members are sometimes invited from other law schools for one or two years in order to test a proposed new clinic, to provide release time for a clinic supervisor who is attending to research or other administrative duties, or to be considered for a permanent appointment. Although law schools usually pay the fees for a professor's bar admission, the delays inherent in the application process often render a professor's visit impossible or delay a visitor's ability to supervise students. Even if a visit can be arranged enough in advance to permit supervision immediately upon the visitor's arrival, many visiting faculty do not want to go through the lengthy process of submitting the D.C. Bar application and others simply do not want to maintain multiple bar memberships.

Law schools, including those in the District of Columbia, have expanded their clinical faculties to lower their student-faculty ratios and to staff the increasing number of seminars and small classes that are now prominent features of legal education. Appointing new faculty is somewhat less complicated than appointing visiting faculty but can have equally undesirable pitfalls. New faculty members are usually appointed in the late spring preceding their initial year of teaching at the new school. They often come from non-District of Columbia law schools, and accordingly are members of other state bars. New faculty members immediately apply to become members of the District of Columbia Bar, but the process is lengthy and often incomplete before the school year commences.<sup>190</sup> As a result, new faculty often cannot supervise students until their second or third semester in residence, and schools are forced to bring in short-term visiting faculty who are members of the D.C. Bar to

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187. D.C. App. R. 49(c)(7).

188. D.C. App. R. 49(c)(9).

189. Comments by the Board of Governors of the District of Columbia Bar on Proposed Amendments to District of Columbia Court of Appeals Rule 48 (Legal Assistance By Law Students) (submitted February 12, 2014) (on file with the author). Related concerns were voiced by the Committee on the Unauthorized Practice of Law. Comments by Cynthia G. Wright, Chair, Committee on the Unauthorized Practice of Law (submitted March 6, 2014) (on file with the author).

190. See D.C. Code §11-2501 (2001).

supervise students. If no local supervisor is available, the students, who enrolled in the course months before, are unable to represent clients.<sup>191</sup>

Other states' rules concerning clinic supervisors are more liberal than those of the District of Columbia. At least twenty-three states permit law professors who are members of another state's bar to supervise law students in a clinical program. Seventeen states have specific rules that allow special bar admission for law professors who are teaching in law school clinical courses.<sup>192</sup> The ad-hoc committee was aware of six additional states that allow law professors from other states to supervise students pursuant to a more general rule that allows non-state bar members to represent clients requiring pro bono assistance.<sup>193</sup>

The District of Columbia Bar permits members of other state bars to practice pro bono for two years and to practice pro hac vice without being members of the District of Columbia Bar.<sup>194</sup> Given the experiences in other states and the D.C. Bar's liberal treatment of non-D.C. lawyers in other circumstances, the ad-hoc committee proposed amendments that would allow new faculty to supervise students while their applications for membership in the D.C. Bar were pending and allow visiting faculty to supervise upon quickly receiving a waiver of the default rule from the District of Columbia Court of Appeals. The ad-hoc committee believed that this procedure would satisfy the Court's and the Bar's concerns about the knowledge and quality of supervisors and satisfy the law schools' academic needs and policies.<sup>195</sup>

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191. Usually a new faculty member is hired because there was no one else on the District of Columbia law school faculty able to assume the duties of the clinic. Non-clinical faculties are often unable to fill in because they are not members of the D.C. Bar or because they have no, or at least no recent, practice experience. In other cases, a school's clinical faculty is not in a position to take on additional responsibilities.

192. Arkansas, Arizona, California, Idaho, Illinois, Michigan, Nevada, New Mexico, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming. *Student Practice Rules—Clinical Research Guide*, supra note 27.

193. In addition to the seventeen states that permit law professors to run clinics without being Bar members, an additional fourteen states permit non-Bar members who are not clinical professors to represent indigent clients. They are Alaska, Delaware, Florida, Hawaii, Kentucky, Maryland, Massachusetts, Minnesota, New Jersey, North Dakota, Oregon, Pennsylvania, South Dakota, and West Virginia. We have been advised that at least Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, and West Virginia consider clinics public interest organizations and permit out of state lawyers to supervise. *Id.*

194. Comment to D.C. App. R. 49(c)(7) (citing *Brookens v. Committee on Unauthorized Practice of Law*, 538 A.2d 1120, 1124 (D.C. 1988)).

195. Based on the authors' personal knowledge, permitting non-D.C. Bar members to supervise would require amending not only the student practice rules but also District of Columbia Bar Rule XI concerning disciplinary proceedings to make new and visiting faculty members who supervise students' cases subject to the disciplinary jurisdiction of the District of Columbia Court of Appeals and its Board on Professional Responsibility.

Neither the judges nor the Board of Governors of the District of Columbia Bar were comfortable with this proposed amendment. The Committee on the Unauthorized Practice of Law had similar reservations. Although the judges recognized the asymmetry between Rule 48's requirements for supervisors and Rule 49's provisions for pro bono and pro hac practice, they saw reasons to expect more from lawyers who supervised students. They also believed that the District of Columbia had enough qualified lawyers to fill visiting professor appointments.<sup>196</sup> The

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The Court of Appeals amended Bar Rule XI when they amended Rule 48. *Court of Appeals Amends Rule Governing Legal Assistance by Law Students, Jurisdiction*, D.C. BAR (Oct. 8, 2014), <https://www.dcbbar.org/about-the-bar/news/rule-48.cfm>.

196. This statement is partially true. The District of Columbia has an ample supply of qualified lawyers. On the other hand, there is a significant difference between supervising lawyers in practice and supervising students in a clinic. The goals of the two are different and the pedagogy of clinical education is highly sophisticated and requires a considerable amount of experience to master. See generally Wallace J. Mlyniec, *Where to Begin: Training New Clinical Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505 (2012). D.C. Superior Court Judge Todd Edelman, former training director at the District of Columbia Public Defender Service and a former Visiting Professor of Law at Georgetown, described the differences this way:

The way I look at it, the goals of a criminal clinic supervisor are to teach the students some things about the role of a lawyer, trial practice, relationships with clients, the substantive law, and ethics, to provide a public service, and to help students determine their suitability for this kind of work. Those goals control, at least in a rough way, the model of supervision. For the most part, the students do not view the work of the clinic as their life's work, and a good portion of my supervision (not only at the beginning of the year, but throughout the academic year) consisted of motivating the students by focusing them on the mission and importance of the work and on the academic mission of the clinic. While the goal of the clinic was to teach by allowing the students to do as much as possible on the case, there was always an understanding that the supervisor was ultimately responsible for each case and client. Finally, because the point of the clinic is to provide an outstanding academic experience, caseloads are kept low, and reflections on (and even criticisms of) the models of representation are encouraged. In a public defender or legal services office, the ultimate goal of the supervisor is to provide new attorneys the tools to succeed on their own. Given the large caseloads of line attorneys and the heavy responsibilities of the supervisors, as well as the fact that the cases are the responsibility of the line attorney rather than the supervisor, the type of intensive supervision of every aspect of the case that should be the norm in a clinic cannot be and should not be the supervision model in a public defender or legal services office. While the supervision in a professional office is thus, less exhaustive and intensive, it is aimed at improving higher-tiered skills. There is less space and need for discussions of the overall value and ethics of the work. The supervision focuses on broad questions concerning strategy and case theory, on fine-tuning trial preparation, and on the use of advanced trial techniques. It does not focus on the day-to-day management or the preparation of the

Bar was especially resistant, believing “there are risks in entrusting such responsibility to individuals who do not have the relevant practice experience in the District of Columbia and who are unfamiliar with the D.C. Rules of Professional Conduct and District of Columbia practice.”<sup>197</sup> The Board noted that the D.C. Rules of Professional Conduct differed from the *ABA Rules of Professional Conduct* in significant ways, and feared that visiting professors would not know the differences.<sup>198</sup> The

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case. Nor does the supervision focus on the larger systemic and societal questions that arise in the case, or on the personal development of the lawyer.

Quoted in Wallace J. Mlyniec, *Developing a Teacher Training Program For New Clinical Teachers*, 19 CLINICAL. L. REV. 327 (2012). It also misconceives the nature of modern law faculties in which academic credentials are at least equally if not more important than being a successful practitioner.

197. Comments by the Board of Governors of the District of Columbia Bar on Proposed Amendments to District of Columbia Court of Appeals Rule 48 (Legal Assistance By Students), 3 (submitted February 12, 2014) (on file with the author).

198. *Id.* at 3–4. The Board of Governors noted that “Under the D.C. Rules of Professional Conduct (“D.C. Rules”) and the American Bar Association *Model Rules of Professional Conduct* (“ABA *Model Rules*” or “*Model Rules*”), the basic duties of competence, diligence, loyalty, and protection of client information are substantially the same. However, although some former differences were narrowed as a result of relatively recent amendments to both the D.C. Rules and the ABA *Model Rules*, the D.C. Rules may still vary more from the *Model Rules* than other jurisdictions that have adopted the *Model Rules* format. In some instances, the D.C. Rules are more specific, for example, in addressing the application of particular rules to government lawyers. In other instances, the D.C. Rules are more general, for example, in addressing trial-related publicity in Rule 3.6. Some differences are substantive. Noteworthy differences between the D.C. Rules and the ABA *Model Rules* include, but are not limited to, the differences in the rules on written retainer agreements; confidentiality of information- both the scope of the duty and a lawyer’s limited ability to use or reveal Rule 1.6 protected information pursuant to narrowly defined exceptions; written waivers requirements; paying or guaranteeing client expenses; imputation of conflicts of interests; a lawyer’s ability to report out Rule 1.6 information when a lawyer represents an organization; safekeeping of property; withdrawal; prospective clients; candor to tribunal; inadvertent production of privileged documents; nonlawyer partners; solicitation; choice of law; and nondiscrimination. One area in which the D.C. Rules vary significantly from the ABA *Model Rules* (and those jurisdictions that follow the ABA *Model Rules*) is on Rule 3.3 (Candor to the Tribunal). A specific example where a supervising lawyer unfamiliar with the D.C. Rules might resolve an ethical dilemma incorrectly would be in a civil matter in which a clinic law student discovered that a client’s statement/s of material fact were patently false and as a result, the student’s statement/s to a tribunal about a material fact or facts were also false. The proper course of conduct would be to discuss and persuade the client to correct the record, or to allow the student to do so. If the client refused to correct the record or to allow the student to do so, the only proper course of conduct would be for the student to seek to withdraw (pursuant to D.C. Rule of Professional Conduct 1.16) without alerting the tribunal as to the reason for withdrawal except under a very narrow exception. This is because the reason for withdrawal is itself protected by Rule 1.6 (Confidentiality). In contrast, a lawyer resolving this question under the rules of a jurisdiction that had

Board felt that given the short terms of their stays, visiting faculty members would not be invested in learning those differences.<sup>199</sup> The Board also questioned whether the “high standard of supervision [could] be maintained if the requirement of active D.C. Bar membership [were] eliminated”<sup>200</sup> and worried that the students might be put at risk of ethical violations based on non-D.C. Bar member supervisors’ misinterpretations of the Rules of Professional Conduct. These fears assume that visiting faculty members would immediately begin to supervise without preparation and training to ensure that they understood key aspects of District of Columbia law and practice. Such fears are of course, without substance.

Despite these initial disagreements and the Board of Governors’ reservations, the judges and the ad-hoc committee looked for ways to accommodate all the interests involved. A compromise solution was derived from comments by the Bar’s Board of Governors. In its comments, the Board speculated that the Court might be willing to allow new and visiting professors to supervise without being members of the D.C. Bar and suggested a series of conditions it believed would satisfy the Board’s concerns and protect the public. The Governors proposed that faculty members who were not members of the D.C. Bar should, like those non-D.C. Bar members practicing pursuant to Rule 49, be members in good standing of a state bar, have not ever been disbarred or suspended for disciplinary reasons, and have not resigned membership in any state with such charges pending.<sup>201</sup> The Governors suggested that non- D.C. Bar member faculty supervisors be supervised by a member of the District of Columbia Bar<sup>202</sup> and that they, like all new members of the D. C. Bar, be required to successfully complete a course on ethics and practice conducted by the Bar.<sup>203</sup> The judges and the ad-hoc committee accepted these suggestions. The amended rules allow a practitioner who joins a District law school’s permanent clinical faculty to supervise students if he or she is an active member in good standing of the highest court of any

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adopted ABA Model Rule 3.3 would have an entirely different ethical duty. Under ABA Model Rule 3.3, the lawyer would be required to tell the tribunal of the material misrepresentation, even if the client directed the student to stay silent. In the District of Columbia, however, the lawyer's disclosure to the tribunal in most circumstances would be a violation of D.C. Rule.

199. *Id.* at 3–6.

200. *Id.* at 3. The Committee on the Unauthorized Practice of Law had similar reservations. Comments submitted by Cynthia G. Wright, Chair, Committee on the Unauthorized Practice of Law, 2 (submitted March 6, 2014) (on file with the author).

201. Comments by the Board of Governors of the District of Columbia Bar on Proposed Amendments to District of Columbia Court of Appeals Rule 48 (Legal Assistance By Students), 7 (submitted February 12, 2014) (on file with the author).

202. *Id.*

203. *Id.* at 8–10.

state, has not been sanctioned by any state bar or be pending disciplinary proceedings, and has applied to the D.C. Bar within ninety days after assuming his faculty position. Such a faculty member must be supervised by an enrolled, active member of the Bar who is employed by the law school, must be subject to D.C. Bar rules, and must cease supervising students if his bar application is denied.<sup>204</sup> Similarly, a visiting faculty member must seek a waiver of the student rule's default provision regarding supervisors rather than seek admission to the D.C. Bar and meet the other conditions that apply to new faculty members. They must also complete the Mandatory Course on the District of Columbia Rules of Professional Conduct and District of Columbia Practice required for new admittees to the District of Columbia Bar.<sup>205</sup>

### C. ISSUES ARISING FROM PUBLIC COMMENTS

Two issues that deviated from the ad-hoc committee's proposed amendments arose during the public comment period. The first concerned the role that the Office of Administrative Hearings ("OAH") would have in promulgating rules for students who appear before District of Columbia agencies. The OAH's Chief Administrative Law Judge noted that the OAH had promulgated its own rules concerning student practice<sup>206</sup> and argued that it should be allowed to continue to do so. Second, some members of the District of Columbia pro bono bar suggested that the proposed amendments did not go far enough and that student practice in pro bono matters should be decoupled from what they perceived to be unnecessarily restrictive rules concerning clinics. The ad-hoc committee opposed both suggestions based on pedagogical and client concerns.

#### 1. THE ROLE OF THE OFFICE OF ADMINISTRATIVE HEARINGS

The Chief Administrative Law Judge noted that the Office of Administrative Hearings had promulgated its own student practice rules that reflected the needs of the clients who appeared before OAH hearing panels and the procedures used by its tribunals.<sup>207</sup> Although Rule 48 specifically covered practice before administrative tribunals,<sup>208</sup> the Chief Judge and some clinical teachers believed that Rule 49 created an exemption for lawyers and other persons practicing before D.C. agency tribunals<sup>209</sup> and that the exemption was applicable to law students as

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204. See D.C. App. R. 48(e)(4)(i).

205. See D.C. App. R. 48(e)(4)(ii).

206. 1 D.C.M.R. §§ 2833.4–2833.6.

207. See *id.*

208. D.C. App. R. 48(a)(4).

209. 1 D.C.M.R. § 2833.1, citing D.C. App. R. 49(c)(1), (4), (8), and (9).

well.<sup>210</sup> Moreover, as several commenters noted and as the ad-hoc committee and the Court recognized, non-D.C. lawyers and even non-lawyers are permitted by law to represent people in many of the cases brought before the agencies.<sup>211</sup> Therefore, they asserted, no law or policy prohibits law students from providing representation in similar kinds of cases.

The ad-hoc committee recognized that Rules 48 and 49 seemed to contradict each other, but it believed that Rule 49 was written for bar-admitted lawyers, not students who were regulated by Rule 48. The ad-hoc committee also noted that the OAH student rules were less stringent than Rule 48, in that they allowed students to practice law in administrative tribunals without participating in any formal training, completing pre- or co-requisite courses, or having received a certification of good character and legal competence. In addition, Rule 49 provided no academic standards for supervising lawyers other than that they be members of the D.C. Bar.<sup>212</sup>

Because the ad-hoc committee believed that students were bound by Rule 48, it believed that students, at least those who appeared in cases where lawyers were required, should be governed by Rule 48. The OAH believed it needed students to help the hundreds of poor litigants who came before its tribunals, and argued in its public comments that it had the authority pursuant to Rule 49 to create its own rules. The ad-hoc committee recognized these concerns but believed the OAH position invited a poor educational experience and could put clients at risk.

## 2. THE POSITION OF THE PRO BONO BAR

The pro bono organizations, through their public comments, did not object to an expansion of the student practice rules. Instead, many of the public commenters believed that the proposed rules were too restrictive and that pro bono organizations should be able to make more use of students with fewer restrictions. Pro bono organizations pointed to a long history of D.C. law students participating in pro bono work, performing tasks similar to those students have performed in private law firms and public interest organizations for years. Neither the 1982 student practice rules nor the proposed amendments sought to affect this activity because

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210. Comments of the District of Columbia Office of Administrative Hearings on Proposed Amendments to District of Columbia Court of Appeals Rule 48 (Student Practice), submitted by Mary Oates Walker, Chief Administrative Law Judge, dated December 31, 2013 (on file with the author).

211. *See, e.g.*, *Digital Broadcast Corp. v. Rosenman & Colin, LLP*, 847 A.2d 384, 389 (D.C. Ct. App. 2004); *Rood v. LaPrade*, 444 A.2d 950, 952 (D.C. Ct. App. 1982) (“There is no prohibition in the rules of the Superior Court against an appearance *pro hac vice* by an attorney whose firm has an office in the District of Columbia.”).

212. 1 D.C.M.R. §§ 2833.4–2833.6.

students working with pro bono organizations were not giving legal advice or independently signing documents, and thus were not “practicing law” under Rule 49.<sup>213</sup> When students assist lawyers with pro bono cases, only the lawyers bear responsibility for the legal matters.

The pro bono organizations wanted more, asking the Court to allow students to practice under the supervision of a pro bono organization lawyer without complying with the rigorous requirements that accompanied practice as part of clinical education courses.<sup>214</sup> The ad-hoc committee feared that allowing students to practice without the formal training clinics provide would create serious risks for clients and provide poor education for the students.

#### D. BASES FOR THE AD-HOC COMMITTEE’S OPPOSITION

##### 1. EDUCATIONAL EXPERIENCE: MERGING THEORY AND PRACTICE

The clinical legal education model was developed to broaden legal education and to equip students with the legal practice skills they cannot obtain from the textbook-based theoretical coursework.<sup>215</sup> Though opinions vary as to which practical skills are most essential,<sup>216</sup> clinical legal education has generally sought to supplement the doctrinal foundation and analytical skills the Langdell core curriculum ostensibly

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213. The American Bar Association does authorize such programs but sees them as providing a much different experience from what an in-house clinic provides. *See* ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, at 18. When such programs are affiliated with law schools, they are generally referred to as externships. The language of the ABA Accreditation Standard does not contemplate actual client representation.

214. *See, e.g.*, Comments of the D.C. Bar Section on the Courts, Lawyers & the Administration of Justice (not those of the D.C. Bar or of its Board of Governors) by Fritz Mulhauser, Co-Chair, (submitted January 24, 2014); Comments of the D.C. Consortium of Legal Service Providers, by Chinh Q. Le, Legal Director, Legal Aid Society of the District of Columbia & Tina S. Nelson, Managing Attorney, Legal Counsel for the Elderly (submitted January 29, 2014) (on file with the author).

215. *See, e.g.*, Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 J.L. & POL’Y 11, 14 (2013); Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 613 (1984).

216. One common view looks to provide education that develops what the *Carnegie Report* has described as the three professional apprenticeships: “(1) teaching doctrine and analysis, which provides the basis for professional growth, (2) introducing facets of lawyering practice, which leads to acting with responsibility for clients; and (3) inculcating professional identity, values, and dispositions of the legal profession, which fosters ethical practice.” Tokarz et al., *supra* note 215, at 36 (citing WILLIAM W. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUC. LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 194 (2007)). *See also* AN EDUCATIONAL CONTINUUM, *supra* note 102.



supplies.<sup>217</sup> The Association of American Law Schools and the American Bar Association have envisioned clinical education as providing instruction in everything from interviewing and fact-gathering to developing case strategy to counseling clients to negotiating and settling and trying cases—including developing methods for assessing one’s own professional performance.<sup>218</sup>

Essential to the central function of clinical education is the merger of theory and practice and the reflection<sup>219</sup> upon that merger, which in turn creates a process for lifetime learning. A student’s ability to perform a skill adequately does not create mastery of the skill. The student must learn the skill as an outgrowth of its underlying theory to truly “master” it. Students should also learn to transfer the knowledge gained from the mastery of one skill to a different skill that was not the subject of the original action. For example, it is not especially difficult to teach students how to perform the mechanics of a direct or cross examination—but excellent education relates those skills to case theory, other skills employed prior to and during a trial, and the doctrinal law that supports and controls the exercise of those skills. Teaching a skill in isolation, without teaching its natural relationship to other skills needed to protect a client’s interest creates an underdeveloped understanding of that skill. Such learning takes place in clinics on a daily basis. It does not in most non-clinic experiential courses.

The spectrum of school-sanctioned experiential learning models now includes simulation courses, in-house clinics, field placement programs, and hybrid models of teaching and learning.<sup>220</sup> Although the goals of each differ, each provides a form of academic inquiry that is missing from that provided in a pure pro bono placement. In an in-house clinic, professors

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217. See Anahid Gharakhanian, *ABA Standard 305’s “Guided Reflections”: A Perfect Fit for Guided Fieldwork*, 14 CLINICAL L. REV. 61, 80 (2007) (citing motivating third-year students as a benefit of experiential learning).

218. See ASS’N OF AM. LAW SCH. & AM. BAR ASS’N COMM. ON GUIDELINES FOR CLINICAL LEGAL EDUC., CLINICAL LEGAL EDUCATION, 14–15 (1980) [hereinafter CLINICAL LEGAL EDUCATION]; see also ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, at 17–18 (304(b) and 305).

219. “Reflective practice is the integration of intentional thought and specific action within a professional context.” Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317, 322 (2014); see also citations within.

220. See Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 376 (2001) (describing the three models). There is, of course, variation among programs within each of these categories. See, e.g., Neil Kibble, *Reflection and Supervision in Clinical Legal Education: Do Work Placements have a Role in Clinical Legal Education*, 5 INT’L J. LEGAL PROF. 83 (1998) (describing two types of field placement programs: the “enhanced” model, which includes a reflection element such as a seminar, and the “pure” model, which does not include such a component).

have great control over the curriculum, but students are not always exposed to the full scope of the non-legal challenges associated with ongoing practice. In externships, where students to work with pro bono organizations that provide a high level of academic intervention, students see a broad range of law practice issues but seldom participate in all facets of a case and supervision and critique are not as intense as they are in an in-house clinic. Although summer employment, internships, and programs proposed by the pro bono bar and the OAH are increasingly seen as essential items on students' résumés,<sup>221</sup> they do not and cannot provide students with the academic structure needed to acquire the kinds of knowledge and reflective learning<sup>222</sup> that effective and ethical practice requires.<sup>223</sup> That can only occur in an academically-based program. Non-academic pro bono activities are really on the job training experiences without academic inquiry.

In-house clinics rely on the union of academic insight and real cases to maximize student learning. As academics, clinicians aim to expose students to elements of lawyering that are likely to be difficult to observe in practice, such as case planning, theory development, and strategic decision-making, because students seldom spend enough time with the pro bono organization to participate in all facets of a case. Simultaneously, and unlike non-academic pro bono placements, clinics place responsibility for clients' cases directly with students, enabling them to understand, in the role of a lawyer, what it means to make complex decisions on another's behalf.<sup>224</sup> Implementation of the proposals from OAH and the pro bono bar would decouple the theoretical and analytical training that is

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221. See James H. Backman, *Where Do Externships Fit? A New Paradigm Is Needed: Marshaling Law School Resources to Provide an Externship for Every Student*, 56 J. LEGAL EDUC. 615 (2006); AN EDUCATIONAL CONTINUUM, *supra* note 102, at 270–71 (1992).

222. "Reflective practice is the integration of intentional thought and specific action within a professional context." Casey, *supra* note 219, at 322; *see also* citations within.

223. See, e.g., Tokarz et al., *supra* note 215, at 40 ("Students need the guidance of faculty and repetition with increasing levels of complexity and variations of context, in order to master the skills and develop the habits of reflective practice that are essential to the professional identity of lawyers."); *see also* Posting of Mary Lynch, [mlync@albanylaw.edu](mailto:mlync@albanylaw.edu), to [lawclinic-bounces@lists.washlaw.edu](mailto:lawclinic-bounces@lists.washlaw.edu) (Mar. 17, 2010) (on file with author) ("The legal education reform movement underscored that only integrated, well supervised, well designed opportunities provide the structure for sustained development of professional judgment and professional identity."); Posting of Kenneth Kowalski, [Kenneth.Kowalski@law.csuohio.edu](mailto:Kenneth.Kowalski@law.csuohio.edu) to [lawclinic-bounces@lists.washlaw.edu](mailto:lawclinic-bounces@lists.washlaw.edu) (Mar. 18, 2010) (on file with author) (acknowledging the value of field placement programs especially where students cannot participate in in-house clinics, but asserting that "in almost every instance a student will learn more about how to effectively and ethically practice law in a clinic than in any other course").

224. Posting of Wallace Mlyniec, [mlyniec@law.georgetown.edu](mailto:mlyniec@law.georgetown.edu) to [lawclinic-bounces@lists.washlaw.edu](mailto:lawclinic-bounces@lists.washlaw.edu) (March 17, 2010) (on file with author).

provided during the clinical experience through faculty guidance from the practical tasks of client representation.

The distinctions between the in-house clinic model and pro bono student programs are clear in terms of the type and quality of learning the program provides and the that role law school resources play in helping students achieve such learning.<sup>225</sup> Both models purport to develop professionalism through modeling and mentorship. Proponents of non-academic programs note that they are more flexible than law school programs both in terms of students' abilities to craft programs that fit their needs and shape their own learning by choosing placements they desire and by devising for themselves how to learn on the job.<sup>226</sup> However, it is not clear that pro bono field placements can reliably deliver the effective supervision that educators uniformly believe is the essential element of success under any model.<sup>227</sup>

Professor Vanessa Merton has noted how dramatically experiential legal education can change when it is conducted without academic supervision.<sup>228</sup> Her observations about the differences between clinical supervision and extra-scholastic supervision raise serious concerns about the degree to which experiential learning outside the clinical structure can prepare students for practice, and about the quality of service advocates in such programs provide clients. Partly in response to the New York Bar's pro bono requirement, lawyers in that state created mass pro bono programs to address indigent communities' legal needs, especially in the wake of natural disasters. Merton proposes that these "justice incubators," which are staffed by independent but affiliated law school graduates with some law school-provided supervision, can provide quality client service

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225. CLINICAL LEGAL EDUCATION, *supra* note 218, at 14–17.

226. *See, e.g.*, James H. Backman, *Externships and New Lawyer Mentoring: The Role the Practicing Lawyer is Filling in Educating Lawyers*, 24 *BYU J. PUB. L.* 65, 77 (2009); Backman, *supra* note 221.

227. *See generally, e.g.*, KAY KAVANAGH & PAULA NAILON, *EXCELLENCE IN THE WORKPLACE: LEGAL SKILLS AND LIFE SKILLS* (2007). *See* Tokarz et al., *supra* note 215, at 40; STUCKEY ET AL., *supra* note 75. *See also* LIZ RYAN COLE & LEAH WORTHAM, *Learning from Supervision*, in *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* 44–15 (J.P. Ogilvy, Leah Wortham & Lisa G. Lerman eds., 2007). Cole identifies three characteristics of effective feedback: (1) non-judgmental comments that offer specific examples of how the extern can improve, (2) conversations that include (a) questions (from the supervisor to the supervisee) designed to help the supervisor understand how and why the student arrived at the process she used to complete the assignment and (b) alternatives to that process, and (3) specific instruction on "how things should be done in the future." *Id.*

228. VANESSA MERTON, *PRACTICE IN EXTREMIS: SUPERVISION AND QUALITY CONTROL* (April 4, 2014) (unpublished manuscript) (on file with author).

but that the kind of supervision students receive in incubators provide differs from supervision provided for the same tasks in formal clinics.<sup>229</sup>

In the in-house clinic, faculty supervisors meet frequently and regularly with individuals and case teams in seminars, supervision sessions, and case rounds<sup>230</sup> to transmit their knowledge and advice about relationships between theory and practice. They simulate tasks, maintain high-quality legal research and lawyering resources, and supplement broad guidance with specific feedback. Merton observed that under field-based models, supervisors may conduct one or two mass training sessions but otherwise rely on the distribution of standardized materials and referrals to websites and listservs to disseminate information. In such programs, errors may be corrected directly at the request of individual participants, but individual feedback is rare.<sup>231</sup> Although the programs Merton studied are not exactly like those proposed by the D.C. pro bono bar, her research is nonetheless instructive.

In the in-house clinic, training begins with fundamental theory and emphasizes skills development and cultural competence in relation to that theory. Simulation and individualized instruction tracks student improvement, which can take “as long as it takes.” Non-academic supervisors, however, typically provide legal instruction and tips to help participants complete specific tasks that are in need of immediate attention and action. Clinics employ self- and peer- evaluation to supplement formal assessment (e.g. grades, recommendations, and certifications), but limits on time and personnel usually prevent non-academic supervisors from doing much assessment at all.<sup>232</sup>

In clinics, teachers can address the complex intricacies of legal practice the moment they arise. They have maximal control over their students’ assignments and are afforded maximal time and resources to guide students’ decisions and help them review their experiences. In short, traditional clinicians have greater resources and greater autonomy than even very good lawyers in programs where supervision is based outside the school. As a result, students are likely to receive better education through in-house clinics even when excellent supervising lawyers run

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229. See also Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum*, 56 N.Y.L. SCH. L. REV. 561, 563 (2012) (proposing a hybrid clinic that employs service work and a theoretical classroom component, which was tested during the response to Hurricane Katrina).

230. Susan Bryant & Elliott S. Milstein, *Rounds: A Signature Pedagogy for Clinical Education*, 14 CLINICAL L. REV. 195, 196–97 (2007).

231. MERTON, *supra* note 228.

232. *Id.* But see Natalie Gomez-Velez, *Structured Discrete Task Representation to Bridge the Justice Gap: CUNY Law School’s Launchpad for Justice in Partnership with Courts and Communities*, 16 CUNY L. REV. 21, 33 (2013) (describing an alternative, longitudinal approach to social justice apprenticeship).

alternative programs.<sup>233</sup>

Though scholars have devoted much effort to describing methods by which students can make the most of the often meager supplies of supervision available in their field placements and how mentors can be trained to provide good feedback and guidance,<sup>234</sup> little has been recorded to suggest that students themselves are dissatisfied with the feedback they receive in either academic or non-academic experiential learning settings where feedback is scarce. In one study, Professor Harriet Katz investigated the results of a survey that asked students how frequently they encountered modeling, feedback, collaboration, supervision, and nondirective supervision in academic externship placements and how often they learned from their own reflection. Katz found that students emphasized global themes like motivation and immersion in the practice setting, but not supervision methods, when they described their “best learning experiences.” She also noted that students valued supervision methods more highly the more frequently they were exposed to those methods.<sup>235</sup>

As far as we know, no such surveys have been conducted for purely pro bono placements but it is probably safe to say that students would answer the same way. Practitioners assigned to supervise students in non-academic experiential placements are often ill-equipped to provide the guidance students need to effectively take charge of their own education.<sup>236</sup> Some legal professionals who supervise externs receive formal training about effective supervision techniques from the legal employer administering the externship<sup>237</sup> or from the law school, but many do not. Those who do not may fail to provide effective supervision for a myriad of reasons: They may incorrectly assume students already have the skills required to complete a task, or they may doubt their own abilities to teach the required skills. They may think giving complete feedback is too time-consuming, or they may incorrectly believe that providing examples of good work (e.g. legal writing) is sufficient to impart the information and skills students need to succeed. Supervisors may not know how to address differences between their own teaching

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233. MERTON, *supra* note 228.

234. See, e.g., Liz Ryan Cole, *Training the Mentor: Improving the Ability of Legal Experts to Teach Students and New Lawyers*, 19 N.M. L. REV. 163 (1989); KAVANAGH & NAILON, *supra* note 227.

235. Harriet N. Katz, *Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy*, 41 GONZ. L. REV. 315, 331 (2005–2006) (study of best externship supervision practices).

236. See COLE & WORTHAM, *supra* note 227; see also Bernadette T. Feeley, *Training Field Supervisors to Be Efficient and Effective Critics of Student Writing*, 15 CLINICAL L. REV. 211, 215–16 (2009) (suggesting that practitioners may doubt their own abilities to teach effective legal writing).

237. Cole, *supra* note 234.

styles and students' learning styles. Supervisors may view feedback as criticism and be reluctant to offer feedback for fear of offending or embarrassing students.<sup>238</sup> This is not to say that they are bad lawyers and there is no doubt many are inspirational for students. Notwithstanding, they cannot provide the kind of supervision a student receives in an academic clinic.

Students seeking effective feedback may have to overcome supervisors' preconceptions about the process, like the common belief that supervision is tantamount to "spoon-feeding" and therefore at best, a waste of time and at worst likely to interfere with the supervisor's responsibilities to clients.<sup>239</sup> There is no doubt students will learn *something* when participating in non-academic pro bono field placements detached from the clinical model; however, what they learn will be limited in comparison to what they would learn in a law school clinic, and it will most likely be task-related rather than integrated with complex theory and analysis.

## 2. PRO BONO SUPERVISION: THE PROBLEM OF INEFFICIENCY

Liz Ryan Cole describes three types of supervisor-student relationships outside an in-house clinic: (1) the ideal relationship, wherein the student understands his assignment and quickly and independently produces a product the supervisor is happy with; (2) a bad relationship, wherein the student produces a good product but only with excessive hand-holding and the supervisor is left wondering whether the work would have been done quicker and better had he done it himself; and (3) the nadiral relationship, in which the student does not understand the assignment and turns in unacceptable work, leaving the supervisor closer to his deadline but with nothing to show for his educational efforts. In their zeal to avoid scenarios (2) and (3), Cole suggests, "many lawyers avoid supervision as much as they can."<sup>240</sup> Unfortunately, students in non-academic experiential programs are unlikely to experience the ideal relationship.

Supervision types two and three are hardly ever the product of negligence; they merely reflect the realities of legal service organizations. How supervisors perceive their responsibilities is critical to the educational value of an experiential learning program because, as one clinician put it, "[a non-academic placement's] value very much depends

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238. Feeley, *supra* note 236.

239. *Id.*

240. *Id.*; see also Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students*, 12 NOVA L. REV. 95, 96 (1987) (suggesting that field supervisors have little incentive to meet law schools' educational goals). *But see* Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211 (1989) (expressing willingness to assume there are practitioners who will make good teachers and role models).



on the commitment of the placement to the student as opposed to only . . . the work to be accomplished by the student.”<sup>241</sup> Because a supervising attorney’s workload can rarely be adjusted to accommodate his educational responsibilities when a student is assigned to him through a field placement, pedagogical concerns sometimes necessarily come second to other demands on the supervisor’s time, resulting in sub-optimal educational opportunities for the student. Students’ skills at completing in-demand tasks become more valuable than their developing good independent judgment, and there is little time for exploration of larger questions of justice that unite theory, practice, and ideals.<sup>242</sup> Because clinicians must be both advocates and educators, an in-house clinician may be able to represent five to seven clients in the time it takes him to represent one with a student. If a non-academic supervisor were to try to do everything a clinical teacher does, student placements would make the office less efficient. If I am correct about my five- or seven-to-one ratio, every student reduces a public interest lawyer’s client base by four to six clients. The demand for representation by poor people is too great for that kind of choice. The mission of legal services providers—to serve the poor—would suffer.<sup>243</sup> Therefore, educating students must be a secondary goal for pro bono organizations. In contrast, academic clinics hold both educational and advocacy missions. They achieve these dual goals by maintaining small caseloads—a luxury non-academic supervisors do not have.

It is not even clear that non-academic placements fulfill the goal of providing students with the invaluable exposure to real-life lawyering. Because of clients’ demands, non-academic programs often fail to expose students to the breadth of tasks that full-time practice requires.<sup>244</sup> Pro bono placements often give students little contact with the full range of actors they will encounter in licensed practice, actors such as clients, witnesses, judges, and opposing counsel.<sup>245</sup> Because the assignments are task-based, the experience sometimes produces myopic views about cases and legal

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241. Posting of Kenneth Kowalski, [Kenneth.Kowalski@law.csuohio.edu](mailto:Kenneth.Kowalski@law.csuohio.edu) to [lawclinic-bounces@lists.washlaw.edu](mailto:lawclinic-bounces@lists.washlaw.edu) (March 17, 2010) (on file with the author).

242. Posting of Wallace Mlyniec, [mlyniec@law.georgetown.edu](mailto:mlyniec@law.georgetown.edu) to [lawclinic-bounces@lists.washlaw.edu](mailto:lawclinic-bounces@lists.washlaw.edu) (March 17, 2010) (on file with author).

243. “[S]upervising attorneys may be less likely than those at school-based clinics to risk compromising client service for the purpose of student experience; after all, the agency purpose is defined by service to their clients, not by education of the students they accept as volunteers.” Katz, *supra* note 235, at 328.

244. See Posting of Jay Pottenger, [j.pottenger@yale.edu](mailto:j.pottenger@yale.edu) to [lawclinic-bounces@lists.washlaw.edu](mailto:lawclinic-bounces@lists.washlaw.edu) (March 17, 2010) (on file with the author) (advocating for hybrid clinics but “students who are not really the one exercising primary professional responsibility for the client . . . are deprived of myriad opportunities to notice, analyze, and make choices and decisions”) (internal quotation marks omitted).

245. Rose, *supra* note 240.

issues, with the result that—contrary to the founding purposes of experiential legal education—students have little opportunity to apply the theory they have learned in the classroom.<sup>246</sup> This limited exposure to the scope of real-world legal practice may be attributable to misalignment between supervisors’ purposes and law school’s objectives. Although law schools prioritize students’ experience and education, field supervisors are often more concerned with gaining assistance with heavy workloads.<sup>247</sup> Many scholars—especially those who are skeptical about the mounting popularity of experiential learning centered outside the traditional clinic—hold that “learning how to learn” is perhaps the best skill a student can acquire through any experience-based course of study;<sup>248</sup> however, feedback often falters when law students’ work is seen as a tool to manage the practical demands of a caseload.<sup>249</sup>

### 3. CLIENT CONCERNS

Requests by the pro bono bar and the OAH to use students outside the clinical education context rely on the assumption that clients will be well served by such representation. Two arguments support this assumption: The first is that there is a great need for student representation because there is no constitutional right to counsel in civil cases. The second is that in cases where the law permits lay representation, a law student is preferable to a representative with no legal training. Both of these arguments rely on the premise that a student is better than no one. There *is* a great need for more attorneys to represent the poor, but to say that untrained or marginally trained students can do the job implicitly makes

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246. *Id.* Students who participate in field placement programs often review their experiences in group discussions guided by on-campus faculty. This method of supplementing non-academic supervision may be necessary given field supervisors’ understandable reliance on giving students task-centered work, but it is insufficient to meet the educational imperatives of experiential legal education. Especially during the era surrounding the start of the clinical legal education movement, the Langdell method was critiqued on the basis that it relies on parsing appellate cases without sufficient concern for the human interactions, judgments, and decisions that underlay them and that these exercises are guided by teachers who themselves are detached from practice. Educators concerned by departures from the in-house clinic model point out that a clinical teacher who does not personally guide students’ cases and projects runs the same risks casebook professors run: teaching in the abstract, to the detriment of the students’ theoretical *and* practical learning. Posting of Wallace Mlyniec, mlyniec@law.georgetown.edu to lawclinic-bounces@lists.washlaw.edu (March 17, 2010) (on file with author).

247. Rose, *supra* note 240.

248. Tokarz et al., *supra* note 215, at 41 (quoting EDWARD CELL, LEARNING TO LEARN FROM EXPERIENCE ix (1984)) (“[T]he greatest justification of an experiential component in formal education [is] not in the content of what is learned from those experiences but in what is learned about the process of learning from any experience.”).

249. See Cole, *supra* note 234, at 168-69.



an unacceptable statement about poor people: that the poor can do with less than the rich.

Acceptance of the pro bono bar and the OAH's proposals demands a belief in the assumption that students' performance and supervisors' guidance will always be sufficient to provide adequate service to clients. Accepting that premise requires a great leap of faith. Some members of the pro bono bar hoped law schools would provide the requisite training, but schools are unlikely to spend their training dollars outside of in-house programs unless they jettison quality to save money. Moreover, it is unclear who would guarantee that the students and supervisors will actually provide good service if the clinical model is abrogated.

Ethical pitfalls are inherent when supervision and training are lax. This is evident already where lawyers who represent the poor do little to improve their skills.<sup>250</sup> Untrained supervisors may fail to instruct students in law, skills, and ethics, leading students to inadvertently engage in unethical or unskilled practices when their activities go unchecked.<sup>251</sup> This is not to say such behavior is intentional or even to say that it would become common. It is sufficient to say that the checks on student practice that exist in law school-based clinical education are likely to reduce unethical and unsatisfactory results. No such checks regularly exist in non-academic programs.

#### E. THE COURT'S RESPONSE

In the end, the Court did not address the pro bono organizations' suggestions. The judges saw the issues raised by the pro bono bar as outside the scope of the rule they were considering but saw the modification of the student practice rules as a first step in a longer conversation about the access to justice. Thus, they left the resolution of the pro bono bar's issues for another day. The Court did, however, permit the OAH to fashion its own rules.<sup>252</sup> That decision was based on the fact that non-lawyers may provide representation in many agency cases and because the Court of Appeals Judges believed that the OAH, as an agency of government, can be trusted to write and administer its own rules. Whether the OAG seeks to strengthen its somewhat permissive rules to ensure adequate training and supervision also requires further consultation.

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250. See, e.g., Vanita Gupta & Ezekiel Edwards, *Too Many Still Wait to Hear Gideon's Trumpet*, ACLU BLOG OF RIGHTS (March 18, 2013, 11:38 AM), <https://www.aclu.org/blog/criminal-law-reform/too-many-still-wait-hear-gideons-trumpet>; John A. Lentine, *Gideon at Fifty: The Broken Promise*, 37 AM. J. TRIAL ADVOC. 375–91 (2013).

251. See Nancy M. Maurer & Robert F. Seibel, *Addressing Problems of Power and Supervision in Field Placements*, 17 CLINICAL L. REV. 145 (2010).

252. See D.C. App. R. 48(a)(1)(iii).

## CONCLUSION

Courts, the Bar, and law schools all share responsibility for training students to become effective and ethical lawyers. That process, however, is not static. It remains contextual, changing as the practice of law changes and as teaching methods become more sophisticated. A main instrument in advancing a student's education is a student practice rule that reflects contemporary practice and the best practices in legal education. When a student practice rule no longer reflects contemporary practice or innovations in teaching, the rule must be changed.

The new District of Columbia student practice rule accommodates the needs and concerns of clients, courts, the bar, and the law schools. The process we used demonstrates how several law schools, controlled and somewhat constrained by the same court rule, can collaborate to develop strategies that meet their academic needs, and then work with a court and state bar to implement a rule that not only addresses academic needs but further the interests of the legal profession, expands access to legal services for low income people, and ensures that clients receive excellent representation for their claims. Both the legal academy and the legal profession in the District of Columbia have derived benefits from working together to amend the student practice rule and will benefit from the substance of the amendments. None of this, however, could have been accomplished without the leadership of the D.C. Court of Appeals and the judges of its Rules Committee.

## **APPENDIX A**

District of Columbia Student Practice Rule  
1982 Version

### **RULE 48**

#### **LEGAL ASSISTANCE BY LAW STUDENTS**

##### **a. PRACTICE**

1. An eligible law student may engage in the limited practice of law in the District of Columbia in connection with any civil case or matter (including any family and/or juvenile proceedings) and any criminal case or matter (not involving a felony) which may be pending in any court or any administrative tribunal of the District of Columbia, which by rule of such court or tribunal permits such appearance as a part of a “clinical program,” as hereinafter defined, on behalf of any indigent person who has consented in writing to that appearance, provided that a “supervising lawyer,” as hereinafter defined, has also indicated in writing approval of that appearance.

2. An eligible law student may also appear in any criminal case or matter on behalf of the United States or the District of Columbia with the written approval of the United States Attorney or the Corporation Counsel or their authorized representatives and the “supervising lawyer.”

3. In each case the written consent and approval referred to above shall be filed in the record of the case.

4. A “clinical program” for which such practice by an eligible law student is limited is a law school program for credit, held under the direction of a faculty member of such law school, in which a law student obtains practical experience in the operation of the District of Columbia legal system by participating in cases and matters pending before the courts or administrative tribunals.

##### **b. REQUIREMENTS AND LIMITATIONS.**

To be eligible to make an appearance pursuant to this Rule, the law student must:

1. Be enrolled in a law school approved by the American Bar association and the Admissions Committee of this court.
2. Have successfully completed legal studies amounting to at least 41 semester hours, or the equivalent if the school is on some basis other than a semester basis, including evidence and criminal and civil procedure.
3. Be certified by the dean of the law school as being of good character and  
competent legal ability, and as being adequately trained to participate in cases or  
matters pending before the courts or administrative tribunals.
4. Be certified by the Admissions Committee of this court as eligible to engage in the limited practice of law authorized by this Rule.
5. Be registered with the Unauthorized Practice of Law Committee of this court.
6. Neither ask for nor receive a fee of any kind for any services provided under this rule, except that the payment of a regular salary to a law student who is also an employee of the United States or any agency thereof, the District of Columbia or any agency thereof, or the Public Defender Service shall not make that student ineligible under this rule.
7. Certify in writing that the student has read and is familiar with the rules of the court governing the Bar of the District of Columbia, including the American Bar Association's Code of Professional Responsibility which pursuant to Rule X and Amendment A thereof, constitutes the standard governing the practice of law in the District of Columbia.

c. **CERTIFICATION**

The certification of a student by the law school dean:

1. Shall be filed with the Clerk of the court and, unless it is sooner withdrawn, it shall remain in effect until the

expiration of one year after it is filed, or until the announcement of the results of the first bar examination given by the Admissions Committee of the this court following the student's graduation, whichever is earlier. The certification may be continued in effect for any student who passes that examination until the student is either admitted by this court or denied admission to the Bar by the Admissions Committee.

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

3. May be terminated by this court at any time without notice or hearing and without any showing of cause. Notice of the termination shall be filed with the Clerk and a copy thereof sent to the law school dean of the particular student.

**d. OTHER ACTIVITIES.**

1. In addition to participating in pending cases and matters as provided in section (a)(1) of this Rule, an eligible student may engage in other activities of the "clinical program" under the general supervision, but outside the physical presence, of the supervising lawyer, including:

i. Preparation of pleadings and other documents to be filed in any case or matter in which the student is eligible to participate, but such material must be signed by the supervising lawyer.

ii. Preparation of briefs, abstracts and other documents to be filed in appellate courts of this jurisdiction, but such material must be signed by the supervising lawyer.

iii. Each pleading, brief, or other document must contain the name of the eligible law student who has participated in drafting it. If the student participated in drafting only a portion of it, that fact may be mentioned.

2. An eligible law student may participate in oral argument in this court in the presence of the supervising lawyer in any appeal, including felony and misdemeanor cases, provided that there is filed with the Clerk a written consent from the appellant to that appearance and the supervising lawyer indicates in writing approval of that appearance.

e. **SUPERVISION.**

The “supervising lawyer” referred to in this Rule shall:

1. Be a lawyer whose service as a supervising lawyer for the clinical program is approved by the dean of the law school in which the law student is enrolled.

2. Assume full responsibility for guiding the student’s work in any pending case or matter or other activity in which the student participates and for supervising the quality of that student’s work.

3. Assist the student in preparation of the case, to the extent necessary in the supervising lawyer’s professional judgment to insure that the student’s participation is effective on behalf of the indigent person represented.

4. Be an “active” member of the District of Columbia Bar as set forth in the rules of this court governing the Bar of the District of Columbia.

## **APPENDIX B**

### District of Columbia Student Practice Rule 2014 Version

#### RULE 48

#### LEGAL ASSISTANCE BY LAW STUDENTS

(a) *Practice.*

(1) Pursuant to these rules and as part of a clinical program, an eligible law student may engage in the limited practice of law in the District of Columbia. For purposes of applying this rule, the practice of law shall have the same meaning as it has in D.C. App. R. 49, which defines the unauthorized practice of law. Nevertheless, an eligible student shall not represent a client in any adult criminal case involving a felony in the Superior Court of the District of Columbia. This prohibition on practice in felony cases shall not apply to parole revocation hearings or prison disciplinary actions or to appeals before the District of Columbia Court of Appeals. If the representation occurs before the Superior Court of the District of Columbia, the Office of Administrative Hearings, or an agency of the District of Columbia, the law student must also comply with the rules of that court, agency, or tribunal with respect to student practice. After complying with the certification requirements of this rule, an eligible law student may also engage in the limited practice of law pursuant to the rules of any court, agency, or tribunal of another state of the United States, an international tribunal, or a court or agency of another country which by rule of such court, agency, or tribunal permits such appearance as part of a clinical program. This rule does not govern practice before courts, departments, or agencies of the United States which, by rule or regulation, permit practice by law students. Students practicing pursuant to these rules in a clinical program, as hereinafter defined, may represent any client who is indigent or who, because of limited financial ability or the nature of the claim, would be unlikely to obtain legal representation, or any non-profit organization, if the client or non-profit organization has consented in writing to that appearance or representation. A “supervising lawyer,” as hereinafter defined or defined by the relevant non-District of Columbia tribunal, must indicate in writing an approval of the

student's appearance or representation.

(i) When appearing in any court or agency of the United States or another state of the United States, an international tribunal, or a court or agency of another country, law students and their supervisors shall be bound by the rules of that tribunal governing eligibility to practice and standards of practice and by the ethical rules of that tribunal or by the District of Columbia Rules of Professional Conduct pursuant to Rule 8.5.

(ii) Students practicing pursuant to this rule must give prominent notice in all business documents of the students' status and that their practice is limited to matters related to the District of Columbia or other state, federal, or foreign court or agency that permits their participation.

(iii) The Office of Administrative Hearings and agencies of the District of Columbia may adopt rules governing student practice. If their rules permit, a student may practice before those agencies and tribunals without being enrolled in a clinical program, provided that the student meets the requirements of D.C. App. R. 49(c) (5).

(2) An eligible law student may also appear in the Superior Court of the District of Columbia in any criminal case not involving a felony and, irrespective of the nature of the crime, any appeal in the District of Columbia Court of Appeals, any parole revocation or prison disciplinary action, or civil, family, or juvenile matter on behalf of the United States or the District of Columbia with the written approval of the United States Attorney or the Attorney General for the District of Columbia or their authorized representatives and the "supervising lawyer."

(3) In accordance with D.C. App. R. 49, the "limited practice of law" described in section (a) (1) includes the following so long as the actions are guided by a supervising lawyer as defined by these rules or the rules of the tribunal in which representation is provided:

(i) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents= estates, and other instruments intended to affect or secure legal



rights;

- (ii) Preparing or expressing legal opinions;
- (iii) Appearing before any tribunal that permits student practice;
- (iv) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal that permits student practice;
- (v) Providing advice or counsel as to how any of the activities described in sub-paragraph (A) through (D) might be done, and whether they were done, in accordance with applicable law.

(4) In each case the written consent and approval referred to in (a) (1) and (a) (2) shall be filed in the record of the case. If representation does not entail a court appearance, such consent shall be part of any retainer agreement entered into by the client.

(5) A “clinical program” is a law school program for credit, held under the direction of a faculty member of such law school, in which a law student obtains practical experience in the practice of law or in the operation of the District of Columbia legal system by participating in cases and matters pending before the courts or administrative tribunals, or by otherwise providing legal services to clients with regard to legal issues.

(b) *Requirements and Limitations.*

To be eligible to engage in the practice of law pursuant to this Rule, the law student must:

- (1) Be enrolled in a District of Columbia law school approved by the American Bar Association and the Admissions Committee of this Court, and be enrolled in a clinical course at such law school. A supervised student need not be so enrolled if that student has satisfactorily completed a clinical course in a District of Columbia law school and is either still in law school or working for the clinic in the summer after graduation and is continuing to represent clients of the clinical program. Notice of an extension to continue practice under this rule must be sent by the Dean to the Committee on Admissions. Such extension may be permitted only once and may remain in effect for six months.
- (2) Have successfully completed one-third of his or her legal studies. Law schools shall establish appropriate pre-

and co-requisite instruction to ensure that students are prepared to provide legal representation to clients.

(3) Be certified by the dean of the law school as being of good character and competent legal ability, and as being adequately trained to engage in the limited practice of law as defined by these rules.

(4) Be registered with the Unauthorized Practice of Law Committee of this Court.

(5) Neither ask for nor receive a fee of any kind for any services provided under this rule from any client. Payment of a student research stipend or other law school based support, or a similar grant to a law student or a recent graduate who continues to work on clinic cases after the completion of the clinical course shall not make that student ineligible to practice under this rule. Nothing in this rule shall prevent a law school clinic from receiving court-ordered or statutory fees or court-ordered sanctions related to a case or legal matter.

(6) Certify in writing that the student has read and is familiar with the District of Columbia Student Practice Rule (D.C. App. R. 48), the District of Columbia Unauthorized Practice Rule (D.C. App. R. 49), and the District of Columbia Rules of Professional Conduct.

(c) *Certification.*

(1) A certification of a student by the law school dean:

(i) Shall be filed with the Committee on Admissions and, unless it is sooner withdrawn, it shall remain in effect until the expiration of one year after it is filed, or until the announcement of the results of the first bar examination given by the Admissions Committee of this Court following the student's graduation, whichever is earlier. The certification may be continued in effect for any student who passes that examination until the student is either admitted by this court or denied admission to the Bar by the Admissions Committee. The certification may also be extended one time for six months if the supervised student has satisfactorily completed a clinical course and is either still in law school or working for the clinic during the summer, and is continuing to represent clients of a clinical program.

(ii) May be withdrawn by the dean at any time by mailing a notice to that effect to the Committee on Admissions. It is not necessary that the notice state the

cause for withdrawal.

(iii) May be terminated by this court at any time without notice or hearing and without any showing of cause. Notice of the termination shall be filed with the Committee on Admissions and a copy thereof sent to the law school dean of the particular student.

(iv) Once the certification is delivered to the court, the student shall be registered with the Unauthorized Practice Committee and a Student Bar membership card shall be issued.

(2) A certification of the clinical course by the law school dean:

(i) Shall accompany the Dean's certification of the student.

(ii) Shall certify that the clinical course and the pre or co-requisite instruction are designed to provide the student with classroom or individual instruction to ensure that the student knows and understands the substantive, procedural, and evidentiary law required to provide competent representation.

(d) *Other Activities.*

(1) In addition to participating in pending cases and matters as provided in section (a)(1) of this Rule, an eligible student may engage in other activities of the "clinical program" under the general supervision, but outside the physical presence, of the supervising lawyer, including those actions defined herein as the "limited practice of law," with the exception of the following: appearing before a tribunal unless the tribunal consents with respect to a non-contested matter; conducting depositions; engaging in contract closings; and engaging in final settlement agreements.

(2) All pleadings, briefs, and other documents prepared for a case and delivered to any tribunal, opposing or co-counsel, clients, or other persons involved in the matter for which representation is provided pursuant to these rules must be signed by the student and the supervisor.

(3) An eligible law student may participate in oral argument in this Court in the presence of the supervising lawyer in any appeal, including felony and misdemeanor cases, provided that there is filed with the Clerk a written consent from the client to that appearance and the supervising lawyer indicates in writing approval of that appearance.

(e) *Supervision.*

The "supervising lawyer" referred to in this Rule shall:

(1) Be a lawyer whose service as a supervising lawyer for the clinical program is approved by the dean of the law school

in which the law student is enrolled.

(2) Assume full responsibility for guiding the student's work in any pending case or matter or other activity in which the student participates and for supervising the quality of that student's work.

(3) Assist the student in preparation of the case or matter, to the extent necessary in the supervising lawyer's professional judgment to ensure that the student's participation is effective on behalf of any client represented.

(4) Except as provided below for new and visiting faculty members, be an "active" member of the District of Columbia Bar as set forth in the rules of this court governing the Bar of the District of Columbia.

(i) New Faculty Members.

(A) A supervisor who joins a District of Columbia law school clinical faculty may supervise students if he or she is an active member in good standing of the highest court of any state, has not been suspended or disbarred for disciplinary reasons from practice in any court, and is not subject to any pending disciplinary complaints for violations of the rules of any court, provided that the person has submitted an application for admission to the District of Columbia Bar within ninety (90) days after assuming the position of a clinical faculty member in the District of Columbia and has submitted an application to the Court of Appeals for a waiver of this rule.

(B) Such faculty member must be supervised by an enrolled, active member of the Bar who has suitable experience and is employed by the law school and connected with the school's clinical program.

(C) Such new faculty members shall be subject to the rules of the court governing the Bar of the District of Columbia, including the District of Columbia Unauthorized Practice Rule (D.C. App. R. 49), and the District of Columbia Rules of Professional

Conduct which, pursuant to Rule X and Appendix A thereof, constitute the standards governing the practice of law in the District of Columbia.

(D) A new faculty member must cease supervising students if his or her application for admission to the Bar is denied.

(ii) Visiting Faculty Members

(A) A supervisor who is a visiting faculty member at a District of Columbia law school for one year or less may supervise students without being a member of the District of Columbia Bar if the visiting faculty member is an active member in good standing of the highest court of any state, has not been suspended or disbarred for disciplinary reasons from practice in any court, is not subject to any pending disciplinary complaints for violations of the rules of any court, and has submitted an application to the Court of Appeals for a waiver of this rule.

(B) The visiting faculty member shall certify in the application for a waiver that he or she has completed the Mandatory Course on the District of Columbia Rules of Professional Conduct and District of Columbia Practice required for new admittees to the District of Columbia Bar.

(C) Such visiting faculty member must be supervised by an enrolled, active member of the Bar who has suitable experience and is employed by the law school and is connected with the school's clinical program.

(D) Visiting faculty may extend their supervisory duties pursuant to this rule for one additional year by filing notice with the District of Columbia Court of Appeals.

(E) Such visiting faculty

members shall be subject to the rules of the court governing the Bar of the District of Columbia, including the District of Columbia Student Practice Rule (D.C. App. R. 48), the District of Columbia Unauthorized Practice Rule (D.C. App. R. 49), and the District of Columbia Rules of Professional Conduct which, pursuant to Rule X and Appendix A thereof, constitute the standards governing the practice of law in the District of Columbia.

## **APPENDIX C**

### **QUESTIONS CONCERNING CHARACTER APPEARING IN THE STUDENT BAR APPLICATION PRIOR TO 2014**

1. Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled, requested to resign, or allowed to resign in lieu of discipline, from any school (above the elementary school level), college, or university, or otherwise subjected to discipline by any such school or institution, or requested or advised by any such school or institution to discontinue your studies therein?

IF YES, you MUST submit a statement (including supporting documents or records)

2. Either as an adult or a juvenile, have you ever been cited, arrested, charged or convicted for any violation of any law (except minor traffic violation)? Alcohol or drug related offenses and moving traffic violations are not considered to be minor.

IF YES, you MUST submit a statement (including supporting documents or records)

3. During the past five years, have you been addicted to, treated for, or counseled concerning the use of any drug, including alcohol?

IF YES, you MUST submit a statement (including supporting documents or records)

4. During the past five years, have you voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional or nervous disorder or condition?

IF YES, you MUST submit a statement (including supporting documents or records)

5. Have you ever been delinquent in any financial obligations, including student loans and credit cards?

IF YES, you MUST submit a statement (including supporting documents or records)

6. Have you ever been a party in any civil proceeding (including landlord/tenant and bankruptcy matters) or family law matter (including continuing orders for child support)?

IF YES, you MUST submit a statement (including supporting documents or records)

I do hereby state that I have read and understand the provisions of the Rules of the District of Columbia Court of Appeals governing the Bar of the District of Columbia, including the Rule of Professional Conduct which constitute the standards governing the practice of law in the District of Columbia; and that I will fully comply with all the provisions thereof.

I further certify that I have read the foregoing document, that I have answered all questions fully and frankly, and that my answers are complete and true to the best of my knowledge.